

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

DANIELLE BELL, ERIN HITCHNER and
JONATHAN W. WALKER, individually and
all behalf of all others similarly situated,

Plaintiffs,

v.

GATEWAY ENERGY SERVICES
CORPORATION and DIRECT ENERGY
SERVICES, LLC,

Defendants.

Civil Action No. 7:17-cv-03893-VB

**Second Amended Class Action
Complaint**

Plaintiffs Danielle Bell, Erin Hitchner and Jonathan W. Walker (“Plaintiffs”), by and through their undersigned counsel, Kohn, Swift & Graf, P.C. and Barbat, Mansour & Suciu PLLC on behalf of themselves and all other persons similarly situated, bring this Second Amended Class Action Complaint against Gateway Energy Services Corporation (“Gateway”) and Direct Energy Services, LLC (“Direct Energy”) (collectively “Defendants”), and allege as follows upon personal knowledge as to themselves and their own acts and experiences and, as to all other matters, upon information and belief based upon, *inter alia*, investigations conducted by their attorneys.

NATURE OF THIS CASE

1. This action seeks to redress the deceptive and bad faith pricing practices of Defendants that have caused thousands of New York and New Jersey consumers to pay considerably more for their natural gas and/or electricity than they should otherwise have paid.

2. Defendants have taken advantage of the deregulation of the retail natural gas and/or electricity markets in New York and New Jersey by luring consumers into switching

energy suppliers with false promises that they offer market-based variable rates for natural gas and electricity.

3. Defendants' representations are deceptive. In fact, Defendants' variable rates are substantially higher than those otherwise available in the energy market, and their rates do not reflect changes in the wholesale cost that Defendants pay for the energy they supply to their retail customers. As a result, New York and New Jersey consumers are being fleeced millions of dollars in exorbitant charges for natural gas and/or electricity.

4. This suit is brought pursuant to N.Y. G.B.L. § 349, N.Y. G.B.L. § 349-d, N.J.S.A. 56: 8-1 *et seq.*, and the common law of New York and New Jersey on behalf of a Class of consumers who purchased natural gas and/or electricity from Defendants from 2014 to the present. It seeks, *inter alia*, injunctive relief, actual damages and refunds, treble damages, attorneys' fees, and the costs of this suit.

PARTIES

5. Plaintiff Danielle Bell is a citizen of New York residing in New City, New York. Ms. Bell was a customer of Gateway from approximately 2011 through April 2017, and as a result of Defendants' deceptive conduct, she incurred excessive charges for natural gas and electricity.

6. Plaintiffs Erin Hitchner and Jonathan W. Walker are married citizens of New Jersey residing in Woodstown, New Jersey. Ms. Hitchner and Mr. Walker were customers of Gateway from approximately 2011 through approximately July 2017, and as a result of Defendants' deceptive conduct, they incurred excessive charges for electricity.

7. Defendant Gateway is a citizen of New York, having been organized under the laws of New York, and with a principal place of business or corporate headquarters in Montebello, New York, in Rockland County.

8. Defendant Direct Energy is a limited liability company incorporated in Delaware, with its principle place of business or corporate headquarters in Houston, Texas. Direct Energy provides residential natural gas and electricity services in the District of Columbia and sixteen states across the United States, including New York and New Jersey.

9. In 2011, Direct Energy acquired Gateway as a wholly owned subsidiary.¹ Defendants have thousands of customers in New York and New Jersey, and they have tens of millions of dollars in combined revenues.

JURISDICTION

10. This Court has original jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. § 1332 (the "Class Action Fairness Act").

11. This action meets the prerequisites of the Class Action Fairness Act, because the claims of the Class defined below exceed the sum or value of \$5,000,000; the Class has more than 100 members; and diversity of citizenship exists between at least one member of the Class and Defendants.

12. This Court has general personal jurisdiction over Defendant Direct Energy because it has been doing business in New York through continuous, permanent, and substantial activity in New York, as well as the direction, control, and implementation of all Gateway activities and operations in New York.

13. This Court has specific personal jurisdiction over Defendant Direct Energy because it maintains sufficient minimum contacts in this jurisdiction through the advertising,

¹ See Press Release, Direct Energy, Direct Energy Closes Acquisition of Gateway Energy Services (May 2, 2011), <https://www.directenergy.com/newsroom/press-releases/2011/acquisition-closes-for-gateway>.

marketing, and sale of electricity and natural gas to New York consumers, as well as the direction, control, and implementation of all Gateway activities and operations in New York.

14. This Court has personal jurisdiction over Defendant Gateway because it is incorporated in New York and is headquartered in this judicial district.

OPERATIVE FACTS

The History of Energy Deregulation

15. In 1996, New York deregulated the market for retail natural gas and electricity supply, a major break with past policy. In 1999, New Jersey followed suit and deregulated the market for retail natural gas and electricity supply, a major break with past policy. Prior to deregulation, gas and electricity were supplied and distributed solely by local utility companies. Over the last several years, a number of states, including New York and New Jersey², have begun to change the regulations in the energy industry purportedly to enhance competition between energy providers. The notion is that competition would result in independent energy companies (“ESCOs”) being more aggressive than the utility in reducing wholesale purchasing costs and thereby lower retail residential rates.

16. ESCOs such as Defendants have various options to buy natural gas and/or electricity at wholesale for resale to retail customers in New York and New Jersey, including: owning natural gas and/or electricity production facilities; purchasing natural gas and/or electricity from wholesale marketers and brokers at the price available at or near the time it is used by the retail consumer; and by purchasing natural gas and/or electricity in advance of the time it is used by consumers, either by purchasing natural gas and/or electricity to be used in the

² New Jersey consumers who do not choose to switch to an ESCO for their energy supply continue to receive their supply from their local utility. In New Jersey, the Board of Public Utilities (“NJBPU”) holds market-based auctions that purchase electricity on behalf of such customers; the utilities then charge these customers a rate based upon the market-based auction outcome. A third-party consultant on behalf of the NJBPU manages the auctions, and the bidding processes and results are made publicly available. As a result, these auctions reflect market-determined prices.

future or by purchasing futures and forward contracts for the delivery of natural gas and/or electricity in the future at a predetermined price. The point of deregulation is to allow ESCOs to use these and other innovative purchasing strategies to reduce natural gas and electricity costs, thereby passing off some of those costs savings to their customers and offering competitive prices to their customers.

17. As part of the deregulation plan, ESCOs (like Defendants) do not have to file the natural gas and electricity rates they charge with the New York State Public Service Commission (“NYPSC”) and the New Jersey Board of Public Utilities (“NJBPU”) or the method by which they set their rates.

18. If a customer switches to an ESCO, the customer will have his or her energy “supplied” by the ESCO, but still “delivered” by their existing utility. The customer’s existing utility continues to bill the customer for both the energy supply and delivery costs. The only difference to the customer is which company sets the price for the customer’s energy supply.

19. After a customer switches to an ESCO, the customer’s energy supply charge—based either on a customer’s kilowatt-hour (for electricity) or therm or ccf (for gas) usage—is calculated using the supply rate charged by the ESCO and not the regulated rate charged by customer’s former utility. The supply rate charged is itemized on the customer’s bill as the number of kilowatt-hours (“kWh”) or therms (or ccf) multiplied by the rate. For example, if a customer uses 300 kWh at a rate of 11.0¢ per kWh, the customer will be billed \$33.00 (300 times \$.11) for his/her energy supply.

20. Defendants take advantage of the deregulation and the lack of regulatory oversight in the energy market to deceptively charge New York and New Jersey consumers exorbitant rates for natural gas and/or electricity. In theory, energy deregulation allows consumers to shop around for the best energy rates. However, Defendants exploit deregulated

markets by using the false promise of competitive rates based on market conditions in order to deceive consumers into purchasing energy from them. In fact, Defendants' rates are substantially higher than rates charged by other ESCOs or local utilities and bear no relation to other market rates or the wholesale cost of natural gas and/or electricity.

21. Defendants lure consumers to switch from their local utility companies or other energy suppliers, promising that they will receive competitive rates based on market conditions. However, in reality, after switching to Defendants as a supplier, consumers' energy bills increase dramatically.

22. The NYPSC has taken note of the deceptive acts and practices among ESCOs in New York. In 2016, the NYPSC stated that after considerable experience with energy service to mass market customers by ESCOs, it determined that the retail markets serving mass-market customers are not providing sufficient competition or innovation to properly serve consumers. As a result, the NYPSC is opening an evidentiary hearing to examine measures that must be taken to ensure that these customers can pay just and reasonable rates for commodity and other services from ESCOs.³

Gateway is a Mere Instrumentality of Direct Energy

23. In 2011, Direct Energy acquired Gateway Energy, expanding its presence in New York and New Jersey.

24. Direct Energy dominates Gateway (and has since its acquisition in 2011) in such a way as to make Gateway a mere instrumentality of Direct Energy.

25. Upon information and belief, Gateway does not maintain separate corporate books or records from those of Direct Energy.

³ See <http://documents.dps.ny.gov/search/Home/ViewDoc/Find?id=%7BF3E31C9F-5A4F-4B3E-AE5E-3624B3D691BA%7D&ext=pdf> (accessed on August 31, 2017).

26. Upon information and belief, Gateway's finances, *i.e.*, profits and costs, are integrated with and are inextricable from Direct Energy's finances.
27. Upon information and belief, Gateway does not maintain any of its own capital.
28. Upon information and belief, Gateway does not have any of its own directors, corporate officers, or employees.
29. Upon information and belief, the individuals working in Gateway's official corporate headquarters in Montebello, New York are classified as Direct Energy employees, perform work on behalf of Direct Energy, and receive their salaries from Direct Energy.

30. Upon information and belief, Direct Energy's officers and employees purchase natural gas and/or electricity on behalf of Gateway's customers.

31. Gateway does not maintain any corporate formalities other than its registration with the New York Secretary of State, and Gateway's independent corporate status is nothing more than a meaningless formality and façade.⁴

32. Upon information and belief, Direct Energy sets the variable rates for Gateway by integrating both companies' customers into one pricing model and considering them as a whole such that the companies' variable rates are identical within the same respective utility regions.

33. Upon information and belief, since Direct Energy's acquisition of Gateway in 2011, the two companies have been virtually indistinguishable in their operations, such that the only difference is outward to customers and in name. Indeed, upon information and belief, Gateway is a mere brand of Direct Energy, not a separate entity.

⁴ Indeed, Gateway's residential electricity and natural gas website currently redirects to Direct Energy's website. See GATEWAY ENERGY SERVICES, <http://www.gesc.com/> (last visited Aug. 29, 2017) ("Welcome to Gateway! Thanks for your interest in our company. As a member of the Direct Energy family of brands, we're excited to help you find the right electricity and/or natural gas plan for your home or business. To view the available plans in your area, please visit DirectEnergy.com today!")

34. Upon information and belief, Direct Energy purchases natural gas and/or electricity on behalf of Gateway's customers together with its own customers, and does not distinguish between the two companies in purchasing agreements.

35. Consequently, there is no difference between Direct Energy and Gateway's costs, profits, strategies, operations, or otherwise relevant conduct.

Plaintiff Bell's Experience

36. In 2011, Defendants mailed to Ms. Bell a letter enticing her to switch from her local utility, Orange and Rockland, to Defendants' natural gas and electricity service. The letter contained a phone number, which Ms. Bell called.

37. In 2011, Plaintiff made the switch to Defendants for natural gas and electricity.

38. Plaintiff's contract with Defendants was set to expire in 2014, so Plaintiff entered into a new two-year contract for electricity and natural gas.

39. On December 17, 2014, Defendants sent Ms. Bell a letter in the mail containing the Terms & Conditions that applied to her natural gas and electricity services.

40. Plaintiff was initially placed on a fixed rate plan for natural gas and electricity, but she was switched to a variable rate plan.

41. The representation that Defendants' variable rate would be based on market prices was reinforced by Defendants' standard Residential Terms & Conditions, which was mailed to Plaintiff. The Terms & Conditions (attached as Exhibit "A") represents that the variable rate for all natural gas and/or electricity "is set each month based on our evaluation of market conditions." Market conditions that Defendants might consider include "the prevailing price of natural gas or electricity on the market, costs involved in moving the gas or electricity from the producer to your utility, our total acquisition costs for the electricity or natural gas (including,

where applicable, transmission costs, storage costs, transportation costs and line losses) and the prevailing rates offered by your utility and other competitors.”

42. Defendants also enclosed with the Terms & Conditions provided to Plaintiff a letter stating, “Gateway remains dedicated to your complete satisfaction by providing you with **competitive energy prices**, attractive pricing plans, and excellent customer service.” (emphasis added). Plaintiff received a letter explaining her natural gas rate (attached as Exhibit “B-1”) and a letter explaining her electricity rate (attached as Exhibit “B-2”). Each letter contained identical representations made by Defendants, particularly that Plaintiff would be provided with “competitive energy prices.” *See Exhibits B-1 and B-2.*

43. Any reasonable consumer would understand based on these representations that Defendants’ variable rates would be competitive with the rates offered by the local utility and other ESCOs. Ms. Bell reasonably expected that Defendants’ variable rates for natural gas and electricity would be based on market conditions, *i.e.*, competitive and reflective of the prevailing price of natural gas and electricity in the market and the prevailing rates offered by Ms. Bell’s former utility and other competitors in the market.

44. Defendants’ Terms & Conditions also contains the following statement: “[W]e specifically disclaim any warranty or guaranty that the price charged by us for the energy supplied pursuant to the Agreement will be lower than the price that you would have been charged by the utility or another third-party supplier.” This disclaimer is not applicable to the allegations in this case. Ms. Bell is not complaining that she did not receive guaranteed savings over what the utility might have charged. Instead, Defendants represented to Plaintiff that they would charge a rate commensurate with conditions in the market but instead charged outrageously high prices that bore no relation to other market rates or the wholesale cost of natural gas and/or electricity.

45. Ms. Bell paid Defendants' variable rate from 2014 until approximately March 2017. On May 18, 2017, Ms. Bell cancelled her electricity and natural gas service with Defendants.

46. The following table is a representative sampling which identifies the billing periods during this time, the variable rates Defendants' charged Plaintiff, and the corresponding rates Orange and Rockland would have charged for electricity and natural gas (which is a reasonable representation of the available market rates):

Electricity

Billing Period	Defendants' Rate	Orange and Rockland Rate
4/2016-5/2016	12.39/KWH	5.650/KWH
5/2016-6/2016	12.626/KWH	8.365/KWH
6/2016-7/2016	12.99/KWH	8.442/KWH
7/2016-8/2016	12.99/KWH	8.411/KWH
8/2016-9/2016	12.99/KWH	8.469/KWH
9/2016-10/2016	12.99/KWH	6.727/KWH
10/2016-11/2016	13.0971/KWH	6.080/KWH
11/2016-12/2016	13.29/KWH	7.335/KWH
12/2016-1/2017	13.29/KWH	7.731/KWH
1/2017-2/2017	13.29/KWH	8.377/KWH
2/2017-3/2017	13.29/KWH	8.049/KWH

Natural Gas

Billing Period	Defendants' Rate	Orange and Rockland Rate
4/2016-5/2016	73.00/CCF	17.111/CCF
5/2016-6/2016	73.906/CCF	20.091/CCF
6/2016-7/2016	74.043/CCF	19.276/CCF
7/2016-8/2016	72.4080/CCF	23.525/CCF
8/2016-9/2016	74.0236/CCF	19.359/CCF
9/2016-10/2016	76.2/CCF	19.203/CCF
10/2016-11/2016	78.95/CCF	21.803/CCF
11/2016-12/2016	83.9/CCF	21.112/CCF
12/2016-1/2017	83.90/CCF	29.655/CCF
1/2017-2/2017	83.8756/CCF	41.642/CCF

47. While local utilities' rates may demonstrate less fluctuation over that of the wholesale market, overtime, the rates utilities like Orange and Rockland charge are an accurate reflection of rates that are based on prevailing market conditions. In other words, the electricity and natural gas rates that utilities charge are an accurate measure of what market-based rates should be. That Defendants rates were substantially higher than the local utilities' rates therefore demonstrates that Defendants' rates are not in fact based on prevailing market conditions. Indeed, there are numerous months where Defendants' rates were ***more than double*** Orange and Rockland's rates.

48. A reasonable consumer would understand that the price the local utility or other ESCO charges is part of prevailing market conditions and that a price based on prevailing market conditions would be consistent with the price charged by the local utility or other ESCO. However, Defendants' prices are substantially higher than local utilities rates, as well as the rates that other ESCOs charge.

49. Thus, Defendants' statements and omissions regarding their natural gas and electricity rates are materially misleading because consumers do not receive a price based on market conditions. Instead, consumers are charged rates that are substantially higher. Defendants fail to disclose this material fact to their customers.

50. Defendants' misstatements and omissions caused injury to Plaintiff Bell because she believed that by switching from Orange and Rockland to Defendants' natural gas and electricity plans that her rates would be competitive with the market. Plaintiff would not have enrolled in Defendants' plans but for their false misrepresentations. Had Plaintiff known that the rates she would be charged by Defendants would be substantially higher than her local utility provider, she would not have made the decision to switch.

Plaintiffs' Hitchner and Walker's Experience

51. In or around December 2010, Defendants solicited Plaintiffs to switch from their local utility, Atlantic City Electric ("ACE"), to Defendants' electricity service.

52. In or around January 2011, Plaintiffs made the switch to Defendants for electricity.

53. Plaintiffs were initially placed on a fixed-rate plan for electricity, but they were switched to a variable-rate plan by Defendants.

54. The representation that Defendants' variable rate would be based on market prices was reinforced by Defendants' standard Residential Terms & Conditions, which was provided to Plaintiffs. The Terms & Conditions (attached as Exhibit "C") represent that the variable rate "is a rate set by us each month based on our evaluation of a number of factors that affect the total price of . . . electricity . . . the major components that influence our analysis in a typical month [include] . . . the cost of . . . electricity . . . obtained for delivery to customers in your utility territory for the upcoming month. Because we often acquire supply over time in preparation for future deliver needs (in an effort to mitigate the volatility in price) and do not acquire all of our required . . . electricity from the spot market, our supply costs may not directly follow spot market prices."

55. Defendants' Terms & Conditions also represents that their prices will be competitive with rates otherwise available in the market: "We evaluate, if known, the prices that your utility and other competitors' in your area plan to charge in the upcoming month."

56. Any reasonable consumer would understand based on these representations that Defendants' variable rates would be competitive with the rates offered by the local utility and other ESCOs. Ms. Hitchner and Mr. Walker reasonably expected that Defendants' variable rates

for electricity would be based on market conditions, *i.e.*, competitive and reflective of Defendants' wholesale cost for purchasing electricity.

57. Defendants' Terms & Conditions also contains the following statement: "[W]e specifically disclaim any warranty or guaranty that the price charged by us for the energy supplied pursuant to the Agreement will be lower than the price that you would have been charged by the utility or another third-party supplier." This disclaimer is not applicable to the allegations in this case. Ms. Hitcher and Mr. Walker are not complaining that they did not receive guaranteed savings over what the utility might have charged. Instead, Defendants represented to Plaintiffs that they would charge a rate commensurate with conditions in the market but instead charged outrageously high prices that bore no relation to other market rates or the wholesale cost of electricity.

58. Notwithstanding, Defendants' disclaimer language when read together with the list of factors that influence Defendants' variable rate each month is confusing and ambiguous. Any reasonable consumer would believe that when Defendants' state they will evaluate "the prices that your utility and other competitors in your area plan to charge in the upcoming month," Defendants' variable rate would at least be competitive with the local utility rate. Yet, after reading the disclaimer, a reasonable consumer is left to believe that Defendants' variable rate may never be lower than the local utility, and may never be competitive with the local utility rate.

59. Ms. Hitchner and Mr. Walker paid Defendants' variable rate from approximately 2014 until approximately July 2017. In or around July or August 2017, they cancelled their electricity service with Defendants. The following table (located on page 14) is a representative sampling which identifies the billing periods during this time, the variable rates Defendants'

charged Plaintiffs, the corresponding rates Atlantic City Electric would have charged for electricity, and the then-prevailing wholesale rate for electricity:

Billing Period	Defendants' Rate	Atlantic City Rate	Wholesale Rate
3/18/17- 4/19/17	.1503/KWH	.0867/KWH	.0501/KWH
4/20/17-05/18/17	.1670/KWH	.0867/KWH	.0516/KWH
5/19/17-6/19/17	.1699/KWH	.0867/KWH-.089346/ KWH ⁵	.0437/KWH
6/20/17-7/18/17	.17755/KWH	.079419/KWH-.089346/KWH ⁶	.0482/KWH

60. That Defendants' variable rate is not in fact a competitive market rate based on the wholesale cost of electricity is demonstrated by the fact that Defendants' rate was significantly higher than ACE's rates. In fact, there are numerous months where Defendants' rate was ***more than double ACE's rate***. Furthermore, there are numerous months where Defendants' rate was ***more than triple the wholesale rate***.

61. ACE's rates are reflective of market prices because they are based on publicly held auctions. While ACE and Defendants may not purchase electricity in precisely the same manner, overtime, the costs they incur should be commensurate. Defendants represent in their Terms & Conditions that they purchased electricity supply in advance to mitigate potential price spikes. In fact, there is a highly competitive electricity market where Defendants can purchase electricity for future use (either in a physical purchase of electricity for future use or as a swap transaction), and therefore, their cost for purchasing electricity reflects market prices, albeit over

⁵ From May to June 2017, Plaintiffs' total electricity usage was 1722 kWh. The first rate listed applies to the first 750 kWh used. The second rate listed applies to the remaining 972 kWh used.

⁶ From June to July 2017, Plaintiffs' total electricity usage was 1851 kWh. The first rate listed applies to the first 750 kWh used. The second rate listed applies to the remaining 1101 kWh used.

a longer term than daily spot rates. Similarly, ACE and other New Jersey utilities purchase electricity in rolling auctions that cover periods of more than just short term daily purchases. Therefore, while ACE rates may not precisely match Defendants' rate, they should be commensurate. Indeed, Defendants represent that one of their major considerations in setting prices is the price that utilities charge for electricity.

62. That Defendants' rates do not reflect market costs for wholesale electricity is also demonstrated by the disconnect between changes in wholesale electricity prices and Defendants' costs. While the wholesale (PJM spot market) rate might show more short-term fluctuations than Defendants' costs (because Defendants claim that they do not purchase all their Electricity on the spot market), overtime, the wholesale (PJM spot market) rate is an accurate reflection of wholesale market costs.

63. The cost of wholesale electricity is the primary component of the non-overhead costs that Defendants incur. Indeed, Defendants concede and represent as much, listing the "cost of . . . electricity" as the first factor in the "major components that influence our analysis in a typical month."

64. The other factors Defendants identified in the Terms & Conditions other than the wholesale cost of electricity that affect their variable rate (such as transmission and line losses) are relatively small in terms of the overall costs Defendants incur to provide retail electricity. Therefore, these other cost factors cannot explain the drastic increases in Defendants' variable rate or the reason their rates are disconnected from changes in wholesale costs.

65. Defendants' identification of "profit" amongst the factors they consider does not justify their outrageously high rates. A reasonable consumer might understand that an ESCO will attempt to make a reasonable profit by selling consumers retail electricity. However, such a consumer would also expect that such profits would be consistent with profit margins obtained

by other suppliers of electricity in the market, and also that Defendants' profiteering at the expense of their customers would not be so extreme that their rate bears no relation to market prices but is instead outrageously higher.

66. Thus, Defendants' statements with respect to the electricity rates they will charge are materially misleading because consumers do not receive a price based on the specified factors like wholesale costs and competitor pricing. Instead, consumers are charged rates that are substantially higher and untethered from the specified market factors. Defendants intentionally fail to disclose this material fact to their customers because no reasonable consumer who knows the truth about Defendants' exorbitant rates would choose Defendants as an electricity supplier.

67. Defendants' statements and omissions regarding their electricity rates are materially misleading because the most important consideration for any reasonable consumer when choosing an energy supplier is price.

68. Defendants' misstatements and omissions caused injury to Plaintiffs Hitcher and Walker. Plaintiffs would not have enrolled in Defendants' service plan but for their false misrepresentations. Had Plaintiffs known that the rates they would be charged by Defendants would be substantially higher than their local utility provider and bear no relation to other market rates or the wholesale cost of electricity, they would not have made the decision to switch.

69. Defendants know full well that they charge a rate that is unconscionably high, and the misrepresentations they make with regard to the rate being market-based were made for the sole purpose of inducing consumers to sign up for Defendants' natural gas and/or electricity supply so that they can reap outrageous profits to the direct detriment of New York and New Jersey consumers without regard to the consequences that high utility bills cause such consumers. As such, Defendants' actions were actuated by actual malice or accompanied by wanton and willful disregard for consumers' well-being.

70. Similarly, other Class members have routinely paid substantially more for their energy supplies since switching to Defendants' natural gas and/or electricity plans.

CLASS ACTION ALLEGATIONS

71. Plaintiffs bring this action on their own behalf and additionally, pursuant to Rule 23(b)(2) and (3) of the Federal Rules of Civil Procedure, on behalf of the following Classes:

New York Class (represented by Plaintiff Bell):

All of Defendants' New York State residents who were charged a variable rate from 2014 to the present.

New Jersey Class (represented by Plaintiffs Hitchner and Walker):

All of Defendants' New Jersey State residents who were charged a variable rate for electricity from 2014 to the present.

72. Excluded from the Class are Defendants; any parent, subsidiary, or affiliate of Defendants; any entity in which Defendants have or had a controlling interest, or which Defendants otherwise control or controlled; and any officer, director, legal representative, predecessor, successor, or assignee of Defendants.

73. This action is brought as a class action for the following reasons:

a. The Class consists of thousands of persons and is therefore so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

b. There are questions of law or fact common to the Class that predominate over any questions affecting only individual members, including:

i. whether Defendants violated N.Y. G.B.L § 349 and N.Y. G.B.L § 349-d;

ii. whether Defendants violated N.J.S.A. 56: 8-1 et seq.;

iii. whether Defendants breached their contracts with New York consumers by charging variable rates not based on market conditions;

- iv. whether Defendants breached their contracts with New Jersey consumers by charging variable rates not based on market conditions;
 - v. whether Defendants breached the covenant of good faith and fair dealing by exercising its unilateral price-setting discretion in bad faith, *i.e.*, to price gouge;
 - vi. whether Plaintiffs and the Class have sustained damages and, if so, the proper measure thereof; and
 - vii. whether Defendants should be enjoined from continuing to charge variable rates not based on market conditions;
- c. The claims asserted by Plaintiffs are typical of the claims of the members of the Class;
- d. Plaintiffs will fairly and adequately protect the interests of the Class, and Plaintiffs have retained attorneys experienced in class and complex litigation, including class litigation involving consumer protection and ESCOs;
- e. Prosecuting separate actions by individual class members would create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for Defendants;
- f. Defendants have acted on grounds that apply generally to the Class, namely representing that its variable rates are based on market conditions, *i.e.*, competitive and reflective of the wholesale market, when Defendants' rates are in fact substantially higher, so that final injunctive relief prohibiting Defendants from continuing its deceptive practices is appropriate with respect to the Class as a whole;
- g. A class action is superior to other available methods for the fair and efficient adjudication of the controversy, for at least the following reasons:

- i. Absent a class action, Class members as a practical matter will be unable to obtain redress, Defendants' violations of their legal obligations will continue without remedy, additional consumers and purchasers will be harmed, and Defendants will continue to retain their ill-gotten gains;
- ii. It would be a substantial hardship for most individual members of the Class if they were forced to prosecute individual actions;
- iii. When the liability of Defendants has been adjudicated, the Court will be able to determine the claims of all members of the Class;
- iv. A class action will permit an orderly and expeditious administration of Class claims, foster economies of time, effort, and expense, and ensure uniformity of decisions;
- v. The lawsuit presents no difficulties that would impede its management by the Court as a class action; and
- vi. Defendants have acted on grounds generally applicable to Class members, making class-wide monetary and injunctive relief appropriate.

74. Defendants' violations of N.Y. G.B.L § 349, N.Y. G.B.L § 349-d, N.J.S.A. 56: 8-1 *et seq.*, and the common law are applicable to all members of the Class, and Plaintiffs are entitled to have Defendants enjoined from engaging in illegal and deceptive conduct in the future.

FIRST CAUSE OF ACTION
(Violation of N.Y. General Business Law § 349)
On Behalf of the New York Class

75. Plaintiff Bell repeats and re-alleges the allegations contained in paragraphs 1-74 above as if fully set forth herein.

76. The New York General Business Law § 349 provides, *inter alia*:

Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.

N.Y. Gen. Bus. Law § 349(a).

77. Defendants' misrepresentations and false, deceptive, and misleading statements and omissions with respect to the rates they charge for electricity and natural gas, as described above, constitute deceptive acts and practices in the conduct of business, trade, or commerce in violation of the New York General Business Law.

78. Defendants' false, deceptive, and misleading statements and omissions would have been material to any potential consumer's decision to purchase natural gas and/or electricity from Defendants.

79. Defendants also failed to inform customers that their variable rates for natural gas and/or electricity are substantially higher than those based on the market price of natural gas and/or electricity and do not reflect the whole cost of purchasing natural gas and/or electricity. That information would have been material to any consumer deciding whether to purchase natural gas and/or electricity from Defendants.

80. Defendants knew at the time they promised said prospective customers that they would be charged a variable rate based on market conditions that this promise was false.

81. Defendants made these false, deceptive, and misleading statements and omissions with the intent that consumers rely upon such statements.

82. Defendants' intentional concealments were designed to deceive current and prospective variable rate customers into believing that rates will be commensurate with market conditions, as specified in the Terms & Conditions. Defendants benefit from reliance and deprive consumers from informed purchasing decisions and competitive, market-based energy rates.

83. Defendants' affirmative conduct and omissions constitute unlawful practices beyond a mere breach of contract. Rather, Defendants' practices are unconscionable and outside the norm of reasonable business practices.

84. Plaintiff and the other members of the New York Class entered into agreements to purchase natural gas and/or electricity from Defendants for personal, family, or household use, and suffered ascertainable losses as a direct and proximate result of Defendants' actions in violation of the New York General Business Law.

85. As a consequence of Defendants' wrongful actions, Plaintiff and the other members of the New York Class suffered an ascertainable loss of monies based on the difference in the rates they were charged versus the rates they would have been charged had Defendants charged rates based on market conditions, as specified in the Terms & Conditions, or had they not switched to Defendants from their previous utility provider.

86. Plaintiff and the other members of the New York Class suffered an ascertainable loss caused by Defendants' misrepresentations and omissions because they would not have entered into agreements to purchase natural gas and/or electricity from Defendants if the true facts concerning their rates had been known.

87. By reason of the foregoing, and by virtue of Direct Energy's liability for Gateway's conduct, Defendants are liable to Plaintiff and the other members of the New York Class for actual damages or \$50.00 for each violation, whichever is greater; punitive damages; injunctive relief, attorneys' fees, and the costs of this suit.

88. Defendants know full well that they charge a rate that is unconscionably high, and the misrepresentations they make with regard to the rate being based on market conditions were made for the sole purpose of inducing consumers to sign up for Defendants' natural gas and/or electricity supply so that they can reap outrageous profits to the direct detriment of New York

consumers without regard to the consequences that high utility bills cause such consumers. As such, Defendants' conduct was intentional, wanton, willful, malicious, and in blatant disregard of, or grossly negligent and reckless with respect to, the life, health, safety, and well-being of Plaintiff and the other members of the New York Class. Defendants are therefore additionally liable for punitive damages, in an amount to be determined at trial.

SECOND CAUSE OF ACTION
(Violation of N.Y. General Business Law § 349-d)
On Behalf of the New York Class

89. Plaintiff Bell repeats and re-alleges the allegations contained in paragraphs 1-74 above as if fully set forth herein.

90. N.Y. G.B.L. § 349-d(3) provides that “[n]o person who sells or offers for sale any energy services for, or on behalf of, an ESCO shall engage in any deceptive acts or practices in the marketing of energy services.”

91. N.Y. G.B.L. § 349-d(10) provides that “any person who has been injured by reason of any violation of this section may bring an action in his or her own name to enjoin such unlawful act or practice, an action to recover his or her actual damages or five hundred dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to ten thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff.”

92. Defendants knowingly and willfully misrepresented to Plaintiff and the other members of the New York Class that their rates are competitive and based on market conditions in the natural gas and/or electricity market when their rates are not, in fact, reflective of the market. Defendants knowingly and willfully fail to inform consumers of the material fact that their rates are substantially higher than those otherwise available in the market.

93. Through their conduct described above, Defendants have engaged in deceptive acts and practices that resulted in injury to Plaintiff and the other members of the New York Class.

94. By reason of the foregoing, and by virtue of Direct Energy's liability for Gateway's conduct, Defendants have violated N.Y. Gen. Bus. Law § 349-d, and should be enjoined from continuing to fail to disclose that their rates are substantially higher than those otherwise available in the market, and misrepresenting that their rates are competitive and reflective of market conditions. Defendants are also liable to Plaintiff and the other members of the New York Class for the damages that they have suffered as a result of Defendants' actions, the amount of such damages to be determined at trial but not to be less than \$500.00 for each violation, such damages to be trebled, plus attorneys' fees and costs.

THIRD CAUSE OF ACTION
(Breach of Contract)
On Behalf of the New York Class

95. Plaintiff Bell repeats and re-alleges the allegations contained in paragraphs 1-74 above as if fully set forth herein.

96. Plaintiff and the other members of the New York Class entered into valid contracts with Defendants for the provision of natural gas and/or electricity.

97. Pursuant to the Agreements, Defendants agreed to charge a variable rate for natural gas and/or electricity purportedly based on market conditions.

98. Pursuant to the Agreements, Plaintiff and the other members of the New York Class paid the variable rates charged by Defendants for natural gas and/or electricity.

99. However, Defendants failed to perform their obligations under the Agreements because they charged variable rates for natural gas and/or electricity that were not based on the market conditions which the parties agreed the rates would be based.

100. Plaintiff and the other members of the New York Class were damaged as a result because they were billed, and they paid, a charge for natural gas and/or electricity that was higher than it would have been had Defendants based their rates on the agreed upon factors.

101. By reason of the foregoing, and by virtue of Direct Energy's liability for Gateway's conduct, Defendants are liable to Plaintiff and the other members of the New York Class for the damages that they have suffered as a result of Defendants' actions, the amount of such damages to be determined at trial, plus attorneys' fees.

FOURTH CAUSE OF ACTION
(Breach of Implied Covenant of Good Faith and Fair Dealing)
On Behalf of the New York Class

102. Plaintiff Bell repeats and re-alleges the allegations contained in the paragraphs 1-74 above as if fully set forth herein.

103. Every contract in New York contains an implied covenant of good faith and fair dealing in the performance and enforcement of the contract. The implied covenant is an independent duty and may be breached even if there is no breach of a contract's express terms.

104. Under the contract, Defendants had unilateral discretion to set the variable rates for natural gas and/or electricity based on market conditions.

105. Plaintiff Bell reasonably expected that the variable rates for natural gas and/or electricity would reflect the market and wholesale prices for natural gas and electricity and that Defendants would refrain from price gouging. Without these reasonable expectations, Plaintiff and other members of the New York Class would not have agreed to buy natural gas and/or electricity from Defendants.

106. Defendants breached the implied covenant of good faith and fair dealing by arbitrarily and unreasonably exercising their unilateral rate-setting discretion to price gouge and

frustrate Plaintiff and other members of the New York Class' reasonable expectations that the variable rates for natural gas and/or electricity would be commensurate with market conditions.

107. As a result of Defendants' breach, and by virtue of Direct Energy's liability for Gateway's conduct, Defendants are liable to Plaintiff and other members of the New York Class for actual damages in an amount to be determined at trial and attorneys' fees.

FIFTH CAUSE OF ACTION
(Violation of N.J.S.A. 56: 8-1 *et seq.*)
On Behalf of the New Jersey Class

108. Plaintiffs Hitcher and Walker repeat and re-allege the allegations contained in paragraphs 1-74 above as if fully set forth herein.

109. The Consumer Fraud Act prohibits, *inter alia*:

The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression, or omission, in connection with the sale or advertisement of any merchandise. . . .

N.J.S.A. § 56:8-2.

110. Defendants' misrepresentations and false, deceptive, and misleading statements and omissions with respect to the variable rates they charge for electricity, as described above, constitute affirmative misrepresentations in connection with the marketing, advertising, promotion, and sale of electricity in violation of the Consumer Fraud Act.

111. Defendants' false, deceptive, and misleading statements and omissions would have been material to any potential consumer's decision to purchase electricity from Defendants.

112. Defendants also failed to inform customers that their variable rates for electricity are substantially higher than those based on the market price of electricity and do not reflect the wholesale cost of purchasing electricity. That information would have been material to any consumer deciding whether to purchase electricity from Defendants.

113. Defendants further deceptively and consciously misrepresented the most determinative factors they use to set variable rates.

114. Defendants knew at the time they promised prospective customers that they would be charged a variable rate based on market conditions that this promise was false.

115. Defendants made these false, deceptive, and misleading statements and omissions with the intent that consumers rely upon such statements.

116. Defendants' intentional concealments were designed to deceive current and prospective variable rate customers into believing that rates will be commensurate with market conditions and the specified factors in the Terms & Conditions. Defendants benefit from reliance and deprive consumers from informed purchasing decisions and competitive, market-based energy rates.

117. Defendants' affirmative conduct and omissions constitute unlawful practices beyond a mere breach of contract. Rather, Defendants' practices are unconscionable and outside the norm of reasonable business practices.

118. Plaintiffs and the other members of the New Jersey Class entered into agreements to purchase electricity from Defendants for personal use and suffered ascertainable losses as a direct and proximate result of Defendants' actions in violation of the Consumer Fraud Act.

119. As a consequence of Defendants' wrongful actions, Plaintiffs and the other members of the New Jersey Class suffered an ascertainable loss of monies based on the difference in the rate they were charged versus the rate they would have been charged had Defendants charged a rate based on market conditions and the factors specified in the Terms & Conditions, or had they not switched to Defendants from their previous supplier.

120. Plaintiffs and other members of the New Jersey Class suffered an ascertainable loss caused by Defendants' misrepresentations and omissions because they would not have

entered into an agreement to purchase electricity from Defendants if the true facts concerning their rates had been known.

121. By reason of the foregoing, and by virtue of Direct Energy's liability for Gateway's conduct, Defendants are liable to Plaintiffs and the other members of the New Jersey Class for trebled compensatory damages, punitive damages, attorneys' fees, and the costs of this suit. N.J.S.A. §§ 56:8-2.11, 8-2.12, 8-19.

122. Defendants know full well that they charge a rate that is unconscionably high, and the misrepresentations they make with regard to the rate being market-based were made for the sole purpose of inducing consumers to sign up for Defendants' electricity supply so that they can reap outrageous profits to the direct detriment of New Jersey consumers without regard to the consequences high utility bills cause such consumers. As such, Defendants' actions were unconscionable and actuated by bad faith, lack of fair dealing, actual malice, or accompanied by wanton and willful disregard for consumers' well-being. Defendants are therefore additionally liable for punitive damages, in an amount to be determined at trial.

SIXTH CAUSE OF ACTION
(Breach of Contract)
On Behalf of the New Jersey Class

123. Plaintiffs Hitcher and Walker repeat and re-allege the allegations contained in paragraphs 1-74 above as if fully set forth herein.

124. Plaintiffs and the other members of the New Jersey Class entered into valid contracts with Defendants for the provision of electricity.

125. Pursuant to the Agreement, Defendants agreed to charge a variable rate for electricity based on market conditions, in particular the wholesale cost of purchasing electricity for delivery to customers from the same utility territory, and the prices charged by local utility companies and other competitors.

126. Pursuant to the Agreement, Plaintiffs and the other members of the New Jersey Class paid the variable rates charged by Defendants for electricity.

127. However, Defendants failed to perform their obligations under the Agreement to charge rates based primarily upon electricity costs and additional market conditions. Indeed, Defendants charged a variable rate for electricity that was untethered from the factors upon which the parties agreed the rate would be based.

128. Plaintiffs and the other members of the New Jersey Class were damaged as a result because they were billed, and they paid, a charge for electricity that was higher than they would have been had Defendants based their rates on the factors agreed upon.

129. By reason of the foregoing, and by virtue of Direct Energy's liability for Gateway's conduct, Defendants are liable to Plaintiffs and the other members of the New Jersey Class for the damages that they have suffered as a result of Defendants' actions, the amount of such damages to be determined at trial, plus attorneys' fees.

SEVENTH CAUSE OF ACTION
(Breach of Implied Covenant of Good Faith and Fair Dealing)
On Behalf of the New Jersey Class

130. Plaintiffs Hitcher and Walker repeat and re-allege the allegations contained in paragraphs 1-74 above as if fully set forth herein.

131. Every contract in New Jersey contains an implied covenant of good faith and fair dealing in the performance and enforcement of the contract. The implied covenant is an independent duty and may be breached even if there is no breach of a contract's express terms.

132. Under the contract, Defendants had unilateral discretion to set the variable rate for electricity based on market conditions and other factors, such as the amount of profit Defendants hoped to earn from the sale of electricity in a customer's utility area.

133. Plaintiffs reasonably expected that the variable rates for electricity would, notwithstanding Defendants' profit goals, reflect the market and wholesale prices for electricity and that Defendants would refrain from price gouging. Without these reasonable expectations, Plaintiffs and other New Jersey Class members would not have agreed to buy electricity from Defendants.

134. Defendants breached the implied covenant of good faith and fair dealing by arbitrarily and unreasonably exercising their unilateral rate-setting discretion to price gouge and frustrate Plaintiffs and other members of the New Jersey Class' reasonable expectations that the variable rates for electricity would be commensurate with market conditions.

135. As a result of Defendants' breach, and by virtue of Direct Energy's liability for Gateway's conduct, Defendants are liable to Plaintiffs and other members of the New Jersey Class for actual damages in an amount to be determined at trial, and attorneys' fees.

EIGHTH CAUSE OF ACTION
(Unjust Enrichment)

136. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1-74 above as if fully set forth herein.

137. By engaging in the conduct described above, Defendants have unjustly enriched themselves and received a benefit beyond what was contemplated in the contract, at the expense of Plaintiffs and the other members of the Class(es).

138. It would be unjust and inequitable for Defendants to retain the payments that Plaintiffs and the Class(es) made for excessive natural gas and/or electricity charges.

139. By reason of the foregoing, Defendants are liable to Plaintiffs and the other members of the Class(es) for the damages that they have suffered as a result of Defendants' actions, the amount of which shall be determined at trial, plus attorneys' fees.

WHEREFORE, Plaintiffs respectfully request that the Court should enter judgment against Defendants as follows:

1. Certifying this action as a class action, with the Class(es) as defined above;
2. On Plaintiffs' First Cause of Action, awarding against Defendants damages that Plaintiff Bell and the other members of the New York Class have suffered, trebled, and granting appropriate injunctive relief;
3. On Plaintiffs' Second Cause of Action, awarding against Defendants damages that Plaintiff Bell and the other members of the New York Class have suffered, trebled, and granting appropriate injunctive relief;
4. On Plaintiffs' Third Cause of Action, awarding against Defendants damages that Plaintiff Bell and the other members of the New York Class have suffered as a result of Defendants' actions;
5. On Plaintiffs' Fourth Cause of Action, awarding against Defendants damages that Plaintiff Bell and the other members of the New York Class have suffered as a result of Defendants' actions;
6. On Plaintiffs' Fifth Cause of Action, awarding against Defendants damages that Plaintiffs Hitchner and Walker and the other members of the New Jersey Class have suffered, trebled, and granting appropriate injunctive relief;
7. On Plaintiffs' Sixth Cause of Action, awarding against Defendants damages that Plaintiffs Hitchner and Walker and the other members of the New Jersey Class have suffered as a result of Defendants' actions;
8. On Plaintiffs' Seventh Cause of Action, awarding against Defendants damages that Plaintiffs Hitchner and Walker and the other members of the New Jersey Class have suffered as a result of Defendants' actions;

9. On Plaintiffs' Eighth Cause of Action, awarding against Defendants damages and/or injunctive relief that Plaintiffs and the other members of the Class(es) have suffered as a result of Defendants' actions;
10. Holding Defendant Direct Energy liable for Defendant Gateway's Actions;
11. Awarding Plaintiffs and the Class(es) punitive damages;
12. Awarding Plaintiffs and the Class(es) interest, costs, and attorneys' fees; and
13. Awarding Plaintiffs and the Class(es) such other and further relief as this Court deems just and proper.

DEMAND FOR TRIAL BY JURY

Pursuant to Federal Rule of Civil Procedure Rule 38, Plaintiffs hereby demand a trial by jury.

Dated: September 7, 2017

Respectfully Submitted By:

/s/ Jonathan Shub
Jonathan Shub (N.Y. Bar # 4747739)
Kevin Laukaitis (*Pro Hac Vice
Forthcoming*)
Harper Segui (*Pro Hac Vice
Forthcoming*)
KOHN, SWIFT & GRAF, P.C.
One South Broad Street, Suite 2100
Philadelphia, PA 19107-3304
(215) 238-1700 – phone
(215) 238-1968 – facsimile
jshub@kohnswift.com
klaukaitis@kohnswift.com
hsegui@kohnswift.com

Nick Suciu III (*Pro Hac Vice
Forthcoming*)
**BARBAT, MANSOUR & SUCIU
PLLC**
1644 Bracken Road
Bloomfield Hills, Michigan 48302

(313) 303-3472 – phone
nicksuciu@bmslawyers.com

*Attorneys for Plaintiffs and
the Putative Class*