

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Index No. 605739/2016

DAVID EISIG, individually and on behalf of all
Similarly situated persons,

SECOND
AMENDED
COMPLAINT

-plaintiff

- against -

GATEWAYS ENERGY SERVICES
CORPORATION, formerly known as
ECONERGY ENERGY COMPANY INC. and
DIRECT ENERGY SERVICES, LLC.,

-defendants

Plaintiff David Eisig, individually and on behalf of all other similarly situated persons, as
and for his second amended complaint, respectfully shows this court and alleges as follows:

INTRODUCTION

1. Plaintiff brings suit against the defendant for claims arising under General
Business Law §349, General Business Law §349(d), for breach of contract and breach of the
covenant of good faith and fair dealing arising out of a contract for natural gas supply to his
residence.

2. Plaintiff seeks damages and restitution on behalf of members of three separate
classes of residential natural gas customers of the defendants who were over-charged in direct
violation and breach of a variable rate natural gas supply contract entered into with the
defendant.

JURISDICTION AND VENUE

3. This court has subject matter jurisdiction of this dispute, as all claims are made under statutes of New York or New York's common law.

4. The plaintiff is a resident of New York. The conduct complained of against the defendants arose solely from defendant's sale of natural gas supply to residences in New York. The defendant is a New York corporation.

5. Venue is proper under CPLR§503 as the plaintiff resides in Nassau County.

THE PARTIES

6. Plaintiff David Eisig is an individual who, at all times relevant, resided in the Village of Lawrence, County of Nassau, State of New York.

7. At all times herein mentioned, ECONnergy Energy Company, Inc. ("EECI") was a New York corporation. On or about November 15, 2007, EECI changed its name to Gateways Energy Services Corporation ("GESC", "EECI/GESC" or defendant). EECI/GESC is one of many energy services companies ("ESCO") that arose after deregulation of the retail natural gas market in New York. As such, defendant was in the business inter alia of selling natural gas supply to its customers, and all natural gas that it sold was delivered to the customer through the gas lines previously installed by and owned by the local regulated utility.

8. At all relevant times alleged herein, defendant was a wholly owned subsidiary of Direct Energy Services, LLC ("DESLLC"), a Delaware-based ESCO that states on its own website that it is the largest residential energy retailer in North America based on "customer numbers", operating in all 50 states, the District of Columbia and 10 Canadian Provinces, with nearly 5 million customers in its North American footprint. DESLLC's website further represents "we offer innovative solutions, including devices and tools that **empower customers**

to better control their energy and home so you can buy less of what we

sell.” <https://www.directenergy.com/about/about-direct-energy/history>, last accessed 7/12/16

(emphasis added).

9. DESLLC is a wholly-owned subdivision of a multi-national ESCO called Centrica, plc, which has over 20 million customers in over 30 countries throughout North America, Europe, Asia and the Americas, and provides energy services ranging from oil and gas exploration to residential energy solutions. Centrica is a financial powerhouse, with 2015 gross revenues of GBP 28 Billion and had an operating profit of GBP 1.46 Billion. https://www.centrica.com/sites/default/files/prelims_announcement_-_final.pdf, last accessed 7/12/16. Centrica is a member of the FTSE 100; its market capitalization is in excess of GBP 11 Billion.

10 On or about May 2, 2011, DESLLC purchased defendant for \$91 Million.

THE FACTS

11. On or about October 26, 2002, plaintiff entered into a standard form contract for supply of natural gas for his residence with EECI. (Exhibit A)(“Contract”) The pricing for natural gas sold by EECI to plaintiff was stated in Exhibit A to be as follows:

The price for all energy sold under this Agreement...is a **variable monthly price set at a level by ECONergy** (Emphasis added)

12. Plaintiff was not allowed to negotiate any of the terms of Exhibit A. Exhibit A was a classic example of an adhesion contract with all terms dictated by the party in the stronger bargaining position, i.e. the defendant.

13. Defendant never specified either in Exhibit A or in any other document the basis on which it would vary the price of natural gas sold.

14. Although not directly part of defendant's contract with plaintiff, the court can take judicial notice that defendant posted on its website *for at least 2 years* the following definition of its variable rate and how it would be calculated

If you want flexible terms, our variable-rate option is a flexible plan that rises and falls with the wholesale energy markets. You will get maximum flexibility and transparency, [*and*] a competitive price point...

(Exhibit B—reprints of 9 cached webpages from defendant's website posted between September 3, 2011 and May 12, 2012)

15. There is an important distinction between the purchase of natural gas supply, which is the subject of the Contract, and the delivery of natural gas, which is a service provided by the local utility. Plaintiff's contract with EECI was for the purchase of natural gas only, and by its express terms was limited to natural gas supply only. (See Exhibit A, Contract, pg. 1, bullet points 3 and 4) ("ECONenergy will charge me for my **energy supply only**"; "I will receive one bill from KeySpan for both my ECONenergy supply and KeySpan delivery charges.") (emphasis added). The natural gas purchased by the plaintiff and fellow members of the class from the defendant was at all times delivered to the plaintiff by the local regulated utility, National Grid. As can be seen from plaintiff's bills, plaintiff's one payment National Grid included payment for the natural gas supplied by defendant, payment for National Grid's delivery services and the state and local taxes applicable to the gas supply purchases. (Exhibit C) National Grid, on receiving payments from plaintiff and his fellow class members, transmitted to defendant the payments made for the gas supply provided by defendant, transmitted to the local and state taxing authorities the taxes that were collected and retained for itself only the delivery charges which plaintiff and his fellow class members were obligated to pay to the National Grid for such services.

16. Plaintiff continued as a variable rate customer of EECI/GESC until March 2014.

17. Although plaintiff remained a variable rate customer throughout, his gas rates did not vary in accordance with any discernable trend other than that generally his rates increased.

The following is a tabulation of the rates GESC charged plaintiff for natural gas sold to him during part of his time as a GESC customer:

GESC Bill Date	GESC Price Per Therm
July 22, 2011	0.728560
August 8, 2011	0.737952
September 12, 2011	0.799000
October 10, 2011	0.799000
November 7, 2011	0.799000
December 8, 2011	0.800667
January 9, 2012	0.854882
February 8, 2012	0.899000
March 8, 2012	0.899000
April 10, 2012	0.902125
May 9, 2012	0.953859
June 8, 2012	0.999000
July 10, 2012	0.999000
August 8, 2012	0.999000
September 10, 2012	0.999000
October 8, 2012	1.049000
November 14, 2012	1.049000
December 8, 2012	1.049000
January 9, 2013	1.049000
February 8, 2013	1.049000
March 8, 2013	1.049000
April 8, 2013	1.049000
May 8, 2013	1.047333
June 8, 2013	0.999000
July 9, 2013	0.999000
August 8, 2013	0.999000
September 13, 2013	0.999000
October 8, 2013	0.999000
November 8, 2013	0.999000
December 9, 2013	0.999000
January 6, 2014	0.999000
Feb. 6, 2014 (approx.)	1.099000
March 5, 2014	1.099000
May 13, 2014	1.119000

(See, Exhibit C)¹

18. During that same period, between July 2011 and May 2014, the rates that the local utility, National Grid, charged residential consumers for natural gas supply were no more than 84% of the rates charged by defendant for natural gas supply, and were as little as 33% of what defendant charged to plaintiff, as per the following chart. Stated more simply, National Grid's natural gas supply prices were as much as 66% lower but no less than 16% lower than the natural gas supply prices charged by defendant.

¹ A "therm" is a unit of heating mathematically derived from a volume of natural gas, which itself is measured in cubic feet. Plaintiff's and his fellow class members' gas usage was measured in cubic feet at their respective gas meters and then billed by the defendants in therms. By way of reference, 10 therms is approximately enough heat to meet the natural gas needs of an average house (space-heating, water-heating, cooking, etc.) for 4 days and is approximately equivalent to the heat content of 1,000,000 standard 4" cooking matches.

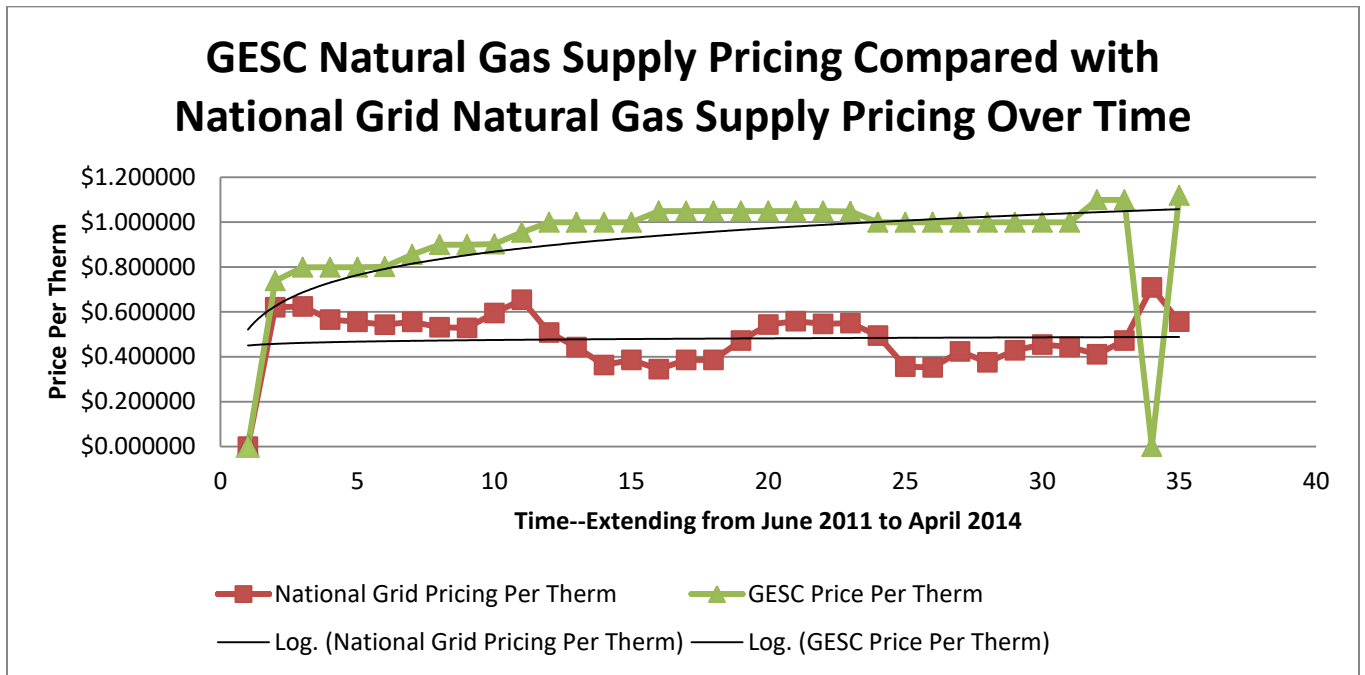
National Grid Service Month/Year	National Grid Total Effective Monthly Cost per Therm	GESC Bill Date	GESC Price Per Therm	Ratio of Nat Grid Rates to GESC Rates (Column B/Column E)
June, 2011	0.595610	July 22, 2011	0.728560	0.82
July, 2011	0.620710	August 8, 2011	0.737952	0.84
August, 2011	0.623870	September 12, 2011	0.799000	0.78
September, 2011	0.565860	October 10, 2011	0.799000	0.71
October, 2011	0.555510	November 7, 2011	0.799000	0.70
November, 2011	0.543160	December 8, 2011	0.800667	0.68
December, 2011	0.555630	January 9, 2012	0.854882	0.65
January, 2012	0.531430	February 8, 2012	0.899000	0.59
February, 2012	0.528960	March 8, 2012	0.899000	0.59
March, 2012	0.594680	April 10, 2012	0.902125	0.66
April, 2012	0.654440	May 9, 2012	0.953859	0.69
May, 2012	0.508270	June 8, 2012	0.999000	0.51
June, 2012	0.443410	July 10, 2012	0.999000	0.44
July, 2012	0.363000	August 8, 2012	0.999000	0.36
August, 2012	0.385960	September 10, 2012	0.999000	0.39
September, 2012	0.345130	October 8, 2012	1.049000	0.33
October, 2012	0.386150	November 14, 2012	1.049000	0.37
November, 2012	0.386150	December 8, 2012	1.049000	0.37
December, 2012	0.472070	January 9, 2013	1.049000	0.45
January, 2013	0.543910	February 8, 2013	1.049000	0.52
February, 2013	0.558450	March 8, 2013	1.049000	0.53
March, 2013	0.546200	April 8, 2013	1.049000	0.52
April, 2013	0.550320	May 8, 2013	1.047333	0.53
May, 2013	0.494460	June 8, 2013	0.999000	0.49
June, 2013	0.356200	July 9, 2013	0.999000	0.36
July, 2013	0.352680	August 8, 2013	0.999000	0.35
August, 2013	0.424240	September 13, 2013	0.999000	0.42
September, 2013	0.375600	October 8, 2013	0.999000	0.38
October, 2013	0.428870	November 8, 2013	0.999000	0.43
November, 2013	0.454730	December 9, 2013	0.999000	0.46
December, 2013	0.443930	January 6, 2014	0.999000	0.44
January, 2014	0.411050	Feb. 6, 2014 (approx.)	1.099000	0.37
February, 2014	0.472370	March 5, 2014	1.099000	0.43
March, 2014	0.709110	Unk.	Unk.	
April, 2014	0.556120	May 13, 2014	1.119000	0.50

Source for National Grid

pricing: https://www9.nationalgridus.com/niagaramohawk/home/rates/4_gas_supply.asp, last accessed 7/12/16.

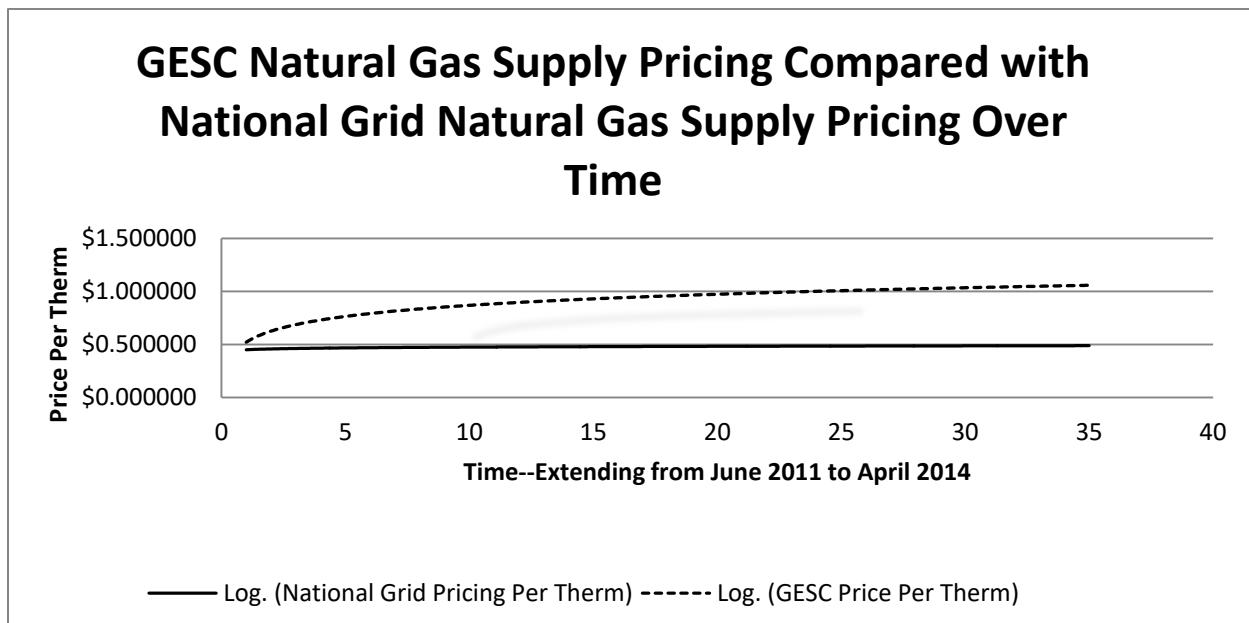
19. Expressed graphically in Table 1 below, the price per therm paid by the plaintiff for natural gas supply compared with the price per therm National Grid charged its customers for natural gas supply is shown below:

Table 1:



20. Removing the data points and leaving only the trend line, as shown in Table 2 below, defendant’s natural gas pricing when compared with National Grid’s natural gas pricing is depicted graphically as follows:

Table 2:



CLASS ALLEGATIONS

21. Plaintiff brings this class action lawsuit pursuant to CPLR Article 9 on behalf of three classes of persons. As used in this Complaint, the “GBL §349-d Class” shall be defined to mean: “All consumers who purchased natural gas supply for their residence in New York from Gateway Energy Services, LLC pursuant to a variable rate contract that violated New York General Business Law §349-d during the three year period preceding the date of filing of this action.” The “GBL §349 Class” shall be defined to mean: “All consumers who purchased natural gas supply for their residence in New York from Gateway Energy Services, LLC

pursuant to a variable rate contract that violated New York General Business Law §349 during the three year period preceding the date of filing of this action.” Finally, the “Contract Class” shall be defined to mean: “All consumers who purchased natural gas supply for their residence in New York from Gateway Energy Services, LLC pursuant to a variable rate contract during the six year period preceding the date of filing this action.”

22. The classes are so numerous that joinder of all members is impracticable. Although the precise number of putative class members in any of the classes is not known to the plaintiff, plaintiff believes that there are potentially thousands of members in each class. In May 2011, for instance, DESLLC, the defendant’s parent company, issued a press release which stated that defendant had 280,000 gas and electric customers, mainly situated in New York, New Jersey and Pennsylvania.

23. There are questions of law and fact common to the respective classes which predominate over any questions affecting only individual members.

24. The claims or defenses of representative parties are typical of the claims or defenses of the classes.

25. The plaintiff will fairly and adequately protect the interests of the classes.

26. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

FIRST CAUSE OF ACTION
BREACH OF GENERAL BUSINESS LAW §349-d

27. Plaintiff repeats every allegation of this complaint as if fully set forth at length herein.

28. Plaintiff's first cause of action is brought pursuant to General Business Law §349-d(3), the "Energy Services Company Consumers Bill Of Rights". This statute provides that

No 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.

29. The bill jacket accompanying GBL §349-d stated that there was a "pressing need" for protections for consumers who were

encouraged to switch service providers from traditional utilities to energy services companies. Unfortunately, consumer protection appears to have taken a back seat in this process...

* * *

...short-term "teaser" rates followed by skyrocketing variable prices... are being repeated in energy competition...Although the PSC [*i.e. New York State Public Service Commission*] has recently adopted a set of guidelines, its "Uniform Business Practices" are limited and omit important consumer protections in several areas. The fact is, competition in supplying energy cannot succeed without a meaningful set of standards to weed out companies whose business model is based on taking unfair advantage of consumers.

...The bill requires the PSC and LIPA to adopt regulations including the following mandatory consumer protections...

* * *

all variable charges must be clearly and conspicuously identified...

* * *

These provisions will go a long way toward restoring an orderly marketplace where consumers can make informed decisions on their choices for gas and electric service with the confidence that state government will prevent fraudulent practices and ensure a level playing field.

2010, New York Bill Jacket, 2010 Assembly Bill 1558, NY Bill Jacket, 2010 A.B. 1558, Ch. 416

30. Pursuant to the Contract, defendant was bound to provide a natural gas supply rate that varied. While the Contract did not specify the manner in which that rate would vary

other than that plaintiff's rate would be a "variable monthly price set at a level by ECONenergy", plaintiff, like any reasonable consumer, understood that "variable monthly price" as used in the Contract meant that the defendant's rate for natural gas supply would rise and fall in accordance with market conditions and/or the weather. This, it is submitted, is the conventional understanding of what variable rate energy pricing would mean, and this is, it is further submitted, is what the reasonable consumer would reasonably expect his contractual right to variable pricing to mean. As stated, supra, defendant's website for years announced to the world that its variable pricing plans would vary with wholesale market pricing and thus that is what Defendant understood the contractual term "variable monthly price" to mean. Plaintiff's natural gas supply rates bore no relationship to the market conditions, the natural gas wholesale market, or to any objective metric of pricing. To whatever minimal extent that the rates defendant charged for natural gas supply did vary, they varied only in an upwards trend direction and in addition were substantially higher than market prices. See Tables 1 and 2, above.

31. Defendant's natural gas supply pricing was based on the arbitrary whims and caprices of defendant so it could make as much profit as possible which were in stark contradistinction to what a reasonable consumer would reasonably understand the term "variable" to mean. As such, the defendant's pricing for natural gas supply was deceptive and allowed Defendant to earn excessive profits under the pretense of providing a variable rate. Plaintiff concedes that defendant provided a "variable monthly rate set by defendant", as set forth in Exhibit A, but neither plaintiff nor any reasonable consumer would ever have signed a contract for natural gas supply that would offer a price that would vary totally and completely by the arbitrary pricing decisions of the natural gas supplier which were determined and set with the sole intent to maximize the profits.

32. On information and belief, defendant never intended to vary rates in accordance with any methodology other than that of maximizing its own profits, to which no reasonable consumer would ever have agreed.

33. As such, the defendant's promise of a variable rate was a deceptive business practice.

34. There was no objective formula pursuant to which the defendant varied its natural gas supply rates based on the market. Defendant did nothing other than raise its rates to the extent that it could without market backlash.

35. Defendant has deceived plaintiff and the members of the putative class into believing that they would get the benefit of decreases in the price of natural gas supply, as did customers of the local public utility. Defendant's natural gas supply pricing did not track lower to any significant degree but only tracked upwards.

36. Defendant and the members of the putative GBL §349-d Class have suffered harm and demand a money judgment in an amount estimated to exceed ONE MILLION DOLLARS (\$1,000,000) from this court to compensate them for their loss.

SECOND CAUSE OF ACTION
BREACH OF GENERAL BUSINESS LAW §349-d

37. Plaintiff repeats every allegation of this complaint as if fully set forth at length herein.

38. Plaintiff and members of the putative GBL §349-d Class demand a judgment awarding their attorneys' fees under GBL §349-d(10).

THIRD CAUSE OF ACTION
BREACH OF GENERAL BUSINESS LAW §349

39. Plaintiff repeats every allegation of this complaint as if fully set forth at length herein.

40. Plaintiff and members of the putative GBL §349 Class demand a judgment in an amount estimated to exceed ONE MILLION DOLLARS (\$1,000,000) against the defendant for violation of GPL §349.

FOURTH CAUSE OF ACTION
BREACH OF GENERAL BUSINESS LAW §349

41. Plaintiff repeats every allegation of this complaint as if fully set forth at length herein.

42. Plaintiffs and members of the putative GBL §349 Class demand a judgment against the defendant for their attorneys' fees pursuant to GBL §349(h).

FIFTH CAUSE OF ACTION
BREACH OF CONTRACT

43. Plaintiff repeats every allegation of this complaint as if fully set forth at length herein.

44. Pursuant to the Contract, defendant was obligated to charge plaintiff and members of the putative class a natural gas supply rate that varied with the market.

45. As detailed above and as shown in Table 1, the price for natural gas supply charged by defendants to plaintiff and members of the putative class not only bore no relationship to changes in the market price of natural gas, but also it uniformly exceeded it by substantial margins.

46. As such, defendant breached the Contract as it didn't provide the contractually agreed upon variable pricing that was tied to market rates.

47. Plaintiff and member of the putative Contract Class demand a judgment against the defendant in an amount to compensate them for their loss as a result of defendant's breach of contract in an amount estimated to exceed ONE MILLION (\$1,000,000) DOLLARS.

SIXTH CAUSE OF ACTION
BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

48. Plaintiff repeats every allegation of this complaint as if fully set forth at length herein.

49. Implied in every contract is a covenant requiring the contract parties to conduct themselves in good faith and deal fairly with their contracting parties.

50. By agreeing to vary the rate charged for natural gas supply to the plaintiff and members of the Contract Class yet hardly varying it at all and at that, primarily moving the rate higher, defendant breached the covenant of good faith and fair dealing implied into the Contract.

51. Every contract in New York implies good faith and fair dealing. It is a well-established rule of law in New York that any court interpreting a contract will, if possible, avoid any construction that is unreasonable or inequitable and particularly one that will place one party at the mercy of another. New York law further provides that ambiguities in a contract will be construed against the draftsman of the contract.

52. As alleged herein, the contract between plaintiff and his fellow class members, on the one hand, and the defendant on the other was a contract of adhesion drafted by the defendant. The terms of the contract were imposed on the plaintiff and his fellow class members. There was no parity of negotiating power and plaintiff and his fellow class members had no leverage to negotiate any of the terms of the contract. As such, the plaintiff and fellow class members were at the mercy of the defendant simply by virtue of the entering into contract with defendant.

53. Plaintiff contends that the defendant compounded the unfair advantage it created for itself through the contract by varying rates charged for natural gas supply in a way that benefitted itself only and was without any rhyme, reason or rational relationship to any objective formula or criteria based on market rates and providing plaintiff and the class with lower prices based on market price downturns.

54. By interpreting the ambiguity of variable rate pricing, which ambiguity the defendant itself created, in a way that benefitted the defendant only and not the plaintiff or putative members of the Contract Class, defendant breached the covenant of good faith and fair dealing.

55. The Court of Appeals has held that

Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance ... This embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract ... Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion (*Dalton v. Educational Testing Serv.*, 87 N.Y.2d 384, 389, 639 N.Y.S.2d 977, 663 N.E.2d 289 [internal quotation marks and citation omitted]).

56. Plaintiff and his fellow Contract Class members contend that the defendant has violated the covenant of good faith and fair dealing and consequently demand a judgment from the defendant to compensate them for their damages in an amount estimated to exceed ONE MILLION (\$1,000,000) DOLLARS.

WHEREFORE, plaintiff demands judgment as follows:

(A) On the first cause of action, for a judgment awarding money damages against the defendant on behalf of the GBL §349-d Class for the defendants' breach of General Business Law §349-d in an amount estimated to exceed ONE MILLION (\$1,000,000) DOLLARS;

(B) On the second cause of action, for a judgment awarding attorneys' fees and disbursements against the defendant pursuant to General Business Law §349-d for the GBL §349-d Class;

(C) On the third cause of action, for a judgment awarding money damages against the defendant on behalf of the GBL §349 Class for the defendants' breach of General Business Law §349 in an amount estimated to exceed ONE MILLION (\$1,000,000) DOLLARS;

(D) On the fourth cause of action, for a judgment awarding attorneys' fees and disbursements against the defendant pursuant to General Business Law §349 for the GBL §349 Class;

(E) On the fifth cause of action, for a judgment awarding damages on behalf of the Contract Class for the defendant's breach of contract in an amount estimated to exceed ONE MILLION (\$1,000,000) DOLLARS;

(F) On the sixth cause of action, for a judgment awarding damages on behalf of the Contract Class for the defendant's breach of the covenant of good faith and fair dealing in an amount estimated to exceed ONE MILLION (\$1,000,000) DOLLARS; and

(F) Costs, disbursements and interest of this action.

Dated: Lawrence, New York
October 23, 2016

Yours, etc.

Paul M. Sod

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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-defendants

SECOND AMENDED COMPLAINT

Yours, etc.

PAUL M. SOD

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RULE 130 CERTIFICATION

s/Paul M. Sod

October 23, 2016