

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

ANGELA WISE and GIDEON ROMM, on  
behalf of themselves and all others similarly  
situated,

Plaintiffs,

v.

ENERGY PLUS HOLDINGS LLC,

Defendant.

No. 11-CV-07345 (WHP)

JIM FORTNEY, on behalf of himself and all  
others similarly situated,

Plaintiff,

v.

ENERGY PLUS HOLDINGS LLC,

Defendant.

No. 12-CV-08119 (WHP)

**SETTLEMENT AGREEMENT**

Subject to the approval of the Court, Plaintiffs Angela Wise, Gideon Romm, and Jim Fortney ("Plaintiffs" or "Named Plaintiffs"), acting individually and on behalf of the Settlement Class as defined herein, and Defendant Energy Plus Holdings LLC, together with Energy Plus Natural Gas LLC, f/k/a Energy Plus Natural Gas L.P. (collectively "Energy Plus"), enter into this Settlement Agreement ("Agreement") as of this 28th day of February 2013. Plaintiffs and Energy Plus are referred to herein as the "Parties" and each as a "Party."

## I. RECITALS

1. Plaintiff Angela Wise filed a class action complaint against Energy Plus on October 18, 2011, styled *Wise v. Energy Plus Holdings LLC*, Civil Action No. 11-7345-WHP, in the United States District Court for the Southern District of New York (the “Wise Action”). Plaintiff Wise, along with Gideon Romm, filed an Amended Class Action Complaint on January 11, 2012.

2. On March 23, 2012, a hearing was held on Energy Plus’s motion to dismiss, after which, on April 19, 2012, plaintiffs filed their Second Amended Class Action Complaint in the Wise Action. Plaintiffs Wise and Romm allege that Energy Plus violated state consumer protection laws entitling them and the putative class to actual and/or statutory damages and injunctive relief.

3. On August 8, 2012, plaintiff Jim Fortney filed a class action complaint styled *Fortney v. Energy Plus Holdings LLC*, Civil Action No. 12-cv-02355, in the United States District Court for the District of Maryland, Greenbelt Division. Plaintiff Fortney filed an Amended Complaint on or about October 25, 2012, in which he alleges that Energy Plus violated state consumer protection laws entitling him and the class to damages and injunctive relief. The Fortney Action was transferred to this Court and accepted as a related case to the Wise Action, where it bears the docket number 12-CV-08119 (WHP) (the “Fortney Action”).

4. Defendant Energy Plus Holdings LLC answered the operative complaints in the Wise Action and the Fortney Action, denying any wrongdoing or liability and asserting a number of defenses.

5. The Wise Action has proceeded through discovery, with class-related deposition testimony taken and more than 829,000 files produced by Energy Plus.

6. In addition to formal discovery, the Parties also conducted informal discovery and extensive research into the applicable law with respect to the claims and defenses and with respect to class certification issues. Counsel for Plaintiffs reviewed files produced by Energy Plus both as part of formal discovery and in preparation for settlement negotiations.

7. The Parties met telephonically and in person on numerous occasions to discuss a comprehensive settlement of the claims of the Named Plaintiffs and the putative class.

8. On December 4, 2012, the Parties participated in day-long settlement negotiations and reached an understanding.

9. The Parties recognize and acknowledge the benefits of settling these cases. Plaintiffs believe that the claims asserted in this case have merit and that the evidence developed to date supports their claims. Despite the strengths of their case, Plaintiffs are mindful of the problems of proof under, and possible defenses to, the claims in this matter. Plaintiffs further recognize and acknowledge the expense and length of time that proceedings necessary to prosecute this matter against Energy Plus through trial, post-trial proceedings, and appeals would take. Counsel for Plaintiffs have taken into account the uncertain outcome and risks of the litigation, as well as the difficulties and delays inherent in such litigation and the likelihood of protracted appeals. Counsel for Plaintiffs have, therefore, determined that the Settlement set forth in this Agreement is fair, reasonable and adequate. The Settlement confers substantial benefits upon, and is in the best interests of, the Plaintiffs and the Settlement Class (hereafter defined).

10. Energy Plus maintains that it has a number of meritorious defenses to the claims asserted in these actions. Nevertheless, Energy Plus recognizes the risks and uncertainties inherent in litigation, the significant expense associated with defending class actions, the costs of

any appeals, and the disruption to its business operations arising out of class action litigation.

Energy Plus also recognizes the risk that a trial on class-wide claims might present.

Accordingly, Energy Plus believes that the Settlement set forth in the Agreement is likewise in its best interests.

## **II. SETTLEMENT TERMS**

### **A. Definitions**

1. "Claim Deadline" means the last date on which a Claim Form may be submitted. The Claim Deadline will be one hundred and twenty (120) days from the entry of the Preliminary Approval Order and not less than sixty (60) days after the first date on which claims may be filed electronically with the claims administrator; however, if the 120<sup>th</sup> day after the entry of the Preliminary Approval Order falls on a weekend or federal holiday, then the Claim Deadline shall be the next day that is not a weekend or federal holiday.
2. "Claim Form" means the form, substantially in the form attached hereto as Exhibit A, whether in electronic or "hard copy," that will be completed by Class Members and submitted to the Settlement Administrator in order to receive settlement benefits.
3. "Class Counsel" means D. Greg Blankinship and Meiselman, Packman, Nealon, Scialabba & Baker P.C.
4. "Class Members" means those consumers who fall within the definition of the Settlement Class and do not timely opt out as provided herein.
5. "Class Period" means any time up to and including October 15, 2012.

6. “Complaints” means, collectively: (i) the Second Amended Class Action Complaint filed in the Wise Action; and, (ii) the Amended Class Action Complaint filed in the Fortney Action.
7. “Court” means the United States District Court for the Southern District of New York.
8. “Effective Date” means the tenth (10<sup>th</sup>) day after the date on which all of the following conditions are satisfied:
  - a. Execution of this Agreement by the Named Plaintiffs and Energy Plus;
  - b. Entry of the Final Approval Order by the Court approving the Settlement embodied in this Agreement;
  - c. The passage of the earliest date on which: (i) the time for taking an appeal from the Final Approval Order and judgment has expired, without any appeal having been taken; or (ii) if an appeal is taken, the highest court to which such appeal may be taken affirms the Final Approval Order or dismisses the appeal without, in either case, any modification of the Final Approval Order that is in any respect unsatisfactory to the Parties.
9. “Fairness Hearing” or “Final Approval Hearing” means a hearing to be held by the Court, on notice to the Settlement Class, to consider approval of the Settlement and Class Counsel’s motion for approval of attorneys’ fees and reimbursement of costs and expenses. The Parties will ask the

Court to schedule a Fairness Hearing approximately ninety (90) days from the entry of the Preliminary Approval Order.

10. "Final Approval Order" means the Order granting final approval to the Settlement, which should not be entered sooner than ninety (90) days after the appropriate state and federal officials have been served with notice of the Settlement in accordance with the Class Action Fairness Act of 2005, as codified at 28 U.S.C. § 1715(b). Energy Plus agrees to provide the Court and Class Counsel promptly with the date(s) of service of said notices.
11. "Individual Settlement Amount" means the monetary amount calculated as of the end date of the Class Period that is allocated to each Class Member. The Settlement Administrator will be charged with (a) determining the applicable Individual Settlement Amount for each Class Member in accordance with data provided by Energy Plus after review and approval by Class Counsel; and (b) making available for viewing on the website by each Class Member his or her respective Individual Settlement Amount, as well as all other required information. The Individual Settlement Amounts, which apply to class members who have received at least two invoices for electric supply, range between a low of \$6.00 and a high of \$101.00, based upon the state in which the class member resides, the value of rewards, and the length of time a class member was a customer of Energy Plus. The estimated average Individual Settlement Amount per class member is \$23. The aggregate value of all Individual Settlement

Amounts available under the Settlement Agreement is estimated to be between \$9,178,451.00 and \$11,014,142.00, depending on the different options available to Class Members.

12. "Named Plaintiff Enhancement Awards" means the monetary amount awarded by the District Court in recognition of the assistance provided by the Named Plaintiffs in the prosecution of this action, for which Class Counsel shall ask for an amount not to exceed \$4,000.00 for each of Plaintiffs Wise and Romm, and \$2,000.00 for Plaintiff Fortney.
13. "Preliminary Approval Date" means the date on which the Court enters the Preliminary Approval Order.
14. "Preliminary Approval Order" means the Order preliminarily approving the Settlement, conditionally certifying the Settlement Class for the purposes set forth in this Agreement, and approving the form of notice to potential Class Members.
15. "Released Claims" means and includes any and all manner of actions, causes of action, suits, accounts, claims, demands, controversies, judgments, obligations, damages and liabilities of any nature whatsoever, whether or not now known, suspected or claimed, that were asserted, or could have been asserted by Plaintiffs in this action, or that could have been asserted by any Class Member against Energy Plus, that relate to or arise out of the conduct alleged in the Complaints or similar conduct, wherever it may have occurred.

16. "Released Persons" means Energy Plus and their parents, subsidiaries, affiliates, predecessors, successors and assigns, as well as all of their respective, current and former officers, directors, owners, employees, agents, attorneys and insurers.
17. The "Settlement" shall mean the settlement embodied in this Agreement.
18. "Settlement Administrator" means the person or entity selected by Class Counsel with the agreement of Energy Plus and appointed by the Court to perform the role of settlement administrator and all related tasks including those set forth in Section II.D. below.
19. "Settlement Class" is defined as:

All persons who were customers of Energy Plus Holdings LLC or Energy Plus Natural Gas LLC in New York, Maryland, Connecticut, New Jersey, Pennsylvania, Texas, Illinois, Ohio, or Massachusetts, at any time up to and including October 15, 2012.

Excluded from the Settlement Class are Energy Plus Holdings LLC and Energy Plus Natural Gas LLC; any of their respective parents, subsidiaries, or affiliates; any entity controlled by either of them; any officer, director, employee, legal representative, predecessor, successor, or assignee of either Energy Plus Holdings LLC or Energy Plus Natural Gas LLC; and any present or former customer who previously received from Energy Plus any payment resolving a claim similar to those asserted in the Wise Action.

#### **B. Class Certification**

The Parties agree that the Wise Action may be conditionally certified as a class action under Fed. R. Civ. P. 23(a) and (b)(3) in accordance with the terms of this Agreement and without prejudice to Energy Plus's right to contest class certification in the event that this Agreement fails to become effective or is not fully implemented in accordance with its terms. If the Settlement is not approved or this Agreement fails to be fully implemented, Energy Plus reserves all rights to object to any subsequent motion to certify a class in this or any other

lawsuit, and no representation or concession made in connection with the Settlement or this Agreement shall be considered law of the case or an admission by Energy Plus or to have any kind of preclusive effect against Energy Plus or to give rise to any form of estoppel or waiver by Energy Plus in these actions or any other proceeding.

Energy Plus expressly denies any and all liability and/or wrongdoing with respect to any and all of the claims alleged in these lawsuits and any similar lawsuits and enters into this Settlement solely to compromise a disputed claim. Accordingly, any references to the alleged business practices of Energy Plus in this Settlement, this Agreement or the related Court hearings and processes shall raise no inference respecting the propriety of those business practices or any other business practices of Energy Plus.

**C. Class Counsel**

The Parties agree, subject to Court approval, that D. Greg Blankinship and the firm of Meiselman, Packman, Nealon, Scialabba & Baker P.C. shall be appointed Class Counsel, without prejudice to Energy Plus's right to contest the appointment in the event that this Agreement is not fully implemented in accordance with its terms. If the Settlement is not approved or this Agreement fails to be implemented fully, Energy Plus reserves all rights to object to any subsequent motion to appoint class counsel in these or any other actions.

**D. Settlement Administrator**

The Settlement Administrator will be responsible for all aspects of claims administration in accordance with the terms of its engagement, including without limitation: (a) creating and maintaining a database of names and addresses of class members in accordance with information provided by Energy Plus; (b) comparing that database with a national change of address database; (c) printing and mailing notices, each with an assigned unique claim number; (d) compiling address information for and re-sending any notices returned as undeliverable;

(e) maintaining and staffing a call center that enables class members to hear automated responses to frequently asked questions and to obtain a live operator to field other questions; (f) developing and maintaining a website for the purposes of notice and Claim Form administration;

(g) calculating the proper Individual Settlement Amount for each Class Member and making available for viewing on the website by each Class Member who inquires, his or her respective Individual Settlement Amount; (h) providing a blank Claim Form by mail to any Class Members who request one; (i) compiling a list of Class Members who submit properly completed Claim Forms, either by mail or via the website, and verifying the accuracy and completeness of the Claim Forms; (j) distributing appropriate Individual Settlement Amounts by check to those Class Members who, on or before the Claim Deadline, request the Cash Option described in Section II.H(1) below; (k) distributing gift certificates provided by Energy Plus to Class Members who choose the gift certificate option described in Section II.H(2) below; (m) providing to Energy Plus a list of Class Members who choose either the "cash back" or "green" options described in Sections II.H(3) and H(4) below. Energy Plus will pay all costs relating to the Settlement Administrator, so long as those costs do not exceed \$300,000.00.

#### **E. Notice**

The Parties will be jointly responsible for agreeing upon the form and language of the notice to the Settlement Class, and they agree to cooperate in drafting that notice and ensuring that notice complies with the requirements of Federal Rule of Civil Procedure 23 and due process, subject to Court approval. Copies of the proposed notice to the class shall be served and filed with the motion for Preliminary Approval.

A short-form notice to the Settlement Class will be provided by United States Mail, postage prepaid, in a preprinted postcard format. Notice to former customers of Energy Plus will be provided in the same manner, mailed to their last known addresses as reflected in records

reasonably available to Energy Plus. The long-form notice will be available on the website to all Settlement Class members.

No later than twenty (20) days prior to the Final Approval Hearing, the Settlement Administrator shall certify to the Court compliance with the notice provisions of this Section II.E.

**F. Website**

The Settlement Administrator will create and maintain a website to provide, among other things, (1) copies of the long-form notice discussed in the preceding section hereof, this Agreement, and certain selected pleadings and Court Orders from the Wise Action; (2) the claims administrator's and Class Counsel's contact information; (3) each Class Member's respective Individual Settlement Amount; (4) a method for the electronic submission of Claim Forms at the appropriate time; and (5) a method for requesting the Claim Form(s) by mail.

**G. Class-Wide Equitable Relief**

As part of the consideration for the Settlement and Releases given herein, Energy Plus agrees, as follows:

Beginning on August 1, 2012, and for twenty-four consecutive months thereafter, Energy Plus shall make or have made the following alterations to its retail consumer marketing materials used in connection with its variable price products sold during the Class Period:

1. In advertisements substantially similar to the advertisement contained in Exhibit B (attached hereto and incorporated herein), Energy Plus shall delete the Frequently Asked Question ("FAQ") entitled "Will I save money with Energy Plus?"
2. In advertisements substantially similar to the advertisement contained in Exhibit B, Energy Plus shall either (i) delete the FAQ entitled "What will

my rate be with Energy Plus?" or (ii) cease to answer such question with any statements related to buying electricity every day at the best possible price, but will instead describe the variable nature of the rate and shall include the following phrase or language substantially similar thereto:

"The price may be higher than your local utility."

3. In advertisements substantially similar to the advertisement contained in Exhibit B, Energy Plus shall either (i) delete the FAQ entitled "What will my rate be with Energy Plus?" or (ii) cease to answer such question with the statement that customers are "getting the best possible price," but will instead describe the variable nature of the rate and shall include the following phrase or language substantially similar thereto: "The price may be higher than your local utility."
4. In advertisements substantially similar to the advertisement contained in Exhibit B, Energy Plus shall cease use of the phrase "no risk," unless it is clear that the statement relates only to the process of switching from the utility to Energy Plus.

During the same 24-month period, Energy Plus further agrees to conduct annual compulsory training for marketing staff, to be conducted by outside counsel. Energy Plus will annually notify Class Counsel of the date(s) on which said training was conducted.

#### **H. Settlement Amounts**

In consideration of the Releases set forth in Section II.L below, each Class Member, upon verification by the Settlement Administrator of a timely submitted, properly completed Claim Form, shall be entitled to one of the following options:

1. The Class Member may choose to receive his or her Individual Settlement Amount in the form of a check payable to the Class Member (the “Cash Option”);
2. In lieu of and not in addition to the Cash Option, a Class Member may choose a gift certificate redeemable for merchant gift card(s) in an amount equal to the Individual Settlement Amount, rounded up to the nearest \$5.00 increment;
3. In lieu of and not in addition to the Cash Option or the gift certificate described immediately above, a Class Member who is a current customer receiving electricity or natural gas supply from Energy Plus may choose to participate in a “cash back” program through which such class member will receive, at the end of 12 consecutive continued months of future energy supply service from Energy Plus, a 15% (in the case of electric supply) or 20% (in the case of gas supply) premium over the Cash Option;  
or
4. In lieu of the choices set forth in sub-paragraphs II.H(1), H(2), and H(3) above, a Class Member who is a current customer receiving electricity supply from Energy Plus may select a “green” option that will give such Class Member a 20% premium over the Cash Option, valued at Energy Plus’s retail rate for its “green” product add-on, to be fulfilled through renewable energy credit purchases used to offset actual customer usage.

Former Energy Plus customers who choose to reenroll with Energy Plus in the then-prevailing fixed-rate energy supply program (to the extent available in that Class Member’s

service area) can choose either the “cash back” program (for electricity supply service, if available) described in sub-paragraph II.H(3) above, or the “green” option (for electricity supply service) described in sub-paragraph II.H(4) above.

It is understood that a given Class Member may receive or have received electric or natural gas supply service at more than one location and, therefore, may have had more than one account with Energy Plus, which may or may not correspond to more than one Individual Settlement Amount. Each such account shall be treated as a Class Member for the purposes of this Section II.H.

The Individual Settlement Amounts described in this Section II.H will be available on a “claims made” basis and Energy Plus will fund valid claims as determined by the Settlement Administrator only insofar as actually claimed on or before the Claim Deadline.

All Class Members who submit a Claim Form must sign (or, in the case of claims made on-line on the Settlement Administrator’s website, electronically sign), as part of the Claim Form, an attestation under penalty of perjury that: (i) they (or their business) are/were a named account holder with Energy Plus Holdings LLC and/or Energy Plus Natural Gas LLC during the Class Period; (ii) they did not already receive a payment resolving a claim similar to those asserted in the Wise Action; (iii) they did not have and are not now seeking to have their account balance discharged due to bankruptcy or receivership; and (iv) they acknowledge that submission of the Claim Form waives any opt-out rights that they may otherwise have.

Class Members who are paid by check shall have 60 days within which to cash those checks. Upon the expiration of that time period, any check not cashed within the time period allotted will become void. The voiding of any such check by the passage of time as described in

this paragraph shall not serve to invalidate the release given in Section II.L hereof by any Class Member who failed timely to negotiate his or her check.

**I. Other Payments by Energy Plus**

1. Energy Plus will not oppose or object to a request for, and agrees to pay to Class Counsel, upon Court approval, attorneys' fees, costs, and expenses of litigation, in such amount as may be approved by the Court, not to exceed in the aggregate \$3,300,000 (Three Million, Three Hundred Thousand Dollars). Energy Plus agrees to pay the Court-approved amount to Class Counsel within seven (7) business days of the Effective Date. Notwithstanding anything contained in this Agreement that might be construed to the contrary, it is understood by the Parties and Class Counsel that attorneys' fees, costs and expenses, in the amount awarded by the Court, are the only such fees, costs and expenses that Energy Plus will pay in connection with this Settlement. With the exception of its own costs, expenses or attorneys' fees, Energy Plus shall not be liable for any other litigation costs, expenses or attorneys' fees except as expressly provided in this Agreement.
2. Energy Plus agrees to pay, upon Court approval, Named Plaintiff Enhancement Awards to each Named Plaintiff in the amount awarded by the District Court, not to exceed the amounts set forth in the Definitions above and to so many of the named plaintiffs in the actions set forth in Section K below as support the Settlement, according to its terms; and
3. After the Court has granted preliminary approval to the Settlement Agreement and approved the form of notices, Energy Plus agrees to pay

costs of notice and administration, including all costs relating to the Settlement Administrator up to a maximum of \$300,000 (Three Hundred Thousand Dollars), it being understood that the Settlement Administrator is to be chosen by Class Counsel, with the consent of Energy Plus and that Class Counsel will use best efforts to minimize costs of administration, including using comparison estimates made available by claims administration services contacted by Energy Plus.

**J. Full and Final Settlement**

The Parties agree that this action is being voluntarily settled after consultation with experienced legal counsel and that the terms of the Settlement were negotiated at arm's length and in good faith. The Parties intend the Settlement to be a final and complete resolution of the Released Claims. In order to effectuate that purpose, the Parties agree to cooperate with one another and use their best efforts to obtain Court approval of the Settlement and this Agreement.

**K. Good Faith Effort to Resolve Other Pending Litigation**

Class Counsel agrees to make good faith efforts to obtain the agreement of plaintiffs in the actions denominated *Yu v. Energy Plus Holdings LLC and Energy Plus Natural Gas LP*, Civil Action No. 2:12-cv-2627-JLL-MAH (consolidated with *Faistl v. Energy Plus Holdings LLC and Energy Plus Natural Gas LP*, Civil Action No. 2:12-cv-2879-JLL-MAH) (D.N.J.); *Harley v. Energy Plus Holdings LLC*, Court of Common Pleas of Philadelphia County, Pennsylvania, October Term 2012, No. 77; and *Taylor v. Energy Plus Holdings LLC*, Court of Common Pleas of Philadelphia County, Pennsylvania, October Term 2012, No. 704, to agree neither to opt out nor object to this Settlement and to agree to the dismissal of each of those actions with prejudice in light of this Agreement without the necessity of Energy Plus pleading the Settlement and Release as a bar to the claims made in those actions.

Class Counsel acknowledges and agrees that Energy Plus will not pay any additional amount as attorneys' fees, expenses, disbursements or costs to plaintiffs in the above-referenced pending New Jersey and Pennsylvania lawsuits or their respective counsel, except that Energy Plus agrees to pay \$2,000 to each representative plaintiff in the above-referenced pending New Jersey and Pennsylvania lawsuits, on the same terms applicable to Plaintiffs receiving Named Plaintiff Enhancement Awards hereunder, provided that said representative plaintiff agrees not to opt out or object to this Settlement and to support the motion for Final Approval.

In the event that Class Counsel cannot reach agreement with respect to the dismissal of any one or more of the above-referenced pending New Jersey and Pennsylvania lawsuits or counsel in any of those lawsuits does not agree upon an apportionment of the attorneys' fees, costs and disbursements, the Parties will renegotiate the terms of this Agreement in good faith, with a view to ensuring that Energy Plus will not pay more than the amounts it has agreed to in this Agreement in order to settle all outstanding class action litigation against Energy Plus.

**L. Release**

Upon the Effective Date and without any further action by the Court or by any Party to this Agreement, Plaintiffs and the Class Members and all of their administrators, executors, personal representatives, heirs, agents, attorneys, assigns, predecessors and successors, for good and sufficient consideration, the receipt and adequacy of which is acknowledged, shall be deemed to, and shall, in fact, have remised, released and forever discharged any and all Released Claims, which they, or any of them, had or has or may in the future have or claim to have against the Released Persons.

### III. PROCEDURES FOR EFFECTUATING SETTLEMENT

#### A. Preliminary Approval

Promptly after the execution of this Agreement, Plaintiffs will move the Court for an order preliminarily approving this Agreement and requesting that the Court approve the form and content of the short-form and long-form Notices to the Class, substantially in the forms of Exhibits C and D to this Agreement, as described in Section II.E above, and:

1. conditionally certifying the Settlement Class, for settlement purposes only, pursuant to Federal Rule of Civil Procedure 23(a)(1)-(4) and (b)(3), with Plaintiffs Wise and Romm as the named Class representatives and Class Counsel as counsel for Plaintiffs and the Settlement Class;
2. setting the date of the Fairness Hearing, upon notice to the Settlement Class, to consider:
  - a. whether the Settlement should be approved as fair, reasonable and adequate and whether the Released Claims of the Settlement Class against the Released Persons should be dismissed with prejudice;
  - b. Class Counsel's Motion for an award of attorneys' fees, costs and expenses; and
  - c. the Named Plaintiff Enhancement Awards.

Class Counsel will file motions on topics III.A.2.a, b, and c at least ten (10) days prior to the date of the Fairness Hearing.

Upon the filing of Plaintiff's Motion for Preliminary Approval, counsel for Energy Plus will provide notice of the Settlement to the appropriate officials pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1715, the costs of such notice to be paid by Energy Plus.

**B. Treatment of Potential Opt Outs and Objectors**

Subject to an Order of the Court so providing, the Parties agree that:

**1. Opt Outs**

Any potential Class Member, other than any Named Plaintiff, may elect to be excluded from this Settlement and from the Class by opting out of the Class. Any potential Class Member who desires to be excluded from the Class must give written notice of the election to be excluded on or before the date specified in the Notices described in Section II.E, to the Settlement Administrator, Class Counsel and counsel for Energy Plus. The last date for Class Members to opt out of the Settlement will, subject to Court approval, be 60 days after the entry of the Preliminary Approval Order. Class Members who timely opt out of the Settlement will not be bound by the terms of this Agreement, including any releases contained herein.

In the event that ten percent or more of the Settlement Class opts out, Energy Plus shall have the option to elect to terminate this Agreement, in which circumstance the Settlement will become null and void and the parties will return to the *status quo ante* as described in Section III.E below.

Named Plaintiffs agree not to opt out of this Settlement, but rather affirmatively to support Final Approval. None of the Named Plaintiffs, Class Counsel, Energy Plus, or its counsel shall in any way encourage any Class Member to opt out or discourage any Class Member from participating in this Settlement.

**2. Objections**

Any Class Member who wishes to object to the Settlement must file a written objection and/or a notice of intention to appear before the Court at the Fairness Hearing, and serve copies on Class Counsel and counsel for Energy Plus. Any objection must set forth in writing a brief, informal statement of the nature of the objection, the reasons for the objection, and copies of any

papers that the objector intends to present to the Court in support of the objection at the Fairness Hearing. The last day for Class Members to object to the Settlement will be 60 days after the entry of the Preliminary Approval Order.

Named Plaintiffs agree not to object to Final Approval of this Settlement, but rather affirmatively to support Final Approval. None of the Named Plaintiffs, Class Counsel, Energy Plus, or its counsel shall in any way encourage any Class Member to object to this Settlement.

### **C. Approval of the Court**

This Agreement and the Settlement embodied herein are subject to Final Approval by the Court. If the Settlement is approved, the Court will enter a judgment dismissing the claims against Energy Plus with prejudice.<sup>1</sup> The Named Plaintiffs waive any right to appeal or collaterally attack a Final Approval Order entered by the Court.

If this Agreement or any part of it is materially modified by the Court or is materially modified upon appeal or remand, either Party may terminate this Agreement pursuant to Section III.D. If no Party timely elects to terminate, then the Parties shall remain bound to the Settlement as so modified. For purposes of this paragraph, a "material modification" is one that significantly affects the rights or obligations of one or more of the Parties. Without limiting the foregoing and by way of illustration only, (a) any change to the scope of the Release set forth in this Agreement; (b) any change to the Final Approval Order, or (c) any increase in the cost of the Settlement to be borne by Energy Plus shall be deemed to be a material modification. No order or action of the Court pertaining to attorneys' fees or expenses shall be considered to constitute a material modification so long as such order, action or modification does not increase the cost of

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<sup>1</sup> To the extent that the Court does not order dismissal with prejudice of the *Fortney* action, Fortney agrees to dismiss his claims voluntarily and with prejudice at the same time as the *Wise* Action is dismissed.

Settlement to be borne by Energy Plus and does not require that Energy Plus do anything not specifically set forth herein. Similarly, no order or action of the Court pertaining to the Named Plaintiff Enhancement Awards shall be considered to constitute a material modification so long as such order, action or modification does not increase the cost of Settlement to be borne by Energy Plus and does not require that Energy Plus do anything not specifically set forth herein. Any dispute as to the materiality of any modification or proposed modification of this Agreement shall be resolved by the Court.

**D. Termination of Agreement**

This Agreement shall terminate: (a) automatically if the Court fails to approve the Agreement; (b) at the election of either Party, in the event of any proposed material modification of this Agreement as a condition to approval of the Settlement; (c) prior to approval of this Agreement by the Court, upon the mutual agreement of the Parties by and through their respective counsel; or (d) at the election of Energy Plus, in the event that ten percent or more of the Settlement Class opts out.

**E. Effect of Termination of Agreement**

If this Agreement is terminated, each Party shall return to his, her, or its respective status as of December 4, 2012, and they shall proceed in all respects as if this Agreement had not been executed and any related orders had not been entered, preserving all of their respective claims and defenses.

**IV. MISCELLANEOUS PROVISIONS**

**A. Costs**

Except as otherwise provided in this Agreement, each Party shall bear its own costs and expenses.

**B. Entire Agreement**

This Agreement, together with the Exhibits hereto, constitutes the entire agreement between the Parties with respect to the subject matter of the Settlement and supersedes all prior negotiations, communications, memoranda and agreements between the Parties. Neither Named Plaintiffs nor Energy Plus are entering into this Agreement in reliance upon any representations, warranties or inducements other than those contained in this Agreement.

**C. Amendments**

This Agreement may be modified or amended only by (a) an order of the Court, or (b) a writing signed by (i) Class Counsel, and (ii) counsel for Energy Plus.

**D. Extensions of Time**

The Parties may jointly request that the Court allow reasonable extensions of time to carry out any of the provisions of the Agreement without formally amending this Agreement.

**E. Plaintiffs' Authority**

Class Counsel represent and warrant that they are authorized to take all appropriate actions required or permitted to be taken by or on behalf of the Named Plaintiffs and, subsequent to an appropriate Court Order, the Class in order to effectuate the terms of this Agreement and are also authorized to enter into appropriate modifications or amendments to this Agreement on behalf of the Named Plaintiffs and, subsequent to an appropriate Court Order, Class Members.

**F. Counterparts**

This Agreement may be executed in one or more counterparts, all of which together shall be deemed to be one and the same instrument. The Parties agree that a copy of the executed counterparts may be filed with the Court in connection with the motion to approve the Settlement, either in portable document format or some other suitable electronic form, as an

exhibit to Plaintiffs' Motion for Preliminary Approval without the need to collate and file a copy with original signatures.

**G. Cooperation**

The Parties shall cooperate with the Settlement Administrator to the extent reasonably necessary to assist and facilitate the Settlement Administrator in carrying out its duties and responsibilities. The Parties will also cooperate so that Class Counsel may have such confirmatory discovery as is reasonably necessary in connection with this Agreement.

**H. Binding Nature**

This Agreement shall be binding upon the heirs, executors, administrators, successors and assigns of the Plaintiffs, Class Members and Energy Plus.

**I. Construing the Agreement**

This Agreement shall not be construed more strictly against one Party than another merely by virtue of the fact that it may have been initially drafted by counsel for only one of the Parties. It is recognized that this Agreement is the result of arm's-length negotiations between the Parties and it is acknowledged that all Parties have contributed substantially to the preparation of this Agreement, accordingly, the doctrine of *contra proferentum* shall not apply in construing this Agreement, nor shall any other such similar doctrine apply.

**J. Choice of Law**

This Agreement shall be governed by and interpreted in accordance with the substantive common law of the State of New York, exclusive of choice of law principles.

**K. Jurisdiction**

The Parties submit to the exclusive jurisdiction of the United States District Court for the Southern District of New York for the purpose of enforcing this Agreement or implementing any part of the Settlement embodied in this Agreement.

**L. Headings**

The captions and headings employed in this Agreement are for convenience only, are not a part of the Agreement, and shall not be used in construing or interpreting the Agreement.

*(Signature pages follow)*

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement, as of the  
date and year first above written.

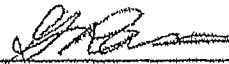
By: Angela D. Wise  
Angela Wise, individually  
and for the proposed class

By: \_\_\_\_\_  
Gideon Romm, individually  
and for the proposed class

By: \_\_\_\_\_  
Jim Fortney, individually  
and for the proposed class

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement, as of the  
date and year first above written.

By: \_\_\_\_\_  
Angela Wise, individually  
and for the proposed class

By:  \_\_\_\_\_  
Gideon Romm, individually  
and for the proposed class

By: \_\_\_\_\_  
Jim Fortney, individually  
and for the proposed class

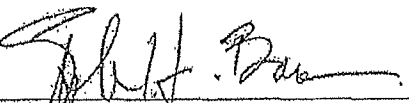
IN WITNESS WHEREOF, the Parties hereto have executed this Agreement, as of the  
date and year first above written.

By: \_\_\_\_\_  
Angela Wise, individually  
and for the proposed class

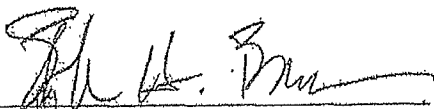
By: \_\_\_\_\_  
Gideon Romm, individually  
and for the proposed class

By: Jim Fortney  
Jim Fortney, individually  
and for the proposed class

For Energy Plus Holdings LLC,

  
\_\_\_\_\_  
Stephen H. Barnes  
President

For Energy Plus Natural Gas LLC, f/k/a Energy Plus Natural Gas LP:  
By: Energy Plus Holdings LLC, its sole member,

  
\_\_\_\_\_  
Stephen H. Barnes  
President