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* *Pro Hac Vice Application Forthcoming*

AYAN RHYMES and LOVELEEN KAUR,
on behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

MPOWER ENERGY NJ LLC,

Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY
DOCKET NO.

CIVIL ACTION

**CLASS ACTION COMPLAINT
AND JURY DEMAND**

CLASS ACTION COMPLAINT

Plaintiffs Ayan Rhymes and Loveleen Kaur (collectively, the “Plaintiffs”), by their attorneys, Finkelstein, Blankinship, Frei-Pearson & Garber, LLP, Wittels McInturff Palikovic, and Kheyfits Belenky LLP, bring this proposed class action in their individual capacity, and on behalf of a class of consumers defined below, against Defendant MPower Energy NJ LLC (hereinafter “MPower” or “Defendant”), and hereby allege the following with knowledge as to their own acts, and upon information and belief, as to all other acts:

NATURE OF THE CASE

1. This action seeks to redress MPower’s deceptive, bad-faith, and unlawful pricing practices that have caused thousands of commercial and residential customers in New Jersey, Pennsylvania, Ohio, Maryland, Illinois, and Washington DC to pay considerably more for their electricity and gas supply than they should otherwise have paid.

2. In New Jersey and these other states, a utility company cannot profit from selling energy supply to end users; it can only profit from delivery of that energy to end users. Following energy deregulation, however, independent energy supply companies (“ESCOs”) can profit by supplying energy to end users. While ESCOs compete to supply energy, local utility companies are required by law to continue to deliver the supply.

3. MPower is an ESCO, and it has taken advantage of deregulation by exploiting consumers hoping to save on their electricity and gas costs. Specifically, MPower uniformly represented to Plaintiffs that its variable rates for electricity and natural gas will be “determined monthly based on market pricing, but is not tied to any published index, and does not have a cap.” In truth, however, MPower did not base Plaintiffs’ electricity and natural gas rates on market pricing.

4. Further, MPower's contract violates several disclosure requirements mandated by New Jersey regulations (which are similar to other states' regulations). The regulations' purpose is to protect customers from an ESCO's price gouging, and they are designed to inform the customer, ahead of time, of the precise formula by which the consumer's rates will be determined. One of the obvious benefits of the regulations is that the customer will know how an ESCO's rates are calculated and set. Another benefit is that consumers can protect themselves if the ESCO deviates from its promised formula. Here, MPower ran roughshod over applicable regulations and, as a result, was able to charge customers energy rates that were consistently more than double, and frequently triple, the rates charged by these customers' existing utilities.

5. MPower's overcharges were not mere happenstance, as MPower's conduct is designed to take advantage of consumers' good faith and their lack of knowledge about, and access to, accurate wholesale and retail energy pricing information.

6. Upon information and belief, Plaintiffs were subject to the same or essentially the same contractual terms for electricity and gas as all MPower customers in New Jersey, Pennsylvania, Ohio, Maryland, Illinois, and Washington DC.

7. As a result of MPower's unlawful acts described herein, thousands of unsuspecting consumers have been, and continue to be, harmed by MPower's exorbitant charges for electricity and gas. Defendant's unlawful conduct, which often affects society's most vulnerable citizens, is immoral, unethical, oppressive, and unscrupulous.

8. Plaintiffs and other MPower customers (the "Class") have been injured by Defendant's unlawful practices. Plaintiffs and the Class therefore seek damages, restitution, statutory penalties, and declaratory and injunctive relief for MPower's breach of contract, breach

of the duty of good faith and fair dealing, violation of state consumer protection statutes, and unjust enrichment.

9. Only through a class action can MPower's customers remedy Defendant's ongoing wrongdoing. Because the monetary damages suffered by each customer are small compared to the much higher cost a single customer would incur in trying to challenge MPower's unlawful practices, it makes no financial sense for an individual customer to bring his or her own lawsuit. Further, many customers do not realize they are victims of MPower's deceptive and unlawful conduct. With this class action, Plaintiffs and the Class seek to level the playing field and make sure that companies like MPower engage in fair and upright business practices.

PARTIES

10. Plaintiffs reside in Nutley, New Jersey. In April 2021, MPower enrolled Plaintiffs on a 12-month fixed rate plan to supply Plaintiffs' gas and electricity. In June 2022, MPower began charging Plaintiffs a variable rate for gas. In November 2022, MPower began charging Plaintiffs a variable rate for electricity. MPower charged Plaintiffs exorbitant variable rates every month they continued to be MPower customers. MPower's variable rates were not based on market pricing. Plaintiffs cancelled their MPower account in February 2023.

11. As a result of Defendant's deceptive and otherwise improper, unlawful, and unauthorized conduct, Plaintiffs incurred excessive charges for electricity and gas.

12. Defendant MPower Energy NJ, LLC, is organized in New Jersey with its principal place of business at One University Plaza, Suite 507, Hackensack, New Jersey 07601.

13. MPower provides electricity and natural gas services to thousands of customers in New Jersey, Pennsylvania, Ohio, Maryland, Illinois, and Washington DC.

JURISDICTION AND VENUE

14. The Court has personal jurisdiction over Defendant because Plaintiffs' claims arise out of and relate to Defendant's conduct in Essex County, New Jersey. MPower's principal place of business is in Bergen County, New Jersey.

15. The court has subject matter jurisdiction over this action because, pursuant to the New Jersey Constitution, "[t]he Superior Court shall have original general jurisdiction throughout the State in all causes." N.J. CONST., art. VI, § 3, ¶ 2.

16. Venue is proper in this County pursuant to Rule 4:3-2(a) of the New Jersey Rules of Court because the causes of action arose in this County and because MPower resides in this County, because it is a business entity deemed to reside in this County pursuant to Rule 4:3-2(b) because it actually does business in this County.

FACTUAL ALLEGATIONS

The History of Deregulation and ESCOs' Role in Deregulated Supply Markets

17. In the 1999, New Jersey's legislature and the New Jersey Board of Public Utilities ("NJBPU") deregulated New Jersey's market for electricity and natural gas. Among deregulation's goals were increased competition, with an eye towards achieving greater consumer choice and an overall reduction of energy rates. As a result, the State's electric industry is open to competition, and consumers may choose their energy supplier.

18. The new energy suppliers, ESCOs, compete against local utilities such as Public Service Electric and Gas Company ("PSE&G"). While ESCOs supply the energy, the delivery of electricity and gas to homes and small businesses remains the job of the local utilities.

19. Before deregulation, retail consumers had to purchase both the supply *and* the delivery of electricity and natural gas from the local utility. The public policy motivation for

allowing consumers a choice of energy suppliers is to enable retail customers to take advantage of competition between suppliers in the open market, as compared to the monopolistic and heavily regulated utility. The premise behind this policy is that competition would result in ESCOs being more aggressive than the monopoly utility in reducing wholesale purchasing costs and thereby lower prices for retail customers.

20. Consumers in deregulated states like New Jersey who do not choose to switch to an ESCO for their energy supply continue to receive their supply from their local utility.

21. In New Jersey, the NJBPU holds market-based auctions for utilities to purchase electricity and natural gas at wholesale 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 prices. A similar process is used in Pennsylvania, Ohio, Maryland, Illinois, and Washington DC.

22. ESCOs such as MPower have various options to buy energy at wholesale for resale to retail customers, including: owning energy production facilities; purchasing energy from wholesale marketers and brokers at the price available at or near the time it is used by the retail consumer; and by purchasing energy in advance of the time it is used by consumers, either by purchasing physical energy to be used in the future or by purchasing futures contracts for the delivery of energy in the future at a predetermined price. The purpose of deregulation is to allow ESCOs to use these and other innovative purchasing strategies to reduce energy costs and pass those savings on to consumers.

23. Because of their increased flexibility, ESCOs can offer rates competitive with—if not substantially lower than—the utilities' rates, and some do. Yet MPower's variable rates are

consistently and substantially higher than the local utility's and wholly detached from market prices; accordingly, no consumer would ever agree to MPower's variable rate if they knew the truth. The only way MPower can retain variable rate customers is by hiding the fact that MPower's rates are not based on market prices, but MPower's unbridled price gouging and profiteering.

24. Consumers who do not choose to switch to an ESCO for their energy supply continue to receive their supply from their local utility. However, 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 also 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.

25. As part of the deregulation plan, ESCOs (like MPower) do not have to file or seek approval for the electricity or natural gas rates they charge or the methods by which they set their rates with the NJBPU.

26. Following deregulation, New Jersey enacted legislation to regulate interactions among ESCOs and consumers. A major component of the legislative scheme is a series of regulations, N.J.A.C. § 14:4-7.1, *et seq.* enacted in 2008. Relevant to this case are the Pricing and Marketing Regulations that apply to a "Third party supplier" or "TPS" of electricity or gas as defined in New Jersey's Electric Discount and Energy Competition Act ("EDECA"). N.J.S.A. § 14:4-1.2; N.J.A.C. § 14:4-7.1. MPower is a TPS.

27. The "Marketing Regulation" requires *inter alia* that for variable rate products, "the TPS shall describe in clear and conspicuous language the mechanism or formula by which the price is determined, and provide a detailed customer bill comparison[.]" N.J.A.C. § 14:4-

7.4(b)(2). The “Pricing Regulation” requires that the terms and conditions of a TPS contract contain “a clear and unambiguous statement of the precise mechanism or formula by which the price will be determined.” N.J.A.C. § 14:4-7.6(b)(2).

28. MPower’s contract violates both the Pricing and Marketing Regulations.

29. MPower’s contract violates the Pricing Regulations because it does not contain a clear and unambiguous statement of the precise mechanism or formula by which MPower’s variable rates will be determined. Instead, MPower’s contract contains only the following description of how its variable rates are set:

For Fixed Rate contracts, once the Fixed Rate term ends the contract will continue at a Variable Rate determined on a month-to-month basis until terminated by either party, or unless renewed at a Fixed Rate. Customers may elect a Variable Rate structure, which is determined monthly based on market pricing, but is not tied to any published index, and does not have a cap. The Variable Rate generally increases with weather fluctuations and extremes.

30. MPower’s contract also constitutes marketing under the Marketing Regulations because the contract is not binding on consumers once signed. Instead, New Jersey customers have seven days to rescind their contracts from the date they receive a confirmation notice of their choice of supplier. N.J.A.C. § 14:4-7.6(b)(4). During this seven-day period, MPower’s contract served as a solicitation for the purpose of persuading the customer to authorize a switch to MPower for electric and gas supply service. N.J.A.C. § 14:4-7.4(a).

31. MPower’s contract violates the Marketing Regulations in the following five ways:

- a. MPower’s contract does not provide potential customers “the average price per kWh for electric generation service or the average price per therm for gas supply service being charged for basic generation service or basic gas supply service by the [relevant local utility] over the same period” as the contract’s duration. N.J.A.C. § 14:4-7.4(a)(4). In fact, MPower’s contract does not mention any local utility pricing whatsoever.
- b. For the period Plaintiffs were on MPower’s fixed rate program, MPower’s contract failed to provide “the estimated percentage savings

on the total bill which a customer will realize under the advertised price relative to the customer taking basic generation service or basic gas supply service from the [relevant local utility].” N.J.A.C. § 14:4-7.4(b)(1). Again, MPower’s contract does not mention any local utility pricing whatsoever.

- c. For the period Plaintiffs were on MPower’s variable rate program, MPower’s contract failed to “describe in clear and conspicuous language the mechanism or formula by which the price is determined, and provide a detailed customer bill comparison” with the requisite information set forth in N.J.A.C. § 14:4-7.4(b)(1). Instead, MPower’s contract states only the description excerpted in paragraph 29 above.
- d. MPower’s contract does not point potential customers to a telephone number or website “which a customer may access to request detailed information concerning the average price per kWh for electric generation service or average price per therm for gas supply service over the term of a contract for the service being offered, exclusive of any charges for any optional services.” N.J.A.C. § 14:4-7.4(a)(1). Instead, MPower’s contract simply lists its telephone number without any reference whatsoever regarding where a customer can access information about MPower’s average variable rates. MPower’s contract also lists its website but states only that “[a] Spanish version of this document may be obtained at www.mpowerenergy.com.”
- e. To the extent MPower claims its exorbitant rates are due to its provision of optional services, MPower’s contract fails to “clearly and conspicuously identify each separate charge.” N.J.A.C. § 14:4-7.4(g).

32. By failing to provide the critical information required under the Pricing and Marketing Regulations, Defendant was able to inflict the precise harm that Plaintiffs suffered—being unknowingly overcharged for their energy.

33. MPower took advantage of deregulation and the lack of regulatory oversight to charge consumers exorbitant rates for electricity and gas. In theory, energy deregulation allows consumers to shop around for the best energy rates, and it allows consumers to take advantage of market-based rates that decline when wholesale costs decline. However, MPower exploits deregulated markets by consistently charging its customers far more than the local utility for the same energy and failing to adequately disclose how its variable rates are determined.

Plaintiffs' Dealings with MPower

34. On April 26, 2021, MPower enrolled Plaintiffs in a 12-month fixed rate plan to supply Plaintiffs' gas at a rate of 59 cents per therm and electricity at a rate of 14.4 cents per kilowatt-hour (kWh).

35. Under the contract, following the 12-month fixed rate term, MPower continued to supply gas and electricity to Plaintiffs at a variable rate.

36. In June 2022, MPower began charging Plaintiffs a variable rate for gas.

37. In November 2022, MPower began charging Plaintiffs a variable rate for electricity.

38. Plaintiffs cancelled their MPower account in February 2023.

39. MPower uniformly represented to Plaintiffs in its form customer agreement that its variable rates for electricity and natural gas will be "determined monthly based on market pricing, but is not tied to any published index, and does not have a cap."

40. Upon information and belief, Plaintiffs were subject to the same contractual terms for their variable rate for electricity and natural gas as all MPower customers in New Jersey, Pennsylvania, Ohio, Maryland, Illinois, and Washington DC.

41. In light of MPower's representations, any reasonable consumer, including Plaintiffs, would reasonably expect that MPower's variable rates would reflect market pricing.

42. Unfortunately, MPower did not provide its customers with variable rates based on market pricing. Instead, MPower charged its customers variable rates that were untethered from market pricing.

43. Price is the most important consideration for energy consumers. Given that there is no difference at all in the electricity and gas that ESCOs supply as opposed to the consumer's

local utility, the only reason a consumer would switch to an ESCO is for the potential savings offered in a competitive market as opposed to prices offered by a regulated utility.

44. The local utility’s rates, like PSE&G (the utility serving Plaintiffs’ home), serve as an ideal indicator of market prices because these rates reflect the wholesale cost of energy and the associated market costs that are the same costs ESCOs like MPower incur. In fact, Defendant has a tactical advantage over the utility as it can purchase energy from highly competitive markets for future use, and, therefore, its costs for purchasing energy should at the very least reflect (if not undercut) market prices, albeit over a longer term. Therefore, while the utility’s rates might not precisely match Defendant’s rates, the latter’s rates should correlate with the utility’s rates and over time should be roughly similar. Instead, MPower’s rates were wildly incongruent.

45. The following table compares Plaintiffs’ gas supply rates from MPower for 9 billing periods (for bills accessible to Plaintiffs spanning the period from June 2022 to March 2023) to their local utility PSE&G’s contemporaneous supply rate.

Billing Period	MPower Rate (Dollars per Therm)	PSE&G’s Supply Costs (Dollars per Therm)	Overcharge Percentage
6/18/2022 – 7/20/2022	\$1.3139	\$0.4101	220%
7/20/2022 – 8/18/2022	\$1.4304	\$0.4104	249%
8/19/2022 – 9/19/2022	\$1.4096	\$0.4103	244%
9/17/2022 – 10/19/2022	\$1.3974	\$0.5835	139%
10/18/2022 - 11/16/2022	\$1.4071	\$0.6519	116%
11/16/2022 - 12/19/2022	\$1.3974	\$0.6518	114%
12/17/2022 – 1/20/2023	\$1.3993	\$0.6518	115%
1/20/2023 – 2/17/2023	\$1.4030	\$0.5630	149%
2/17/2023 – 3/21/2023	\$1.399	\$0.4839	189%

46. The “Overcharge Percentage” column in each chart demonstrates the drastic difference between MPower’s rates for Plaintiffs’ account and PSE&G’s contemporaneous rates. MPower’s rates were more than double PSE&G’s rates for all nine billing periods and were more than triple of PSE&G’s rates for three of the nine billing periods. On average, MPower’s rates were 171% higher than PSE&G’s rate.

47. The following table compares Plaintiffs’ electricity supply rates from MPower for 3 billing periods, for bills accessible to Plaintiffs spanning the period from October 2022 to January 2023, to their local utility PSE&G’s contemporaneous supply rate.¹

Billing Period	MPower Rate (Cents Per kWh)	PSE&G’s Supply Costs (Cents per kWh)	Overcharge Percentage
10/18/2022 - 11/16/2022	\$0.2290	\$0.069413	230%
11/16/2022 - 12/19/2022	\$0.2290	\$0.069413	230%
12/17/2022 – 1/20/2023	\$0.2290	\$0.069413	230%

48. MPower’s rates were more than triple PSE&G’s rates for all three billing periods.

49. The disconnect between MPower’s rates and PSE&G’s rates further demonstrates that MPower’s rates did not even remotely reflect market prices to purchase electricity and gas.

50. By contrast, PSE&G’s supply rate, charged to those customers in Plaintiffs’ geography who do not select an ESCO, reflects market prices. As explained above, PSE&G is MPower’s primary competitor in Plaintiffs’ service territory, and PSE&G’s rates encompass the average wholesale price of electricity, gas, and associated costs over time without any markup, making it an ideal comparator.

¹ Plaintiffs’ net electricity usage for each month between March 2022 to October 2022 and February 2023 to March 2023 was zero.

51. Not only is PSE&G MPower’s primary competitor (as the utility always is), but PSE&G’s rates are also the best indicator of market prices. PSE&G’s rates reflect the rates charged in the competitive short-term public market (also known as “real-time” pricing or the “spot market”) for wholesale energy and the associated market costs (*i.e.*, ancillary services, installed capacity, and transmission—the same costs ESCOs such as MPower incur) and are set without any markups or profit. In other words, PSE&G purchases wholesale electricity and gas for its customers every day on an open free market and passes those costs onto consumers; MPower could do the same. Consequently, PSE&G’s electricity and gas rates are the ideal comparator here because they are MPower’s primary competitor’s and PSE&G’s rates represent wholesale market prices for energy and associated costs.

52. MPower should have been able to procure electricity and gas at a *lower* cost than the utility given its tactical advantages over PSE&G. As explained above, MPower can purchase electricity and gas from any number of sources using a variety of purchasing and hedging strategies. Its cost for purchasing gas or electricity, therefore, should have at least reflected, if not undercut, PSE&G’s prices.

53. Instead, MPower’s rates were consistently and significantly higher than PSE&G’s rates. MPower did not adequately disclose to Plaintiffs that its variable electricity and gas rates are consistently and significantly higher than the rates PSE&G charges. MPower likewise failed to adequately disclose to Plaintiffs that in paying Defendant’s variable energy rates, they were receiving no added material benefit at a dramatically higher price than if they had bought their energy from PSE&G. MPower also failed to provide customers with adequate advance notice of the variable rates it would charge and failed to adequately disclose the conditions that must be

present for a variable rate customer to save money compared to what the consumer's local utility would have charged.

54. A reasonable consumer understands and expects that MPower's variable energy rates will reflect the wholesale price for gas and electricity, that is, the market price available to MPower for the gas and electricity it in turn supplies to its retail customers.

55. However, MPower's variable rates are so much higher than wholesale market prices that they do not reflect market prices.

56. No reasonable customer, including Plaintiffs, would expect an ESCO's variable rate to be artificially inflated beyond any resemblance to the local utility's costs. Indeed, the fact that MPower's rates were consistently more than double, and frequently triple, PSE&G's rates demonstrates the extent of its unscrupulous price gouging.

57. Furthermore, that MPower's variable rates were so much higher than current variable and fixed rate offers from MPower and other ESCOs in New Jersey demonstrates that MPower's rates did not reflect market prices.

58. Based on Plaintiffs' bills from November 2021 to May 2022, MPower charged Plaintiffs a fixed rate of approximately 59 cents per therm for natural gas.

59. As of April 5, 2023, MPower still advertises to New Jersey that it offers a fixed rate of 59 cents per therm for natural gas.²

60. Yet, just one month after MPower stopped charging Plaintiffs a fixed rate for gas supply, MPower charged Plaintiffs a variable rate of \$1.31 per therm, which was more than *double* the previous month's rate. In each month from July 2022 to March 2023, MPower

² See Suppliers by Gas Distribution Company, NEW JERSEY POWER SWITCH, <https://nj.gov/njpowerswitch/suppliers/gas/#simple3> (last accessed April 5, 2023).

charged Plaintiffs a variable rate for gas that was more than double the fixed rate that MPower charged Plaintiffs and still offers to New Jersey customers.

61. MPower's variable rates for electricity were also far higher than the fixed rates that MPower charged Plaintiffs. In February 2022, the last month that MPower charged Plaintiffs a fixed rate for electricity, MPower charged Plaintiffs a rate of 14.4 cents per kWh. In November 2022, the first month that MPower charged Plaintiffs a variable rate for electricity (Plaintiffs' net electricity usage for each month between March 2022 to October 2022 was zero), MPower charged Plaintiffs a rate of 22.9 cents per kWh.

62. That MPower's variable rates were so much higher than its own fixed rates demonstrates that its variable rates were not reflective of market pricing.

63. MPower's variable rates for gas are also far higher than other ESCOs' gas rates in New Jersey. As of March 16, 2023, five other ESCOs advertise variable rate prices for gas in Plaintiffs' utility region through the State of New Jersey's "NJ Power Switch" comparison website.³ The prices offered by other ESCOs range from \$0.409 to \$1.16 per therm, with an average rate of \$0.8198 per therm.⁴ Yet, MPower charged Plaintiffs variable rates for gas between \$1.31 and \$1.43 per therm. At 70% above the average rate, MPower's rate is far beyond the rate that other ESCOs charge. While the difference in these rates is expressed in terms of cents, the effect on MPower's customers from Defendant's practices manifests as overall monthly energy costs that are sometimes hundreds of dollars more than these consumers should have been charged.

³ *Id.*

⁴ *Id.*

64. MPower's variable rates for electricity are also far higher than other ESCOs' electricity rates in New Jersey. As of March 16, 2023, four other ESCOs advertise variable rate prices for electricity in Plaintiffs' utility region through the State of New Jersey's "NJ Power Switch" comparison website.⁵ The prices offered by other ESCOs range from 13.22 to 23.60 cents per kWh, with an average rate of 17.43 cents per kWh.⁶ Yet, MPower charged Plaintiffs variable rates for electricity of 22.9 cents per kWh. At 31% above the average rate, MPower's rate is far beyond the average rate that other ESCOs charge. Only one other ESCO offers a variable rate for electricity that was higher than MPower.

65. MPower knew that its variable rates were consistently and significantly higher than the local utility's rates, MPower's own fixed rates, and other ESCOs' variable rates.

66. Defendant's failure to disclose this fact was a material omission and was materially misleading because the most important consideration for any consumer choosing an energy supplier is price; energy is a fungible commodity.

67. Moreover, Defendant at no time alerted or informed Plaintiffs that the cost for electricity and gas would be continuously *significantly* higher than the same energy sold by PSE&G.

68. No reasonable consumer who knew the truth about MPower's exorbitant rates would have chosen it as an energy supplier.

69. Other than potential price savings, there is nothing to materially differentiate MPower from the local utility, and the potential for price savings is the only reason any reasonable consumer would become an MPower customer.

⁵ *Id.*

⁶ *Id.*

70. MPower lulled consumers into purchasing its energy supply via material omissions about its variable energy rates. Defendant did so to reap excessive profits at the expense of unsuspecting consumers. Defendant acted with actual malice, or wanton and willful disregard, for consumers' well-being.

71. In this case, MPower knew that once it had acquired the consumer's energy account, it could charge high energy rates and its customers would not know that the rates were not based on market prices, and simply pay the exorbitant charges, month after month.

72. It is well-established that defaults are powerful drivers of consumer behavior. There are various factors underlying this human tendency that have been discussed in the judgment and decision-making literature, such as the work about defaults, the "status quo bias,"⁷ and "Nudges."⁸

73. Defendant's exploitation of consumer inertia is further exacerbated by the fact that it is unlikely that consumers will compare MPower's prices with what their local utility is charging, that consumers have access to information about market pricing, or that they will understand the differences in the two companies' charges so as to make the comparison effective.

74. No reasonable consumer would expect that MPower would charge them more than the utility by so much money for so long.

⁷ Daniel Kahneman, Jack L. Knetsch and Richard H. Thaler (1991), "Endowment Effect, Loss Aversion, and Status Quo Bias," *The Journal of Economic Perspectives*, Vol. 5, pp. 193–206.

⁸ R. Thaler and S. Sunstein (2008), *Nudge*, Yale University Press.

75. Thus, MPower's omissions with respect to the rates it would charge were materially misleading.

76. Additionally, Defendant's ability to make a profit does not justify its outrageously high rates. A reasonable consumer might understand that an ESCO will attempt to make a reasonable profit by selling consumers retail electricity and gas. However, such a consumer would also expect that such profits would be consistent with profit margins obtained by other suppliers of electricity and gas in their respective markets and that Defendant's profiteering at the expense of its customers would not be so extreme that its rate bears no relation to market prices but is instead outrageously higher.

77. Given that Defendant has engaged in a series of deceptive acts and omissions for which it billed consumers and consumers continued to pay, the continuing violation doctrine applies, effectively tolling the limitations period until the date of MPower's last wrongful act against Plaintiffs, which was in March 2023, when MPower last charged Plaintiffs substantially more for electricity than the local utility.

CLASS ACTION ALLEGATIONS

78. Plaintiffs bring this action on their own behalf and, pursuant to Rule 4:32 of the New Jersey Rules of Court, on behalf of a class of all New Jersey, Illinois, Maryland, Ohio, Pennsylvania, and Washington DC MPower customers charged for residential and commercial electricity and/or natural gas services by MPower from the earliest allowable date through the date of judgment.

79. Plaintiffs also bring this action on their own behalf and, pursuant to Rule 4:32 of the New Jersey Rules of Court, on behalf of a class of all New Jersey MPower customers

charged for residential and commercial electricity and/or natural gas services by MPower from the earliest allowable date through the date of judgment (the “New Jersey Subclass”).

80. As alleged throughout this Complaint, the Class claims all derive directly from a single course of conduct by Defendant. Defendant has engaged in uniform and standardized conduct toward the Class—its marketing and billing practices—and this case is about the responsibility of Defendant for its knowledge and conduct in deceiving its customers. This conduct did not meaningfully differentiate among individual Class Members in its degree of care or candor, its actions or inactions, or in its omissions. Upon information and belief, the applicable rate provisions in the customer agreements for all of MPower’s customers (the “Class Members”) are materially the same.

81. Excluded from the Class are Defendant; any parent, subsidiary, or affiliate of Defendant; any entity in which Defendant has or had a controlling interest, or which Defendant otherwise controls or controlled; and any officer, director, employee, legal representative, predecessor, successor, or assignee of Defendant.

82. Plaintiffs reserve the right, as might be necessary or appropriate, to modify or amend the definition of the Class and/or add additional Subclasses, when Plaintiffs file their motion for class certification.

83. Plaintiffs do not know the exact size of the Class because such information is in the exclusive control of MPower. Plaintiffs believe, however, that based on the publicly available data concerning Defendant’s customers in New Jersey, Pennsylvania, Ohio, Washington DC, Illinois, and Maryland, the Class encompasses at least tens of thousands of individuals whose identities can be readily ascertained from Defendant’s records. Accordingly, the members of the Class are so numerous that joinder of all such persons is impracticable.

84. Questions of law and fact are common to the Class and predominate over any questions affecting only individual Class Members, and a class action will generate common answers to the questions below, which are apt to drive the resolution of this action:

- a. Whether Defendant breached its contract with Plaintiffs and Class Members by failing to set variable rates in the method dictated by the parties' contract;
- b. Whether Defendant's conduct violates N.J.S.A. 56:8-1 *et seq.*;
- c. Whether Defendant's conduct violates N.J.A.C. 14:4-7.3(d)(1) and 7.4(n)(1);
- d. Whether Defendant's conduct violates multiple state consumer protection statutes;
- e. Whether Defendant was unjustly enriched as a result of its conduct;
- f. Whether Defendant violated the duty of good faith and fair dealing in its consumer contracts;
- g. Whether Class Members have been injured by Defendant's conduct;
- h. Whether, and to what extent, equitable relief should be imposed on Defendant to prevent it from continuing its unlawful practices; and
- i. The extent of class-wide injury and the measure of damages for those injuries.

85. Their claims are typical of the claims of the Class and do not conflict with the interests of any other members of the Class. Plaintiffs and the other members of the Class were subject to the same or similar conduct engineered by the Defendant. Further, Plaintiffs and members of the Class sustained substantially the same injuries and damages arising out of Defendant's conduct.

86. Plaintiffs are adequate class representatives. Plaintiffs will fairly and adequately protect the interests of all Class Members. Plaintiffs have retained competent and experienced class action attorneys to represent their interests and those of the Class.

87. A class action is necessary because i) the prosecution of separate actions by Class Members will create a risk of adjudications with respect to individual Class Members that will, as a practical matter, be dispositive of the interests of the other Class Members not parties to this action, or substantially impair or impede their ability to protect their interests; and ii) the prosecution of separate actions by Class Members will create a risk of inconsistent or varying adjudications with respect to individual Class Members, which will establish incompatible standards for Defendant's conduct.

88. A class action is appropriate because Defendant has acted or refused to act on grounds generally applicable to all Class Members.

89. A class action is superior to all other available methods for resolving this controversy because questions of law and fact common to the Class predominate over any questions affecting only individual Class Members and a class action will fairly and efficiently adjudicate the controversy.

90. Further, the following issues are also appropriately resolved on a class-wide basis:

- a. Whether Defendant's conduct violates the New Jersey Consumer Fraud Act;
- b. Whether Defendant's conduct violates N.J.A.C. 14:4-7.3(d)(1) and 7.4(n)(1);
- c. Whether Defendant's conduct violates multiple states' consumer protection statutes;
- d. Whether Defendant was unjustly enriched as a result of its conduct;
- e. Whether Defendant violated the duty of good faith and fair dealing in its consumer contracts;
- f. Whether Class Members have been injured by Defendant's conduct; and
- g. Whether, and to what extent, equitable relief should be imposed on Defendant to prevent it from continuing its unlawful practices.

91. Accordingly, Defendant's violation of the multiple state consumer protection statutes and common law apply to all Class Members, and Plaintiffs are entitled to have Defendant enjoined from engaging in illegal and deceptive conduct in the future.

CAUSES OF ACTION

COUNT I

Breach of Contract

(On Behalf of Plaintiffs and All Class Members)

92. Plaintiffs reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

93. MPower customers have customer agreements whose variable rate terms are identical or substantially similar.

94. Plaintiffs and the Class entered into valid contracts with Defendant for the provision of electricity and/or gas.

95. MPower uniformly represents to its New Jersey customers in its form customer agreements that its variable rates for electricity and natural gas will be "determined monthly based on market pricing, but is not tied to any published index, and does not have a cap."

96. Upon information and belief, MPower's New Jersey customers were subject to the same or essentially the same contractual terms for their variable rate for electricity and gas as all MPower customers in Pennsylvania, Ohio, Maryland, Illinois, and Washington DC.

97. Pursuant to the contracts, Plaintiffs and the Class paid the variable rates Defendant charged for electricity and gas.

98. However, Defendant failed to perform its obligations under its contracts to charge rates based upon market pricing. Instead, Defendant charged variable rates for electricity and gas that were untethered from market pricing upon which the parties agreed the rate would be

based.

99. Plaintiffs and the Class were damaged as a result because they were billed, and they paid, a charge for electricity and/or gas that was higher than it would have been had Defendant based its rate on market prices.

100. By reason of the foregoing, Defendant is liable to Plaintiffs and other Class Members for the damages that they have suffered as a result of Defendant's actions, the amount of such damages to be determined at trial, plus attorneys' fees.

COUNT II
Breach of the Implied Covenant of Good Faith and Fair Dealing
(On Behalf of Plaintiffs and All Class Members)

101. Plaintiffs reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

102. Plaintiffs and the Class contracted with Defendant for the provision of electricity and/or gas supply.

103. Every contract has 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 the contract's express terms.

104. Under the contract, to the extent Defendant had discretion to set the variable rate for electricity or gas, it was obligated to exercise its discretion in good faith. Defendant exercised its discretion in bad faith. Specifically, for years Defendant has been receiving complaints from consumers regarding MPower's high variable energy rates and complaining that those rates were not consistent with consumers' expectations. Despite these many complaints, Defendant acted with a bad motive and continued to gouge consumers and small businesses. Likewise, Defendant has known for years (i) that its variable energy rates are consistently and significantly higher than the

rates the customer's existing utility charges, (ii) that customers paying Defendant's variable energy rates receive no material added benefit in exchange for paying energy rates that are dramatically higher than the local utility's rates, (iii) that Defendant could, but failed to, provide customers with adequate advance notice of the variable rates it would charge, and (iv) that Defendant could, but failed to, adequately disclose the conditions that must be present for a variable rate customer to save money compared to what the consumer's local utility would have charged. Despite this superior knowledge, Defendant acted with a bad motive and continued to gouge consumers and small businesses.

105. Further, Defendant's violation of the Pricing and Marketing Regulations as described herein demonstrates that it has violated community standards of decency, fairness, and reasonableness.

106. Defendant's failure to comply with the regulations is what permitted MPower to charge Plaintiffs whatever it wanted—unmoored from any specific pricing formula or mechanism—and Plaintiffs experienced the adverse consequences in the performance of the parties' agreement.

107. Similarly, Defendant's failure to disclose the material information (i) that its variable energy rates are consistently and significantly higher than the rates the customer's existing utility charges, (ii) that customers paying Defendant's variable energy rates receive no material added benefit in exchange for paying energy rates that are dramatically higher than the local utility's rates, (iii) that Defendant could, but failed to, provide customers with adequate advance notice of the variable rates it would charge, and (iv) that Defendant could, but failed to, adequately disclose the conditions that must be present for a variable rate customer to save money compared to what the consumer's local utility would have charged is what permitted MPower to charge Plaintiffs whatever it wanted—unburdened by disclosing the truth about its rate

setting practices—and Plaintiffs experienced the adverse consequences in the performance of the parties' agreement.

108. Plaintiffs reasonably expected that MPower's variable energy rates would not be continuously and significantly higher than the utility's rates, which provide the same energy supply as MPower. Without these reasonable expectations, Plaintiffs and other Class Members would not have agreed to buy electricity or gas from Defendant. Indeed, for years, Defendant has been receiving complaints from consumers putting MPower on notice that its variable energy rates were consistently and significantly higher than consumers' utility rates and were thus not consistent with consumers' expectations.

109. Plaintiffs also reasonably expected that Defendant would refrain from price gouging. Without these reasonable expectations, Plaintiffs and other Class Members would not have agreed to buy electricity or gas from Defendant. Defendant knew it was engaging in price gouging and nevertheless extracted unreasonable and excessive margins from its variable rate customers. In fact, Defendant's margins for its fixed rate products were substantially lower than the margins for its variable rate products—even though Defendant incurred greater financial risk from fixed rate products.

110. Defendant breached the implied covenant of good faith and fair dealing via engaging in the conduct described above.

111. As a result of Defendant's breaches, MPower is liable to Plaintiffs and members of the Class for damages and attorney's fees and expenses.

COUNT III

**Violation of the New Jersey Consumer Fraud Act
(On Behalf of Plaintiffs and the New Jersey Subclass)**

112. Plaintiffs reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

113. The New Jersey 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.

114. Defendant’s material omissions with respect to the rates charged for electricity and/or natural gas, as described above, constitute actionable omissions in connection with the marketing, advertising, promotion, and sale of electricity and/or natural gas in violation of the New Jersey Consumer Fraud Act. Specifically, as detailed herein, Defendant made, and continues to make, the following material omissions, including:

- a. Failing to provide a contract that “describe[s] in clear and conspicuous language” to variable rate customers “the mechanism or formula by which the price is determined, and provide a detailed customer bill comparison” with the requisite information set forth in § 14:4-7.4(b)(1).
- b. Failing to provide customers with a contract that discloses “the average price per kWh for electric generation service or the average price per therm for gas supply service being charged for basic generation service or basic gas supply service by the [relevant local utility] over the same period” as the contract’s duration. § 14:4-7.4(a)(4).
- c. Failing to provide customers with a contract that discloses “the estimated percentage savings on the total bill which” a fixed rate “customer will realize under the advertised price relative to the customer taking basic generation service or basic gas supply service from the [relevant local utility].” § 14:4-7.4(b)(1).

- d. To the extent MPower claims its exorbitant rates owe to its provision of optional services, MPower's contract failed to "clearly and conspicuously identify each separate charge." N.J.A.C. § 14:4-7.4(g).
- e. Failing to provide a contract that points potential customers to a telephone number or website "which a customer may access to request detailed information concerning the average price per kWh for electric generation service or average price per therm for gas supply service over the term of a contract for the service being offered, exclusive of any charges for any optional services." N.J.A.C. § 14:4-7.4(a)(1).
- f. Failing to adequately disclose that Defendant's variable energy rates are consistently and significantly higher than the rates the customer's existing utility charges.
- g. Failing to adequately disclose that customers paying Defendant's variable energy rates receive no material added benefit in exchange for paying energy rates that are dramatically higher than the local utility's rates.
- h. Failing to provide customers with adequate advance notice of the variable rates it would charge.
- i. Failing to adequately disclose the conditions that must be present for a variable rate customer to save money compared to what the consumer's local utility would have charged.

115. The information Defendant concealed would have been material to any consumer deciding whether to purchase electricity and/or natural gas from Defendant.

116. Defendant also engaged in unlawful misrepresentations. Defendant's misrepresentations and false, deceptive, and misleading statements with respect to the rates charged for electricity and/or natural gas, as described above, constitute affirmative misrepresentations in connection with the marketing, advertising, promotion, and sale of electricity and/or natural gas in violation of the New Jersey Consumer Fraud Act. During the rescissionary period, Defendant's contract serves as a solicitation because consumers may "cancel" the agreement before it becomes legally binding. The agreement is not legally binding prior to the expiration of the rescissionary period. Thus, the contract is an advertisement in

which Defendant misrepresents that the variable energy rates will be based upon market pricing.

Specifically, as detailed herein, Defendant made, and continues to make, the affirmative misrepresentations, including:

- a. Providing a materially misleading contract that misrepresents that Defendant's variable energy rates will be based upon market pricing.
- b. Providing a materially misleading contract that fails to state "the average price per kWh for electric generation service or the average price per therm for gas supply service being charged for basic generation service or basic gas supply service by the [relevant local utility] over the same period" as the contract's duration. N.J.A.C. § 14:4-7.4(a)(4).
- c. Providing a materially misleading contract that fails to state "the estimated percentage savings on the total bill which" a fixed rate "customer will realize under the advertised price relative to the customer taking basic generation service or basic gas supply service from the [relevant local utility]." N.J.A.C. § 14:4-7.4(b)(1).
- d. Providing a materially misleading contract that fails to "describe in clear and conspicuous language" to variable rate customers "the mechanism or formula by which the price is determined, and provide a detailed customer bill comparison" with the requisite information set forth in N.J.A.C. § 14:4-7.4(b)(1).
- e. To the extent MPower claims its exorbitant rates owe to its provision of optional services, MPower provided a materially misleading contract that failed to "clearly and conspicuously identify each separate charge." N.J.A.C. § 14:4-7.4(g).
- f. Providing a materially misleading contract that fails to point potential customers to a telephone number or website "which a customer may access to request detailed information concerning the average price per kWh for electric generation service or average price per therm for gas supply service over the term of a contract for the service being offered, exclusive of any charges for any optional services." N.J.A.C. § 14:4-7.4(a)(1).

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

118. Defendant's misrepresentations and omissions were outside the norm of

reasonable business practices, unconscionable, and constitute substantial aggravating circumstances under the New Jersey Consumer Fraud Act. Had MPower not committed the misrepresentations and omissions detailed herein, Plaintiffs and New Jersey Subclass Members would not have agreed to accept MPower's gas and electric services.

119. Defendant made these false, deceptive, and misleading statements and omissions with the intent that its customers rely upon such statements.

120. Plaintiffs and the other members of the New Jersey Subclass entered into agreements to purchase electricity and/or natural gas from Defendant and suffered ascertainable loss as a direct and proximate result of Defendant's actions in violation of the New Jersey Consumer Fraud Act.

121. As a consequence of Defendant's wrongful actions, Plaintiffs and the other members of the New Jersey Subclass suffered an ascertainable monetary loss, including but not limited to the difference between the price Plaintiffs and Class Members paid and the price they would have paid had Defendant set the variable rate consistent with market pricing and/or the utility's rate, which is a reflection of market pricing, and damages consistent with statutory penalties.

122. Plaintiffs and other members of the New Jersey Subclass suffered an ascertainable loss caused by Defendant's misrepresentations and omissions because they would not have entered into an agreement to purchase electricity from Defendant if the true facts concerning its rates had been known.

123. By reason of the foregoing, Defendant is liable to Plaintiffs and the other members of the New Jersey Subclass 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.

124. Defendant knows full well that it charges variable rates that are unconscionably high, and the misrepresentations and omissions it makes with regard to its rates were made to induce customers to purchase electricity from MPower so it can reap outrageous profits to the direct detriment of its New Jersey customers and without regard to the consequences high utility bills cause such consumers. Defendant's conduct was intentional, wanton, willful, malicious, and in blatant disregard of, or grossly negligent and reckless with respect to the well-being of Plaintiffs and the other members of the Class. Defendant is therefore additionally liable for punitive damages, in an amount to be determined at trial.

COUNT IV
Violation of Materially Identical State Consumer Protection Statutes
(On Behalf of Plaintiffs and All Class Members)

125. Plaintiffs reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

126. Pursuant to the materially identical consumer protection statutes of New Jersey, Pennsylvania, Ohio, Maryland, Washington DC, and Illinois, consumers are protected against deceptive acts or practices, misrepresentations, or omissions which affect business, trade, or commerce.

127. MPower violated the following materially identical statutes:

- a. New Jersey Consumer Fraud Act, N.J. Stat. Ann. §§ 56:8-2;
- b. Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-2(4);
- c. Ohio Consumer Sales Practices Act, Ohio Rev. Code §§ 1345.02, .03;
- d. Maryland Consumer Protection Act, Md. Commercial Law Code Ann. § 13-303, *et seq.*;

- e. District of Columbia Consumer Protection Procedures Act, D.C. Code § 28-3904, *et seq.*; and
- f. Illinois Consumer Fraud and Deceptive Trade Practices Act, 815 ILCS § 505/2.

128. Plaintiffs bring this claim on their own behalf and on behalf of each member of the Class.

129. Defendant's marketing and sales practices are consumer-oriented in that they are directed at members of the consuming public.

130. Defendant has engaged in, and continues to engage in, deceptive acts and practices, including:

- a. Providing a materially misleading contract that misrepresents that Defendant's variable energy rates will be based upon market pricing.
- b. Failing to adequately disclose that Defendant's variable energy rates are consistently and significantly higher than the rates the customer's existing utility charges;
- c. Failing to adequately disclose that customers paying Defendant's variable energy rates receive no material added benefit in exchange for paying energy rates that are dramatically higher than the local utility's rates;
- d. Failing to provide customers with adequate advance notice of the variable rates it would charge;
- e. Failing to adequately disclose the variable rate methodology MPower used to calculate its variable rates to enable customers to potentially compare prices; and
- f. Failing to adequately disclose the conditions that must be present for a variable rate customer to save money compared to what the consumer's local utility would have charged.

131. The above unfair and deceptive practices and acts by MPower were misrepresentations and/or material omissions of existing or past facts.

132. Defendant knew or believed that the above unfair and deceptive practices and acts were material misrepresentations and/or material omissions of existing or past facts.

133. The aforementioned acts are continuing, unconscionable, and deceptive and are contrary to each state's public policy, which aims to protect consumers.

134. Defendant first engaged in these deceptive acts prior to the conclusion of the rescissionary period of the contract, during which Defendant's contract served as a solicitation. The agreement is not legally binding prior to the expiration of the rescissionary period. Thus, the contract is an advertisement in which Defendant committed the unlawful acts described herein.

135. Defendant's false, deceptive, and misleading statements and omissions would have been material to any potential consumer's decision to continue to purchase electricity and/or gas from MPower.

136. Defendant knew at the time it signed up Plaintiffs and prospective customers that the price of a customer's electricity and/or gas supply was a material factor in choosing MPower.

137. Defendant knew at the time it signed up Plaintiffs and prospective customers that a customer's primary alternative to MPower was the customer's local utility.

138. Defendant knew at the time it signed up Plaintiffs and prospective customers that MPower's marketing was premised on offering customers a lower electricity or gas rate than the customer's local utility.

139. Defendant knew at the time it signed up Plaintiffs and prospective customers (i) that MPower's variable rates for electricity and gas were consistently substantially higher than Plaintiffs and prospective customer's local utility rate, a rate based on market factors, (ii) that customers paying Defendant's variable energy rates receive no material added benefit in exchange for paying energy rates that are dramatically higher than the local utility's rates, (iii)

that Defendant could, but failed to, provide customers with adequate advance notice of the variable rates it would charge, (iv) that Defendant could, but failed to, adequately disclose the conditions that must be present for a variable rate customer to save money compared to what the consumer's local utility would have charged, and (v) that its variable energy rates were not based on market pricing.

140. Defendant's above-listed misrepresentations omissions were and are material to prospective customers.

141. Defendant's intentional concealments and misrepresentations were designed to deceive current and prospective variable rate customers and deprives consumers from being able to make informed purchasing decisions.

142. Defendant's practices are unconscionable and outside the norm of reasonable business practices.

143. As a direct and proximate result of Defendant's unlawful deceptive acts and practices, Plaintiffs and Class Members suffered and continue to suffer an ascertainable loss of monies, including but not limited to, the difference between the price Plaintiffs and Class Members paid and the price they would have paid had Defendant set the variable rate consistent with market pricing and/or the utility's rate, which is a reflection of market pricing, and damages consistent with statutory penalties. By reason of the foregoing, Defendant is liable to Plaintiffs and Class Members for compensatory damages, statutory enhancements, attorneys' fees, and the costs of this suit.

144. Plaintiffs and the members of the Class further seek equitable relief against Defendant. This Court has the power to award such relief, including but not limited to, an order declaring Defendant's practices to be unlawful, an order enjoining Defendant from engaging in

any further unlawful conduct, and an order directing Defendant to return to the Plaintiffs and the Class all amounts wrongfully assessed and/or collected.

145. As a result of Defendant's deceptive acts or practices, Plaintiffs and Class Members suffered actual damages in an amount to be determined at trial, and are entitled to their damages, costs, and reasonable attorneys' fees and all other relief available under each state's respective consumer protection statute.

COUNT V

Violation of the Truth-in-Consumer Contract, Warranty, and Notice Act ("TCCWNA") (On Behalf of Plaintiffs and the New Jersey Subclass)

146. Plaintiffs reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

147. The TCCWNA states:

No seller, lessor, creditor, lender or bailee shall in the course of his business offer to any consumer or prospective consumer or enter into any written consumer contract or give or display any written consumer warranty, notice or sign after the effective date of this act which includes any provision that violates any clearly established legal right of a consumer or responsibility of a seller, lessor, creditor, lender or bailee as established by State or Federal law at the time the offer is made or the consumer contract is signed or the warranty, notice or sign is given or displayed.

N.J.S.A. § 56:12-15.

148. Plaintiffs and New Jersey subclass Members are "consumers" within the meaning of N.J.S.A. § 56:12-15.

149. Defendant is a "seller" within the meaning of N.J.S.A. § 56:12-15.

150. Defendant violated the TCCWNA by inducing Plaintiffs and New Jersey Subclass Members to switch their energy supplier to Defendant using contract terms that violate the CFA by making misrepresentations and false, deceptive, and misleading statements and material omissions with respect to the rates charged for electricity and/or natural gas, as described above,

in connection with the marketing, advertising, promotion, and sale of electricity and/or natural gas. N.J.S.A. § 56:8-2.

151. Defendant violated Plaintiffs' and New Jersey Subclass Members' legal rights under the CFA and therefore, Defendant violated the TCCWNA.

152. As a result of Defendant's violations of the TCCWNA, Plaintiffs and Class Members are entitled to statutory damages of not less than \$100 for each of Defendant's TCCWNA violations. N.J.S.A. § 56:12-17.

COUNT VI
Violation of the EDECA and Retail Choice Consumer Protection Regulations
(On Behalf of Plaintiffs and the New Jersey Subclass)

153. Plaintiffs reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

154. Under N.J. Admin. Code § 14:4-7.3(d)(1) electric power and gas suppliers like Defendant are prohibited from making false or misleading advertising claims to a potential residential customer.

155. Under N.J. Admin. Code § 14:4-7.4(n)(1) electric power and gas suppliers like Defendant are prohibited from making false or misleading marketing claims to a potential residential customer.

156. N.J. Admin. Code § 14:4-7.13 provides a private right of action to residential customers who were subjected to false or misleading advertising or marketing by an electric power or gas supplier in violation of either N.J. Admin. Code § 14:4-7.3(d)(1) or N.J. Admin. Code § 14:4-7.4(n)(1).

157. Defendant's material misrepresentations and omissions with respect to the rates charged for electricity and/or natural gas, as described above, constitute false and misleading advertising and marketing under N.J. Admin. Code § 14:4-7.3(d)(1) or N.J. Admin. Code § 14:4-

7.4(n)(1). Specifically, as detailed herein, Defendant made, and continues to make, the following material misrepresentations and omissions, including:

- a. Providing a materially misleading contract that misrepresents that Defendant's variable energy rates will be based upon market pricing;
- b. Failing to adequately disclose that Defendant's variable energy rates are consistently and significantly higher than the rates the customer's existing utility charges;
- c. Failing to adequately disclose that customers paying Defendant's variable energy rates receive no material added benefit in exchange for paying energy rates that are dramatically higher than the local utility's rates;
- d. Failing to provide customers with adequate advance notice of the variable rates it would charge;
- e. Failing to adequately disclose the variable rate methodology MPower used to calculate its variable rates to enable customers to potentially compare prices; and
- f. Failing to adequately disclose the conditions that must be present for a variable rate customer to save money compared to what the consumer's local utility would have charged.

158. Defendant first made this false and misleading advertising prior to the conclusion of the rescissionary period of the contract, during which Defendant's contract served as a solicitation. The agreement is not legally binding prior to the expiration of the rescissionary period. Thus, the contract is an advertisement in which Defendant violates the prohibition against false and misleading advertising.

159. Plaintiffs and all New Jersey Subclass Members were subjected to Defendant's false and misleading advertising and marketing under N.J. Admin. Code § 14:4-7.3(d)(1) or N.J. Admin. Code § 14:4-7.4(n)(1).

160. Defendant collected charges for electric generation service and/or gas supply service from Plaintiffs and all New Jersey Subclass Members.

161. By reason of the foregoing, Defendant is liable to Plaintiffs and New Jersey Subclass Members for an amount equal to all charges paid by these customers to MPower after such violations occurred.

162. By reason of the foregoing, Defendant is also liable to Plaintiffs and New Jersey Subclass Members for a civil penalty pursuant to N.J.S.A. 48:3-83.

163. Plaintiffs and the members of the New Jersey Subclass further seek equitable relief against Defendant. This Court has the power to award such relief, including but not limited to, an order declaring Defendant's practices to be unlawful, an order enjoining Defendant from engaging in any further unlawful conduct, and an order directing Defendant to return to the Plaintiffs and the Class all amounts wrongfully assessed and/or collected.

164. As a result of Defendant's false and misleading advertising and marketing, Plaintiffs and New Jersey Subclass are also entitled to their damages, costs, and reasonable attorneys' fees and all other relief available.

COUNT VII
Unjust Enrichment
(On Behalf of Plaintiffs and All Class Members)

165. Plaintiffs re-allege and incorporate by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

166. This cause of action is pleaded in the alternative to Plaintiffs' contract claims. To the extent the Court determines that a valid contract exists between the parties, Plaintiffs do not intend to proceed with their unjust enrichment claim.

167. Plaintiffs and the Class Members conferred a tangible economic benefit upon Defendant by contracting with Defendant for electricity or gas. Plaintiffs and the Class would not have contracted with Defendant for electricity and gas had they known that Defendant would

abuse its discretion and the information asymmetry to charge rates substantially in excess of competing rates available on the market.

168. Plaintiffs and the Class Members would not have purchased energy from Defendant had they known the truth about Defendant's variable energy rates.

169. By engaging in the conduct described above, Defendant has unjustly enriched itself and received a benefit beyond what was contemplated by the parties at the expense of Plaintiffs and Class Members.

170. It would be unjust and inequitable for Defendant to retain the payments Plaintiffs and Class Members made for excessive energy charges.

171. Therefore, Defendant is liable to Plaintiffs and Class Members for the damages that they have suffered as a result of Defendant's actions.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

- (a) Issue an order certifying the Classes defined above, appointing the Plaintiffs as Class Representative, and designating the undersigned firms as Class Counsel;
- (b) Find and declare that Defendant MPower has committed the violations of law alleged herein;
- (c) Render an award of compensatory and statutory damages, the precise amount of which is to be determined at trial;
- (d) Issue an injunction or other appropriate equitable relief requiring Defendant to refrain from engaging in the deceptive practices alleged herein;
- (e) Render an award of punitive damages;
- (f) Enter judgment including interest, costs, reasonable attorneys' fees, costs, and expenses; and
- (g) Grant all such other relief as the Court deems appropriate.

JURY DEMAND

Plaintiffs demand that a jury determine any issue triable of right.

NOTICE TO ATTORNEY GENERAL

A copy of this Complaint will be mailed to the Attorney General of the State of New Jersey within ten days of its filing, pursuant to N.J.S.A. 56:8-20.

A copy of this Complaint will be mailed to the Attorney General of the State of Illinois within ten days of its filing, pursuant to 815 ILCS 505/10(a)(d).

DESIGNATION OF TRIAL COUNSEL

Pursuant to Rule 4:25-4, D. Greg Blankinship is designated as trial counsel for Plaintiffs.

CERTIFICATION

Pursuant to Rule 4:5-1, I hereby certify to the best of my knowledge that the matter in controversy is not the subject of any action pending in any court or the subject of a pending arbitration proceeding, nor is any other action or arbitration proceeding contemplated.

I further certify that I know of no party who should be joined in this action at this time.

I hereby certify that pursuant to Rule 1:38-7: All confidential identifiers of the parties to this action have been redacted from all documents or pleadings submitted to the Court.

Dated: April 6, 2023
New York, New York

WITTELS MCINTURFF PALIKOVIC

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* *Pro Hac Vice Application Forthcoming*

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