Simmons v Ambit Energy Holdings, LLC
2016 NY Slip Op 32107(U)
October 19, 2016
Supreme Court, Kings County
Docket Number: 503285/2015
Judge: Sylvia G. Ash
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At an IAS Term, Part Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 19th day of October, 2016.

PRESENT:

HON. SYLVIA G. ASH,
Justice.

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TAURSHIA SIMMONS, NAVID KALATIZADEH, AND BRIAN WHITNEY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs,

- against -

Index No. 503285/15

AMBIT ENERGY HOLDINGS, LLC, AMBIT TEXAS, LLC, AMBIT MARKETING, LLC, AMBIT NEW YORK, LLC, JERE W. THOMPSON, AND CHRIS CHAMBLESS,

Defendants.

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The following papers numbered 1 to 9 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3, 4-5
Opposing Affidavits (Affirmations)	6-8
Reply Affidavits (Affirmations)	9
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, Defendants Ambit Engegy Holdings, LLC, Ambit Texas, LLC, Ambit Marketing, LLC, and Ambit New York, LLC ("Ambit NY") (collectively referred to as "Ambit" or the "Ambit Defendants") move for an order staying this case pending resolution of Plaintiffs' complaint by the New York Public Service Commission or, alternatively, dismissing Plaintiffs' first amended consolidated class action complaint pursuant to CPLR 3211 (a)(7), (8), and (9). In a separate motion, Defendants, Jere W. Thompson and Chris Chambless (collectively referred to as the "Individual Defendants") move for an order dismissing the complaint against them based upon lack of personal jurisdiction.

Background Facts and Procedural History

The Ambit Defendants are related energy service companies or "ESCOs" which were formed to provide electricity and natural gas consumers with alternatives to traditional utilities such as Con Edison. Based in Dallas, Texas, Ambit serves consumers around the country including New York. As part of its marketing strategy in New York, Ambit offered prospective customers a "Guaranteed Savings Plan" (the "Guaranteed Plan") under which it promised that their 12-month energy costs would be at least 1% less than their existing cost or Ambit would refund the difference. According to Plaintiff's first consolidated class action complaint, this 1% savings guarantee was illusory inasmuch as Ambit overstated what the existing energy provider charged and also failed to inform customers that they would need to wait a year or more for their refund checks. The complaint further alleges that in or about January 2012, Ambit NY instituted a new policy set forth in its New York Service Area Sales Agreement and Terms of Service whereby existing customers would automatically default into a newly created New York Select Variable Plan (the "Variable Plan") unless they affirmatively renewed their participation in the Guaranteed Plan. Finally, the complaint alleges that Ambit failed to adequately notify its customers that they were subject to the new default Variable Plan.

On September 5, 2013, Plaintiffs commenced a class action lawsuit against Ambit in the United States District Court for the Southern District of New York. In an opinion and order dated September 30, 2014, United States District Court Judge Jesse M. Furman dismissed the federal action based upon lack of subject matter jurisdiction without prejudice to the refiling of the suit in an appropriate state court.

On or about March 23, 2015, Plaintiffs commenced the instant class action on their own behalf and on behalf of two subclasses by filing a summons and complaint alleging that Ambit and

the Individual Defendants violated General Business Law ("GBL") §§ 349-d(6), 349-d(7), 349-d(3), 349. The complaint also alleges a cause of action sounding in unjust enrichment. Thereafter, the Ambit Defendants moved to dismiss the complaint against them pursuant to CPLR 3211 (a)(7) for failure to state a claim. In a separate motion, the Individual Defendants moved to dismiss the complaint against them based upon lack of personal jurisdiction. In an order dated October 29, 2015, the Hon. Martin Solomon adjourned a hearing on the motions and directed Plaintiffs to file and serve an amended complaint by December 15, 2015.

On December 15, 2015, Plaintiffs filed a first amended consolidated class action complaint on their own behalf and on behalf of two subclasses. In this regard, the first subclass consists of all Ambit customers who were enrolled in the Guaranteed Plan and who purchased natural gas or electricity for residential use in New York at any time from September 4, 2007 and thereafter (the Guarantee subclass). The second subclass consists of all Ambit customers who were automatically enrolled in the Variable Plan who purchased natural gas or electricity for residential use in New York at any time from September 5, 2007 and thereafter (the Variable Plan subclass).

The first cause of action in the amended complaint, which is asserted on Plaintiffs' own behalf and on behalf of the Variable Plan subclass, alleges that Defendants Ambit Energy Holdings, LLC and Ambit NY violated GBL §349-d(6) when they switched customers from the Guaranteed Plan to the Variable Plan without first obtaining their express consent to the change. The second cause of action in the amended complaint, which is also asserted on Plaintiffs' own behalf and on behalf of the Variable Plan subclass, alleges that Ambit Energy Holdings, LLC and Ambit NY violated GBL §349-d(7) in failing to clearly and conspicuously identify all variable charges in their Terms of Service and marketing materials. The third cause of action in the amended complaint, which is asserted on behalf of Plaintiffs and both subclasses, alleges that the Ambit Defendants violated GBL §349-d(3) in engaging in deceptive acts and practices in the marketing of energy services. The fourth cause of action in the amended complaint, which is asserted on behalf of Plaintiffs and both subclasses, alleges that the Ambit Defendants violated GBL §349 by engaging in deceptive acts and practices in furnishing services in New York State. The final cause of action in the amended complaint, which is asserted on behalf of Plaintiffs and both subclasses, sounds in unjust enrichment.

On January 4, 2016, Defendants filed a motion to stay this action pending resolution of Plaintiffs' complaint before the New York Public Service Commission ("Service Commission") or, alternatively, for an order dismissing the amended complaint for failure to state a claim.[1]

Motion to Stay

The Ambit Defendants move for an order staying the instant action to permit the Service Commission to resolve any customer complaints against Ambit regarding overcharges on their utility bills and/or failure to disclose information. In support of this motion, Defendants rely upon the doctrine of primary jurisdiction arguing that, under this doctrine, courts have the discretion to refrain from exercising jurisdiction over a matter where an administrative agency also has jurisdiction, and the determination of the issues involved depends upon a specialized knowledge and experience of the agency. Here, Defendants contend that the allegations in Plaintiffs' amended complaint depend upon an interpretation of the Service Commission's regulations which they dispute. Under the circumstances, Defendants maintain that the Service Commission should be given the first opportunity to interpret its own regulations. Defendants further note that the Service Commission has already addressed complaints made to it by customers who were moved off the Guaranteed Plan onto the Variable Plan and concluded that Ambit had adequately addressed any issues by giving refunds and offering the opportunity to opt back on to the Guaranteed Plan. As a final matter, Defendants state that the crux of Plaintiffs' claim is that they were overcharged for their utilities. According to Defendants, relevant case law holds that, inasmuch as utility rates are extensively regulated by the Service Commission and within its specialized knowledge, courts should defer to the Service Commission in disputes involving utility rates.

In opposition to this branch of Defendants' motion, Plaintiffs contend that the doctrine of primary jurisdiction does not apply here given that GBL §349-d was specifically enacted to give individuals who are the victim of consumer fraud and abuses in the energy services market a private right of action. Plaintiffs further submit that the Service Commission previously opened an investigation into Ambit's practices based on similar claims but that that investigation has been

[1]Thus, the motion to stay/dismiss supercedes the Ambit Defendants' prior motion to dismiss.

closed as evidenced by the Service Commission's letter to Ambit dated January 20, 2016. Moreover, according to Plaintiffs, the only customers who received redress as a result of this investigation were those who formally complained to the Commission, which was only a small percentage of the total customers affected by Ambit's policies.

Plaintiffs also maintain that those Ambit customers who have not received redress via the Service Commission's investigation have no means of obtaining relief except by joining in the instant class action lawsuit. In support of this contention, Plaintiffs submit affidavits by two former Ambit customers, Rocco Feola and Mitchelle Frasier. According to Mr. Feola, on December 29, 2015, he filed a complaint with the Service Commission after Ambit automatically switched him from the Guaranteed Plan to the Variable Plan and the Commission merely referred him to Ambit. Thereafter, Mr. Feola contacted Ambit and was informed by a representative that Ambit was not providing refunds to customers for alleged overcharges. Mr. Feola further states that, as of March 1, 2016, he has not heard any explanation from Ambit as to why he was shifted off the Guaranteed Plan. Similarly, Mr. Frasier states, in his affidavit, that in or about February 2016, he realized that Ambit automatically shifted him off the Guaranteed Plan without his knowledge or consent. Mr. Frasier further states that this resulted in his energy rate being approximately three times higher than the rates charged by National Grid, his original utility. Finally, Mr. Frasier avers that when he called Ambit in order to obtain a refund, he was informed by a representative that the settlement with the Service Commission was concluded and that Ambit would not be issuing any additional refunds.

As a final matter, Plaintiffs contend that the doctrine of primary jurisdiction does not apply herein because no specialized expertise is needed to resolve this dispute. In particular, Plaintiffs maintain that the instant action consists of garden variety statutory violations and deceptive practices claims, which are well within the traditional realm of judicial competence.

"The doctrine of primary jurisdiction provides that where the courts and an administrative agency have concurrent jurisdiction over a dispute involving issues beyond the conventional experience of judges, the court will stay its hand until the agency has applied its expertise to the salient questions" (*Flacke v Onondaga Landfill Sys, Inc.*, 69 NY2d 355, 362 [1987][internal quotation marks omitted]). "The doctrine . . . is intended to coordinate the relationship between courts and administrative agencies to the end that divergence of opinion between them not render

ineffective the statutes with which both are concerned, and to the extent that the matter before the court is within the agency's specialized field, to make available to the court in reaching its judgment the agency's views concerning not only the factual and technical issues involved but also the scope and meaning of the statute administered by the agency" (*Capital Tel. Co., Inc. v Pattersonville Tel. Co., Inc.*, 56 NY2d 11, 22 [1982]). "However, where the determination does not require the special competence of an administrative agency, the doctrine does not apply" (*Matter of Neumann v Wyandanch Union Free School Dist.*, 84 AD3d 816, 818 [2011]).

Here, Plaintiffs' claims against the Ambit Defendants are primarily based upon alleged violations of GBL §349-d. GBL §349-d(10) specifically provides that "any person who has been injured by reason of any violation of this section may bring an action in his or her own name to enjoin such unlawful act or practice, an action to recover his or her actual damages or five hundred dollars, whichever is greater, or both such actions." Inasmuch as individuals have a private right of action under the statute, it cannot be said that such claims are barred under the doctrine of primary jurisdiction. In fact, any such ruling would effectively nullify the private right of action granted by the legislature in enacting GBL §349-d(10). In any event, Plaintiffs' claims against the Ambit Defendants revolve around the issue of whether or not Ambit's actions, non-actions, and Terms of Service violated GBL §§349 and 349-d. Such issues of contractual and statutory interpretation lie squarely within the purview of the courts and do not otherwise require the special competence of the Service Commission (*Matter of Neuman*, 84 AD3d at 818; *Good v American Pioneer Title Inc. Co.*, 12 AD3d 401 [2004]). Indeed, in its order implementing GBL §349-d into the Uniform Business Practices, the Service Commission itself noted that "our understanding of such provisions as incorporated into the UBP should not preclude a court from engaging in an independent analysis of the meaning of the provisions of GBL § 349-d." Finally, although the Service Commission opened an investigation into the Ambit Defendants' practice of switching energy customers from the Guarantee Savings plan to the Variable plan without their express consent, that investigation has now been closed and the Plaintiffs in this action did not receive any redress as a result of the investigation because they never filed a complaint with the Service Commission.

Accordingly, that branch of the Ambit Defendants' motion which seeks an order staying the instant action based upon the doctrine of primary jurisdiction is denied.

Plaintiffs' General Business Law § 349-d (6) Claim

The Ambit Defendants move to dismiss Plaintiffs' amended complaint pursuant to CPLR §3211 (a)(2) and (7). Defendants maintain that Plaintiffs fail to state a claim under GBL §349-d(6) since Ambit New York, LLC could legally change Plaintiffs from the Guaranteed Plan to the Variable Plan without their express consent. Specifically, the Ambit Defendants contend that their actions in this regard were in full compliance with the Uniform Business Practices Rules established by the Service Commission. In support of this claim, the Ambit Defendants point to Uniform Business Practices §5(B)(5)(d) which was adopted by the Service Commission in December 2010 to implement the addition of §349-d to the GBL. This provision states in pertinent part that:

> "[N]o material changes shall be made in the terms or duration of any contract for the provision of energy by an ESCO without the express consent of the customer . . . This shall not restrict an ESCO from renewing a contract by clearly informing the customer in writing, not less than thirty days nor more than sixty days prior to the renewal date, of the renewal terms and the customer's option to reject the renewal terms . . . Regarding contract renewals, with the exception of a rate change, or an initial sales agreement that specifies that the agreement renews on a monthly basis with a variable rate methodology which was specified in the initial sales agreement, all other changes will be considered material and will require that the ESCO obtain the customer's express consent for renewal."

Here, the Ambit Defendants note that the sales agreement between Ambit New York and its customers states that it automatically renews on a monthly basis. The Ambit Defendants further point out that the sales agreement states that "your rate will be set at a competitive variable market rate with an annual savings of at least 1% less than the incumbent utility's published supply rate (i.e. the Guaranteed Plan) for the same 12-month period that you received power from Ambit Energy under this agreement . . . At the end of each 12-month period, you must renew your Guaranteed Savings Plan to continue to receive the 1% annual savings guarantee . . . If Ambit does not receive a request to renew your plan, your service will continue on the New York Select Variable plan." Thus, according to the Ambit Defendants, inasmuch as the sales agreement stated that it renewed on a monthly basis with a variable rate methodology, changing customers from the Guaranteed Plan to

the Variable Plan was not a material change that required the express written consent of the customers.

In further support of its motion to dismiss Plaintiffs' GBL §349-d(6) claim, the Ambit Defendants point to a Service Commission Order issued October 19, 2012 which sought comments regarding the operation of retail energy markets in New York State.[2] This Order states in pertinent part that:

> "The only information that the [Uniform Business Practices] require ESCOs to provide existing customers concerns material changes to an existing contract and contract renewals that include a material change such as a longer length of a renewal contract's term or the addition of termination fees. The UBPs do not require express consent from a customer for a change in rate, or a contract renewal involving a change in rate . . . Staff notes that the absence of a requirement that customers provide express consent to changes in their contracts raises concerns regarding both fixed and variable priced contracts. For example, a contract that renews at a new fixed rate, could bind a customer to a contract with a significant change in rate through inaction. Similarly, expiring fixed price contracts can renew at a variable price determined by the ESCO, without express authorization of the customer. ESCOs are not required to provide notice of the variable price that would be applicable in the first month, or any subsequent month, of the automatically renewed contract."

Thus, the Ambit Defendants aver that, although the Service Commission has considered amending the Uniform Business Practices so as to require ESCOs to obtain written consent before changing a customer's rate plans, no such requirement is currently in place. Under the circumstances, the Ambit Defendants argue that Plaintiffs' GBL §349-d(6) claim must be dismissed since there was no requirement under the statute or the Uniform Business Practices that Ambit New York obtain Plaintiffs' prior consent before switching them from the Guaranteed Plan to the Variable Plan.

In opposition to this branch of the Ambit Defendants' motion, Plaintiffs maintain that the complaint clearly states a claim under GBL §349-d(6) because this provision requires Ambit to obtain its customers' express consent before making any material change to the terms of their service

[2]This order can be accessed at an internet address set forth in Ambit's papers.

contracts. According to Plaintiffs, removing them from the Guaranteed Plan and placing them on the Variable Plan clearly constituted a material change to the terms of the contract. Further, with respect to Ambit's argument that the Uniform Business Practices allowed it to shift customers to different rate plans without obtaining express consent, Plaintiffs maintain that Ambit's actions amounted to more than a shift in rate plans inasmuch as it also eliminated a 1% savings guarantee. Finally, Plaintiffs argue that even if Ambit's actions were in compliance with GBL §349-d(6) as interpreted by the Service Commission, it should not result in the dismissal of this claim pursuant to CPLR §3211(a)(7) because the Service Commission's own order implementing the statute into the Uniform Business Practices states that "our understanding of such provisions as incorporated into the UBP should not preclude a court from engaging in an independent analysis of the meaning of the provisions of GBL §349-d."

"On a motion to dismiss pursuant to CPLR §3211(a)(7), the court should accept the alleged facts in the complaint as true and afford the proponent the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Janusonis v Carauskas*, 137 AD3d 1218, 1219 [2d Dept 2016], citing, inter alia, *Leon v Martinez*, 84 NY2d 83, 87 [1994]). When a party makes such a motion, "the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (*SI Hylan Care, LLC v 2454-2464 Hylan Blvd., LLC*, 138 AD3d 821, 822 [2d Dept 2016][internal citations and quotation marks omitted]). However, "[a]lthough the pleading is to be afforded a liberal construction on a motion to dismiss pursuant to CPLR §3211 . . . the allegations in a complaint cannot be vague and conclusory . . . and [b]are legal conclusions will not suffice" (*Rios v Tiny Giants Daycare, Inc.*, 135 AD3d 845, 845 [2d Dept 2016][internal citations and quotation marks omitted]). Lastly, "[i]n opposition to such a motion, a plaintiff may submit affidavits to remedy defects in the complaint and preserve inartfully pleaded, but potentially meritorious claims" (*Nilazra, Inc. v Karakus, Inc.*, 136 AD3d 994, 995 [2016][internal citations and quotation marks omitted]).

Here, accepting the facts alleged in the complaint as true, and affording the Plaintiffs the benefit of every favorable inference, the Court finds that Plaintiffs have stated a claim against the Ambit Defendants under GBL §349-d(6). This statute precludes ESCOs such as Ambit from making material changes to the terms of a service contract without the express consent of the customer.

Although the Service Commission has determined that merely changing a customer's rate plan in a contract that renews on a month-to-month basis does not constitute a material change for purposes of the Uniform Business Practices or GBL §349-d(6), here, the complaint alleges that Ambit did more than change Plaintiffs from one variable rate plan to another. Rather, the complaint alleges that, without obtaining prior express consent, Ambit New York switched Plaintiffs from a rate plan that contained a guaranteed 1% savings over what they would pay with a traditional utility to a rate plan that contained no such guarantee and, in fact, charged more than what they would pay their incumbent provider. Affording these allegations a liberal construction, it is possible that these alleged actions constitute a "material change" under GBL §349-d(6) thus requiring a customer's express consent. Accordingly, that branch of Ambit's motion seeking to dismiss this cause of action is denied.

Plaintiffs' General Business Law § 349-d (7) Claim

The Ambit Defendants move to dismiss Plaintiffs' General Business Law §349-d(7) claim pursuant to CPLR §3211(a)(1) and (7). In support of this branch of their motion, the Ambit Defendants note that this provision requires that in every contract for energy services and all marketing materials provided to prospective purchasers of such contracts, all variable charges must be clearly and conspicuously identified. According to the Ambit Defendants, the variable nature of both the Guaranteed Plan and the Variable Plan were clearly and conspicuously set forth in the terms of service. In particular, the Ambit Defendants note that the terms of service in the contract state that, under the Guaranteed Plan, "your rate will be set at a competitive *variable market rate* with an annual savings of at least 1% less than the incumbent utility's published supply rate for the same 12-month period" (emphasis added). Similarly, the terms of service state that the Select Variable Plan is a "competitive month-to-month *variable rate plan*" (emphasis added). In further support of this branch of its motion to dismiss, the Ambit Defendants note that the actual price per kilowatt hour on a month-to-month variable rate contract cannot appear in the terms of service given that it changes monthly. Instead, customers can access this information on the Service Commission's "power to choose" website.

In opposition to this branch of Ambit's motion, Plaintiffs note that the terms of service

provision in the service contract do not contain any description of the charges under the Variable Plan and that merely mentioning that the plan is set at a variable rate is insufficient to satisfy the statutory requirement that all variable charges be clearly and conspicuously identified. Instead, Plaintiffs aver that the contract should have specified the variable rate methodology used in calculating rates. Finally, Plaintiffs note that the amended complaint alleges that Ambit's marketing materials failed to clearly and conspicuously identify all variable charges. Indeed, Plaintiffs maintain that these marketing materials failed to mention any variable charges at all. Here, the Ambit Defendants' motion to dismiss does not address this allegation.

General Business Law §349-d(7) provides that "[i]n every contract for energy services and in all marketing materials provided to prospective purchasers of such contracts, all variable charges shall be clearly and conspicuously identified." Assuming, for the sake of argument, that the language in the service contract regarding the Select Variable plan was sufficient to satisfy this statutory requirement, the complaint also alleges that Ambit's marketing materials failed to clearly and conspicuously identify all variable charges. Here, the Ambit Defendants' motion fails to address this allegation, which the Court must accept as true. Accordingly, that branch of the Ambit Defendants' motion which seeks to dismiss Plaintiffs' GBL §349-d(7) cause of action must be denied.

Plaintiffs' General Business Law §§ 349 and 349-d(3) Claims[3]

The Ambit Defendants move to dismiss Plaintiffs' GBL §§ 349 and 349-d(3) causes of action pursuant to CPLR §3211 (a)(1) and (a)(7). The Ambit Defendants argue that, to the extent that these claims are based upon allegations that Ambit NY automatically defaults customers from the Guaranteed Plan to the Variable Plan and failed to adequately disclose that this would occur, the claims must be dismissed based upon documentary evidence. Specifically, that the sales agreement and terms of service provide that "[a]t the end of each 12 month period, you must renew your [Guaranteed Plan] to continue to receive the 1% annual savings guarantee . . . If Ambit Energy does

[3]Both General Business Law §349 and §349-d(3) preclude deceptive acts and business practices. However, General Business Law§349-d(3) applies only to ESCOs while GBL §349 applies generally to all businesses furnishing any services in the state. Thus, the two claims are largely duplicative of each other and will be analyzed together.

not receive a request to renew your plan, your service will continue on the [Variable Plan]." Thus, the Ambit Defendants aver that Plaintiffs cannot demonstrate that Ambit NY failed to adequately disclose that the rate plans would automatically change to the Variable Plan unless customers take affirmative steps to remain on the Guaranteed Plan. Similarly, the Ambit Defendants argue that Plaintiffs cannot demonstrate that Ambit's actions were misleading in a material way inasmuch as the sales agreement fully disclosed that customers would be transferred from the Guaranteed Plan to the Variable Plan if they did not renew the Guaranteed Plan after 12 months.

In further support of their motion to dismiss Plaintiffs' GBL §§ 349 and § 349-d(3) causes of action, the Ambit Defendants maintain that the allegation that Ambit NY failed to disclose that its Variable Plan rate may be higher than the rates charged by customers' existing utility fails to state a claim because there was no duty to disclose such information. In addition, the Ambit Defendants reiterate their argument that the Service Commission has determined that a change in rate on a month-to-month contract is not a material change. Thus, the Ambit Defendants conclude that failing to disclose that rate cannot support a claim for liability. Further, the Ambit Defendants note that they do disclose the variable rates they charge for electricity every month where consumers can compare Ambit New York's rates to rates charged by other carriers. Specifically, the Ambit Defendants point to the aforementioned "power to choose" website.

The Ambit Defendants also contend that Plaintiffs' allegations regarding delayed refund payments are insufficient to support their claims under GBL§349 and §349-d(3) inasmuch as Plaintiffs have failed to plead facts showing that Ambit NY was obligated to issue instantaneous refunds. Finally, Defendants argue that Plaintiffs' deceptive business practices claims may not be based upon allegations that Ambit NY overstated the rates charged by existing utilities by failing to provide customers with the necessary information to calculate the rates charged by these carriers because it was never obligated to provide this information and, in any event, this information is publically available on the Service Commission's website.

In opposition to the Ambit Defendants' motion to dismiss these causes of action, Plaintiffs note that their complaint alleges that Ambit New York's 1% guaranteed savings claim was false and that it misrepresented the rates charged by customers' incumbent utility. Thus, Plaintiffs maintain that the Ambit Defendants' argument that they were under no obligation to provide customers with

the rates charged by incumbent carriers is irrelevant. With respect to the Ambit Defendants' argument that the terms of service in the sales agreement notified customers that they would automatically be changed from the Guaranteed Plan to the Variable Plan, Plaintiffs argue that such "fine print" disclosures cannot rehabilitate years of misleading marketing of the 1% savings guarantee. Plaintiffs also contend that the notification in the sales agreement is insufficient inasmuch as they were current Ambit customers at the time this new policy was adopted in January of 2012.

In further opposition to this branch of the Ambit Defendants' motion, Plaintiffs argue that Ambit New York was required to disclose that the Variable Plan rates were higher than those charged by a customer's existing utility and the failure to do so violated GBL §349 and §349-d(3). In this regard, Plaintiffs note that Ambit was in exclusive possession of this information and customers would only learn of the truth after the increase appeared on their energy bills. Finally, Plaintiffs claim that their allegations that Ambit NY unreasonably withheld refund checks for an inordinate period of time is sufficient to state a claim under GBL §349 and §349-d(3).

GBL §349-d(3) states that "[n]o person who sells or offers for sale any energy services for, or on behalf of, an ESCO shall engage in any deceptive acts or practices in the marketing of energy services." Similarly, GBL §349(a) provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." "To assert a viable claim under General Business Law §349(a), a plaintiff must plead that (1) the challenged conduct was consumer-oriented, (2) the conduct or statement was materially misleading, and (3) damages" (*Lum v New City Mortg. Corp.*, 19 AD3d 558, 559 [2005]). GBL §349-d(3) has the same pleading requirements (*Progressive Mgt. of New York v Galaxy Energy LLC*, 51 Misc3d 1203[a] [2016]). With respect to the second element, courts have held that where the subject conduct is fully disclosed, it may not be considered to be materially misleading (*Disa Realty, Inc. v Rao*, 137 AD3d 740, 742 [2016]).

As an initial matter, the Court agrees with the Ambit Defendants' argument that some of the allegations set forth in the amended complaint are insufficient to form the basis of a claim under GBL §349 or §349-d(3). In particular, the sales agreement and terms of service, which was effective January 31, 2012, unambiguously disclosed to Plaintiffs and all Ambit New York customers that at the end of a 12-month period, they would be switched from the Guaranteed Plan to the Variable Plan

unless they renewed the Guaranteed Plan. Thus, it cannot be said that Ambit's actions in this regard were materially misleading. Further, Ambit New York's alleged actions in delaying refund payments were not materially misleading inasmuch as there is no allegation that it ever made any representation as to when the refund payments would be made.

However, Plaintiffs' allegation that Ambit New York failed to deliver on its 1% savings guarantee by misrepresenting the rates charged by incumbent carriers is sufficient to state a claim under GBL §349 and §349-d(3). The 1% savings guarantee was a major component of the Ambit Defendants' marketing strategy in seeking to attract new customers. If true, Plaintiffs' allegation that the rates charged under the Guaranteed Plan were not at least 1% lower than the rates charged by Plaintiffs' existing carriers, such conduct could be deemed to be materially misleading. Finally, Plaintiffs' allegations regarding Ambit's failure to disclose that the Variable Plan rates are higher than those charged by a customer's existing utility are sufficient to state a claim under GBL §349 and §349-d(3). Considering Ambit's marketing of its services was based almost exclusively upon the savings customers would achieve by choosing Ambit over their incumbent utility, the failure to disclose that the rates charged under the Variable Plan were higher than those charged by an existing carrier could be deemed materially misleading.[4]

Accordingly, that branch of the Ambit Defendant's motion which seeks to dismiss Plaintiffs' GBL §349 and §349-d(3) causes of action is denied.

Plaintiffs' Unjust Enrichment Claim

The Ambit Defendants also move to dismiss Plaintiffs' unjust enrichment cause of action on the basis that a valid contract existed between Plaintiffs and Ambit New York and, as such, the contract governs the subject matter of the dispute. At the same time, the Ambit Defendants contend that the unjust enrichment claim must be dismissed against the remaining Defendants since the dispute is governed by a contract which they did not sign.

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[4]This is not to say that Ambit New York was required to disclose the specific rate that it would charge as this would be impossible given the variable nature of the rate plan. Rather, the failure to generally inform customers and potential customers that the rates charged under the Variable Plan may exceed the rates charged by incumbent utilities could be deemed a violation of GBL §349 and §349-d(3).

In opposition, Plaintiffs contend that the existence of a contract does not preclude their unjust enrichment claim if the contract is found to be void and unenforceable under GBL §349-d(8). In addition, Plaintiffs contend that the class members who were deprived of their guaranteed savings prior to the expiration of the three-year statute of limitations under GBL §349 and §349-d(3) do not have an adequate remedy at law.

"The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in equity and good conscience should be paid to the plaintiff" (*Corsello v Verizon New York, Inc.*, 18 NY3d 777, 790 [2012]). Further, "[u]njust enrichment is not a catchall cause of action to be used when others fail. It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff (*id.*). "An unjust enrichment claim is not available where it simply duplicates or replaces a conventional contract or tort claim" (*id.*).

Here, Plaintiffs' unjust enrichment claim merely duplicates their statutory claims under GBL §349 and §349-d(3). Further, the quasi-contract claim of unjust enrichment is "not viable against the defendants where, as here, the parties entered into express agreements" (*Air & Power Transmission, Inc. v Weingast*, 120 AD3d 524, 526 [2014]). Accordingly, that branch of the Ambit Defendants' motion which seeks to dismiss Plaintiffs' unjust enrichment cause of action is granted. Further, that branch of the Individual Defendants' motion which seeks dismissal of Plaintiffs' unjust enrichment claim against them is granted.

The Individual Defendants' Motion to Dismiss

The Individual Defendants, Jere W. Thompson and Chris Chambless, move to dismiss Plaintiffs' action against them pursuant to CPLR §3211(a)(8) on the grounds that they do not reside in New York and there is no basis for personal jurisdiction over them under New York's long-arm statutes or the Due Process Clause of the United States Constitution. In support of this contention, the Individual Defendants maintain that Plaintiffs' allegations are insufficient to confer general jurisdiction over them under CPLR §301 because the amended complaint fails to state that they personally carried out business in New York. To the contrary, the amended complaint alleges that the Individual Defendants undertook actions "in their respective roles with the various Ambit

entities."

In further support of their motion, the Individual Defendants argue that Plaintiffs' allegations are insufficient to confer specific personal jurisdiction over them under CPLR §302(a)(1) because the allegations in the complaint fail to demonstrate an articulable nexus between the Individual Defendants' actions in New York and the injuries allegedly sustained by Plaintiffs. Specifically, that the allegations that they were co-founders of Ambit, formulated Ambit New York's marketing plans and materials, traveled to New York to direct Ambit's New York activities, signed off on the 1% savings guarantees, and made personal statements in a series of press releases expressing their satisfaction with the execution of Ambit's marketing plans do not demonstrate that they were personally involved in any activities which violated GBL §349 or §349-d, such as failing to satisfy the 1% guarantee or implementing the changes to the terms of service whereby customers were changed from the Guaranteed Plan to the Variable Plan. In addition, the Individual Defendants contend that Plaintiffs failed to plead facts demonstrating that they used Ambit New York as their agent in transacting business which ran afoul of GBL §349 or §349-d. In this regard, the movants maintain that none of the allegations in the amended complaint indicate that they had knowledge of and consented to the alleged unlawful transactions carried out by Ambit. In other words, that Plaintiffs fail to specifically claim that the Individual Defendants implemented the complained-of-policies, controlled the policies, or ever met or contracted with the named Plaintiffs or any members of the putative class. According to the movants, the vague and conclusory allegation that they exercised control over the corporate entities is insufficient to establish agency.

As a final matter, the Individual Defendants argue that, even if the allegations in the complaint meet the requirements of New York's long-arm statute, Plaintiffs have failed to establish that the exercise of personal jurisdiction over them comports with due process.

In opposition to the Individual Defendants' motion to dismiss, Plaintiffs argue that the allegations in the amended complaint are sufficient to confer personal jurisdiction over the Individual Defendants pursuant to CPLR §302(a) because they played a direct role in Ambit New York's conduct including:

- Founding the Ambit Defendants as a purportedly less expensive energy supplier than consumers' existing utilities;

- Personally formulating Ambit New York's marketing plans and materials, pursuant to which they personally directed the New York sales activities of specially retained sales consultants;

- Traveling to New York from Dallas to direct Ambit's New York activities;

- Personally signing the 1% Savings Guarantees widely disseminated in New York;

- Including personal statements on a series of press releases expressing their satisfaction with the execution of the marketing plans they formulated;

- Executing those marketing plans, which resulted in increased not decreased energy costs for New York consumers; and

- Owning and controlling the operations of the Ambit Defendants.

According to Plaintiffs, given these allegations, the court may properly exercise jurisdiction over the Individual Defendants because they are active participants in Ambit's unlawful consumer fraud in New York. Alternatively, Plaintiffs contend that the Individual Defendants are subject to personal jurisdiction under an agency theory. Specifically, Plaintiffs maintain that the allegations establish that the Individual Defendants controlled Ambit and had knowledge of and consented to the illegal transactions carried out by Ambit in New York.

Finally, Plaintiffs argue that the exercise of personal jurisdiction over the Individual Defendants satisfies constitutional due process requirements because they personally directed Ambit's New York activities and traveled to New York on a number of occasions in furtherance of their deceptive energy practices. As such, Plaintiffs contend that the Individual Defendants had sufficient minimum contacts with New York. In addition, Plaintiffs aver that the exercise of personal jurisdiction over the individuals is reasonable inasmuch as they decided to participate in the New York retail energy market and would likely have to travel to New York even if they were not directly sued because they are key witnesses in the case against the Ambit Defendants.

Turning first to the issue of general jurisdiction, "[j]urisdiction under CPLR 301 may be acquired over a foreign corporation only if that corporation does business here 'not occasionally or casually, but with a fair measure of permanence and continuity' so as to warrant a finding of its presence in this jurisdiction" (*Sedig v Okemo Mtn.*, 204 AD2d 709, 710 [1994], quoting *Apicella v Valley Forge Military Academy & Jr. Coll.*, 103 AD2d 151, 154 [1984]). "Furthermore, 'an

individual cannot be subject to jurisdiction under CPLR 301 unless he [or she] is doing business in New York as an individual rather than on behalf of a corporation'" (*Okeke v Momah*, 132 AD3d 648, 649 [2015], quoting, *Brinkmann v Adrian Carriers, Inc.*, 29 AD3d 615, 617 [2006]). Here, the amended complaint does not allege that the Individual Defendants were doing business in New York as individuals as opposed to on behalf of the Ambit Defendants. To the contrary, the amended complaint alleges that the Individual Defendants undertook actions "in their respective roles with the various Ambit entities." Accordingly, the Individual Defendants are not subject to personal jurisdiction under CPLR §301.

With respect to the issue of specific jurisdiction, "[i]n order to order to determine whether personal jurisdiction exists under CPLR §302(a)(1), a court must determine (1) whether the defendant transacted business in New York and, if so, (2) whether the cause of action asserted arose from that transaction" (*Pichardo v Zayas*, 122 AD3d 699, 701 [2014]). With respect to the second prong of this inquiry, case law requires that there be a substantial relationship or articuable nexus between a defendant's activities in New York and the underlying claim (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]; *McGowan v Smith*, 52 NY2d 268, 272 [1981]). Further, even when there are no direct interactions between a plaintiff and an individual defendant, the court's jurisdiction over a corporation may be imputed to the individual under an agency theory (*Kreutter* at 467). In particular, personal jurisdiction will attach to an individual who benefits from, has knowledge of, and consents to an underlying transaction carried out in New York between the plaintiff and an entity over which the individual exercises "some control" (*id.*).

Here, there were no direct dealings between the Individual Defendants and Plaintiffs. Rather, all of the Plaintiffs' dealt directly with Ambit NY. Thus, the issue before this Court is whether or not the allegations in the amended complaint are sufficient to demonstrate that Ambit New York acted as the Individual Defendants' agent with respect to the actions which allegedly violated GBL §349 and §349-d. Affording the complaint a liberal construction, the Court finds that allegations are sufficient in this regard. The complaint alleges that the Individual Defendants founded Ambit, personally formulated Ambit's New York marketing plans, and signed the 1% Savings Guarantees disseminated in New York. Accepting these allegations as true, they demonstrate that the Individual Defendants exercised some degree of control over Ambit NY. These allegations are also sufficient

to show that the Individual Defendants were aware of and consented to the complained of conduct including automatically switching customers from the Guaranteed Plan to the Variable Plan, failing to deliver on the 1% savings guarantee, and failing to disclose that the Variable Plan rates are higher than those charged by a customer's existing utility. Accordingly, personal jurisdiction attaches to the Individual Defendants pursuant to CPLR §302(a)(1) based upon their use of Ambit NY as their agent.

As a final matter, the Court finds that the exercise of personal jurisdiction over the Individual Defendants is not precluded under the Due Process Clause. "Due process requires that to exercise jurisdiction over a nonresident defendant, the nonresident defendant must have 'minimum contacts' such that maintenance of the action does not offend traditional notions of fair play and substantial justice" (*Zottola v AGI Group, Inc.*, 63 AD3d 1052, 1053 [2009], citing *International Shoe Co. v State of Wash.*, 326 US 310 [1945]). Further, "[m]inimum contacts alone do not satisfy due process. The prospect of defending a suit in the forum State must also comport with traditional notions of 'fair play and substantial justice'" (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 217 [2000], quoting *Burger King Corp. v Rudzewicz*, 471 US 462, 476 [1985]). "This is in essence another way of asking what is reasonable" based upon various considerations including the burden on the defendant, the interest of the forum State, and the plaintiff's interest in obtaining relief (*id.*). Here, the Individual Defendants had the requisite minimum contacts with New York inasmuch as they used Ambit NY as an agent to directly carry out business in New York. Further, the Individual Defendants traveled to New York on several occasions in furtherance of Ambit's business in New York and allegedly formulated the marketing materials and plans for the New York market. Finally, the exercise of jurisdiction over the Individual Defendants is not unreasonable. Any inconvenience faced by the Individual Defendants would be minimal and, in any case, they would likely have to travel to New York as witnesses in the case against the Ambit Defendants (*Kreutterr*, 71 NY2d at 471).

Summary

In summary, the Court rules as follows: (1) that branch of the Ambit Defendants' motion which seeks an order staying this case pending resolution of Plaintiffs' complaints by the Service Commission is denied; (2) that branch of the Ambit Defendants' motion which seeks an order dismissing the amended complaint is granted only to the extent that Plaintiffs' unjust enrichment cause of action is dismissed; (3) that branch of the Individual Defendants' motion which seeks to dismiss the amended complaint against them is granted only to the extent that Plaintiffs' unjust enrichment cause of action is dismissed.

This constitutes the Decision and Order of the court.

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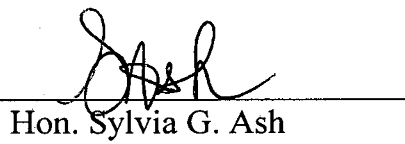

Hon. Sylvia G. Ash