

<b>Bell v Gateway Energy Servs. Corp.</b>
2021 NY Slip Op 30907(U)
January 8, 2021
Supreme Court, Rockland County
Docket Number: 31168/2018
Judge: Sherri L. Eisenpress
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

-----X  
DANIELLE BELL, individually and on behalf of  
others similarly situated,

Plaintiffs,

-against-

GATEWAY ENERGY SERVICES CORP.,

Defendant.

-----X  
EISENPRESS, J.

**DECISION & ORDER  
(Motion #12)**

Index No.: 31168/2018

The following papers numbered 1-12 were read on this motion by defendant Gateway Energy Services Corporation, pursuant to CPLR 3212, for an Order granting defendant summary judgment and dismissal of plaintiff's Complaint; and Plaintiff's cross-motion for an Order, pursuant to CPLR 3212, granting Plaintiff partial summary judgment as to liability:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/MEMORANDUM OF LAW IN SUPPORT/STATEMENT OF MATERIAL FACTS/AFFIRMATION/EXHIBITS A-V/AFFIDAVIT OF DANIEL WOOD	1-5
MEMORANDUM IN OPPOSITION TO MOTION AND IN SUPPORT OF CROSS-MOTION/STATEMENT OF MATERIAL FACTS/AFFIRMATION IN SUPPORT OF CROSS-MOTION/EXHIBITS A-Q	6-8
MEMORANDUM OF LAW IN OPPOSITION TO CROSS-MOTION AND IN FURTHER SUPPORT OF MOTION/AFFIRMATION IN OPPOSITION TO CROSS-MOTION AND IN FURTHER SUPPORT OF MOTION/EXHIBITS X-C/SUPPLEMENTAL AFFIDAVIT OF DANIEL WOOD IN FURTHER SUPPORT OF SUMMARY JUDGMENT	9-11
MEMORANDUM OF LAW IN REPLY TO CROSS-MOTION/EXHIBITS A-B	12

Upon the foregoing papers, these motions are determined as follows:

Plaintiff Danielle Bell, a resident of New City, New York, commenced this putative class action by Summons and Verified Complaint dated March 1, 2018, alleging that defendant Gateway Energy Services Corporation ("Gateway"), of Montebello, New York, overcharged her and thousands of New York consumers for natural gas and/or electricity. The Complaint alleges

that Gateway engaged in deceptive business practices to lure Bell and other similarly situated customers into designating Gateway as their supplier for natural gas and/or electricity in lieu of their local utility companies. Defendant Gateway moved to dismiss Plaintiff's action pursuant to CPLR Sec. 3211(a)(1) and (7), which resulted in an Order dated September 13, 2018. Said Order dismissed all causes of action except the First Cause of Action which alleged violation of General Business Law ("GBL") Section 349. Defendant served an Answer to the remaining Complaint on October 3, 2018. After completion of discovery, the above referenced summary judgment motions were timely filed.

### **Background/Factual Allegations**

Starting in the 1980s, the Legislature authorized the New York State Public Service Commission ("PSC") to begin deregulating New York's retail energy market by requiring utilities to transport certain energy commodities owned or supplied by other companies (see e.g. Rochester Gas & Elec. Corp. v Public Serv. Commn., 71 NY2d 313-320-522 [1988]; Public Service Law § 66-d). Starting in the 1990s, the PSC restructured the electric service provider industry by allowing independent energy service companies known as ("ESCOs"), such as Gateway, to supply energy to retail consumers and set rates by means separate from geographically-based local utility companies that, by law, must continue to deliver such energy even if such local utility does not supply the energy it delivers (See Id.; General Business Law § 349-d[1][b]). This market-access policy changed New York's historical practice by which each residential customer previously received electricity and natural gas from a local utility company that supplied energy, delivered energy and charged the customer on a single bill for both supply and distribution (See Retail Energy Supply Ass'n v Public Service Commn., 152 AD3d 1133, 1134 [3d Dept 2017], *lv granted sub nom.* National Energy Marketers Assn. v New York State Public Serv. Commn., 31 NY3d 902 [Mar. 27, 2008]; Progressive Mgmt. of N.Y. v Galaxy Energy LLC, 51 Misc. 3d 1203, 1203 [Sup Ct Nassau Co 2016]).

The gravamen of plaintiff's action is that Gateway used its "false promise of

competitive rates based on market conditions in order to deceive [Bell and similarly situated] consumers into purchasing energy" from Gateway instead of local utilities, when in fact Gateway charged energy prices "substantially higher than rates charged by" local utilities and that bore "no relation to market rates or the wholesale cost of natural gas and electricity" (Complaint, at ¶ 14). Gateway's consumer-outreach practice, the Complaint asserts, was a "classic bait and switch deceptive scheme" by which "Gateway lure[d] consumers into switching to [Gateway's] natural gas and/or electricity supply service by offering teaser rates that [were] much lower than its regular rates" (*id.*, at ¶ 17), then raising rates far above market prices.

Gateway's General Manager of Energy Business, Predrag Popovic, testified that Gateway's business model was premised on attracting customers by offering competitive fixed rate energy plans for a fixed period of time. As the customers's fixed rates were about to expire, Gateway sent them notices telling them that they need to take no action since their account would simply convert to "our highly competitive variable-rate pricing plan<sup>1</sup> on a month-to-month basis." The vast majority of Gateway's business was indeed variable- including 71% of electricity and 76% of gas.<sup>2</sup> Additionally, Mr. Popovic wrote that Gateway's energy, when sold to its variable rate customer segment was price inelastic<sup>3</sup>, and that it accounted for 80

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<sup>1</sup>In relation to Gateway's variable pricing for electricity and natural gas, the Terms and Conditions provided as follows:

**"Variable-Rate Plan.** The price you will pay for all natural gas and/or electricity under our Variable-Rate Plan is a rate we set each month based on our evaluation of market conditions. Market conditions that we might consider include, among other items: the prevailing price of natural gas or electricity on the market, costs involved in moving the gas or electricity from the producer to your utility, our total acquisition costs for the electricity or natural gas (including, where applicable, transmission costs, storage costs, transportation costs and line losses) and the prevailing rates offered by your utility and other competitors"

<sup>2</sup>Refers to the period of January 2016 and April 2016.

<sup>3</sup>"Demand elasticity measures whether demand for a particular product is sensitive to price changes. If a product is 'price elastic,' small changes in price will result in relatively large changes in the quantity demanded. If a product is 'price inelastic,' the quantity demanded will not change much as the price is increased or decreased. Because a

percent of annual gross margin and 60 percent of volumes of the business.

During the course of discovery, various relevant emails were produced including one from Maura Clark, President of Business for Gateway and also a customer, to Steven Murray, Gateway's then President of its Residential Unit, which stated in part:

-(Ms. Clark) "So I get a letter sometime late Jan saying my rate plan is about to expire. Doesn't say when. Just says I'll roll over to a market based rate. Doesn't say what that is or how it is calculated. Knowing more than I should, I call the call center (btw generally very good experience there- someone named Dawn did try to be very helpful and script was v professional etc)."

-(Ms. Clark) "She first tells me that my plan expired Feb 17 so it will be two months of floating rate before I can get back on fixed. She can't tell me what the floating rate will be, She can't tell me what it would have been last month. She can't provide any utility to compare benchmarks or any historical utility rate info. She does acknowledge that it is all very confusing, for me and for her."

-(Ms. Clark) "I know we are guilty of same practices, but why, at a minimum can we not tell people exactly when their contract expires, give them at least the first month default rate and give some sense how historical or current rates compare to the utility?"

Mr. Murray then forwarded the email chain to Geoffrey Duda, Gateway's then Head of Operations, and copied Robert Comstock, Gateway's then Senior Vice President, Residential and directed Mr. Duda to let him and Ms. Clark know what his solution includes. The email eventually reached Sayed Khoja, Gateway's then Senior Commercial Director. In response to some of the issues raised, Mr Khoja responded in part:

"(3) Providing customers a view of our variable rate and/or the PTC [utilities price to compare]. I don't think we want to provide a comparison given the large differences. "

During discovery it was also revealed that certain Gateway employees acknowledged in April of 2016 that Gateway had not been competitive with the New York local

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monopolist can increase the price of a price inelastic product without having a great effect on the demand for the product, 'it is extremely profitable for a monopolist to sell a product with an inelastic demand curve." Johnson Elec. N. Am. Inc. V. Mabuchi Motor Am Corp., 103 F supp. 2d 268, 274 (S.D.N.Y. 2000).

utilities for a period of at least 15 months prior. Sam Gifford, who worked in Gateway's Regulatory and Compliance Group, sent an email to Chris Kallaher, Gateway's then Senior Director of Government & Regulatory Affairs, which reads:

"[a]s you expected, it's not a good look for us. Very roughly, and not accounting for seasonal usage profiles or weighting by LDC, we are 190% of the utility rate over the last 15 months in New York. We have not been competitive with the utility in any LDC."

Ms. Bell first began purchasing natural gas and electricity from Gateway on or about January 26, 2011, on a fixed rate contract that expired on August 29, 2011. She testified that she chose to enroll with Gateway in response to their marketing materials in order to save money and that the fixed rate plan was appealing to her since she wanted to lower her gas and electric costs monthly. When her fixed rate contracts expired, Ms. Bell renewed her service with new fixed rate contracts, which expired on May 30, 2012. A third fixed rate contract was signed, which expired on June 1, 2013. On or about April 29, 2013, prior to her fixed rate plans expiring, Ms. Bell received a renewal notice from Gateway which stated, in part:

I am writing to you to let you know that your rate plan with Gateway Energy is due to expire. No action needs to be taken at this time since your account will simply convert to our highly competitive variable-rate pricing plan on a month-to-month basis."

Ms. Bell testified that she wanted a fixed rate plan and was not interested in a variable rate plan.

On June 1, 2013, Ms. Bell's natural gas and electricity service transitioned to Gateway's variable rate energy plan for the first time. She testified that she does not recall why she let her plan roll to a variable rate, but she knows that it was not intentional. She remained on Gateway's variable rate plan for electricity from June 1, 2013 through September 16, 2014. On September 16, 2014, her electric service was then switched to a different variable rate plan with Gateway, which she remained on until December 16, 2014. Ms. Bell was on Gateway's

variable rate plan for natural gas service from June 1, 2013 through July 17, 2014. On July 17, 2014, her natural gas service was then switched to a different variable rate plan with Gateway, which she remained on until December 16, 2014.

On December 16, 2014, Ms. Bell contacted Gateway about her variable plan. She was advised that she was paying significantly more at 12.99 cents per kilowatt hour and with gas she was paying a rate of 84.9 center per ccf on the variable plan. She was offered a new fixed rate of 9.99 cents per kilowatt hour and 52.9 cents per ccf, which she accepted. The "Welcome Letters" for those plans were sent on December 17, 2014 and contained the statement:

"Gateway remains dedicated to your complete satisfaction by providing you with *competitive energy prices*, attractive pricing plans, and excellent customer service"

The Welcome Letters for those Plans also contained the following disclaimer:

"*No Warranties.* ... [W]e specifically disclaim any warranty or guaranty charged by us that the energy supplied pursuant to the Agreement will be lower than the price that you would have been charged by the utility or another ESCO"

Ms. Bell remained on the fixed rate plans until January 1, 2016, at which time the fixed rate plan expired. For one month, Ms. Bell was placed on a "glide path" variable rate, which is a "blended rate to soften the transition from a fixed to variable rate." Thereafter, the rate switched to Gateway's standard residential variable rate plan for both her natural gas and electric services, where they stayed until March 14, 2017. At that time, Ms. Bell enrolled in a final fixed rate plan. When asked at her examination before trial if there was anything that she believes Gateway did that was wrong, she replied that she was put into a variable rate that was not comparable to the local market rates and that she was told that she would get a competitive rate.

Plaintiff initially brought the claims asserted here as a putative federal class

action (see Bell v Gateway Energy Servs. Corp., No. 17-CV-3893, 2017 WL 5956887 [SDNY 2017]). The Court dismissed that action for lack of federal subject matter jurisdiction (see id., citing Purdue Pharma LP v Kentucky, 704 F3d 208, 213 [2d Cir 2013]; 28 USC § 1332[d] [Class Action Fairness Act]). After dismissal of the federal action, but before the instant Complaint was filed, on December 19, 2017, Gateway sent Ms. Bell a letter enclosing a check for \$1,184.79 and \$250 in Visa Prepaid Cards. Gateway alleges that the amount of the check was “the difference between what [Ms. Bell] paid at variable-rate and what [she] would have paid at [her] preceding fixed rates...plus interest.” Gateway contends that the check and prepaid card were sent “without any obligation.” Although Ms. Bell never cashed the check (or a replacement check issued at her attorney’s request) a portion of the prepaid Visa Card was used by Ms. Bell.

Lastly, the Court takes judicial notice that New York’s Public Service Commission, after a 10-day evidentiary hearing, made regulatory changes to New York’s ESCO marketplace on December 12, 2019, which made illegal the same type of variable rate pricing practices utilized in this case. The regulations note:

Based upon the number of customer complaints that continue to be made against ESCOs, and the likely need for increased enforcement activities, the large number of ESCO customers that pay significant premiums for products with little or no apparent added benefit,...it appears that a material level of misleading marketing practices continues to plague the retail access market.

In the PSC’s December 12, 2019 decision, the PSC notes that it was “troubling” that “neither ESCOs nor any other party have shown...that ESCO charges above utility rates were generally- or in any specific incidents- justified, and that there was a “long-held concern that many customers may only be taking ESCO service due to their misunderstanding of [ESCOs’] products and/or prices.” Under the new regulations, if the ESCO charges the consumer more than the local utility, the consumer is owed a refund for the difference.

### The Parties' Contentions

Defendant Gateway moves for summary judgment and dismissal of the GBL Sec. 349 cause of action on several grounds. It argues that the action must be dismissed because Ms. Bell did not suffer any injury as a result of Gateway's challenged statement and because her testimony affirmatively disproves causation. Gateway contends that Ms. Bell's testimony demonstrates that the reason she paid variable rates had nothing to do with what Gateway said about the rates being "competitive" because her decision to go to the variable rates was inadvertent.

Additionally, Gateway argues that the action must be dismissed because Plaintiff is unable to demonstrate damages. Her expert, Dr. Felder, did not evaluate the rates charged by Gateway's ESCO competitors, but rather unfairly limited its comparison to utility rates. In this regard, Gateway contends that it would be unfair to compare the rates to the utility company because the utility companies don't offer the same unquantifiable benefits like price certainty.

Defendant Gateway also argues that Ms. Bell's claim is moot because there is no live controversy. More specifically, they claim that she was made whole with regard to the difference between the fixed rate plan and the variable rate plan by virtue of a \$100 credit to her bill, and the check and gift cards she was sent between the dismissal of the federal action and commencement of this State action. They argue that although she did not cash the check, the fact that she held on to it for so long can nonetheless be construed as acceptance.

Defendant Gateway also argues that the action must be dismissed because Ms. Bell has no proof that Gateway's statement was "materially deceptive" to her or any other reasonable consumer. More specifically, they claim that "competitiveness" is a statement of opinion that cannot be materially deceptive or misleading as a matter of law, and can be categorized as legal "puffery." Gateway also argues that Plaintiff cannot show the challenged statement was "material." This argument is based upon Ms. Bell's knowledge that Gateway's

variable rates, could be, and were indeed, higher than Orange and Rockland's rates, and as such this was fully disclosed. Lastly, Gateway argues that there is no evidence that Gateway's rates were not competitive, and her analysis ignores all the "other value Ms. Bell received from her plan."

In opposition to Defendant's summary judgment and in support of her cross-motion, Plaintiff argues that Gateway's motion must be denied because her testimony supports the contention that she believed that she would be receiving competitive energy rates regardless of whether she was on a fixed rate or variable rate plan and that she chose Gateway as her energy supplier as a result of those statements. Plaintiff asserts that Gateway's promises of competitive rates and its omissions that its variable rates are not competitive and exorbitantly priced, were material to Ms. Bell's decision to enroll in Gateway's energy plans. Ms. Bell asserts that Gateway does not provide its customers with the amount of their upcoming variable rates in advance of customers switching to its variable rate plan, and falsely reassures its customers in its fixed rate expiration and renewal notice that no action need be taken since their account will simply convert to their "highly competitive variable-rate pricing plan."

Plaintiff also asserts that she has established damages, which is the difference between what Gateway customers paid versus what they would have paid had they purchased electricity and /or natural gas from their local utilities. In Ms. Bell's case, her expert, Dr. Felder, calculated that Ms. Bell was overcharged on the variable rate plan at a rate 47% higher for electricity (\$1,012.65) and 170% higher for her natural gas (\$943.08). Plaintiff further contends that the local utilities, who have 80% of the market share, serve as an appropriate comparison with respect to a determination of a competitive rate. They further note that of the remaining 20% of the New York market, Gateway is the second largest market shareholder for ESCO's, and ESCO historical rates are not available.

Ms. Bell also opposes Defendant Gateways contention that her claims are "moot" based upon issuance of a check and gift cards. Counsel for Plaintiff argues that defense counsel

improperly sent Ms. Bell the gift cards and a check when she was represented by counsel and now seeks to take advantage of the fact that she only used a portion of the “no strings attached” gift cards, to dismiss her action. Plaintiff argues that Defendant misapprehends the case of Tractor & Equipment Corp v. Chain Belt Co., 50 F. Supp. 1001, 1004 (S.D.N.Y. 1942) for its contention that retaining a check for too long renders it an acceptance, because in that case, the Court noted that this merely created a triable issue of fact. Plaintiff further argues that even assuming that the check and gift card were considered to have been appropriately sent and/or accepted, there remains a triable issues of fact as to whether this accounted for the total of the overcharges.

On the issue of whether Gateway’s statements and omissions were materially deceptive and misleading to Ms. Bell and the proposed class, Plaintiff argues that Gateway did not meet its summary judgment burden. It contends that Gateway’s promise of “competitive” energy rates was not a statement of opinion or puffery, based upon its own employees’ emails, including those of Mr. Gafford, who states that Gateway had not been competitive with the utility an any way and were 190% above the local utility rate for over 15 months, as well as statements that “it’s not a good look for us.” Plaintiff also argues that Gateway’s promises to provide competitive energy rates were material, in that Gateway never differentiated between its fixed rates and variable rates in making its competitive rate promises. Ms. Bell argues that while she did not want to be on variable rate plans in the first place, she never expected to be overcharged if she happened to be placed on one or more variable plans. Lastly, Plaintiff argues that Gateway failed to make a prima facie showing that its variable rates were in fact competitive and is therefore not entitled to summary judgment.

Plaintiff cross-moves for summary judgment and makes essentially the same arguments set forth in opposition to Defendant’s motion. In opposition to the cross-motion, Defendant sets forth essentially the same arguments it made in support of its summary judgment motion. Gateway also argues that Plaintiff’s cross-motion is premature in that the

class has not been certified yet. In response, Plaintiff argues that she made the certification motion first and that Court's routinely decide these motions simultaneously on the ground of judicial economy.

### **Legal Discussion**

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., et al., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985).

Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). On a motion for summary judgment, evidence is to be viewed in the light most favorable to the party opposing the motion, giving them the benefit of every favorable inference, and the Court should not pass of issues of credibility. Torres v. Jeremias, 283 A.D.2d 484, 724 N.Y.S.2d 461 (2d Dept. 2001); Cortale v. Educational Testing Services, 251 A.D.2d 1998, 674 N.Y.S.2d 753, 756 (2d Dept. 1998).

The Legislature deems unlawful "deceptive acts or practices in the conduct of any business, trade or commerce, or in the furnishing of any service" (General Business Law § 349[a]); and authorizes a private right of action by "any person who has been injured by

reason of any violation [thereof] ... to enjoin such unlawful act or practice [and to] recover [such person's] actual damages" incurred (*id.*, § 349[h]). Among the purposes of section 349 are to "ensure an honest marketplace" Karlin v IVF America, Inc., 93 NY2d 282, 287 [1999], quoting Mem of Gov Rockefeller, 1970 NY Legis Ann, at 472 [L 1970 ch 43]). As such, the statute's consumer-protection purpose is explicitly remedial, to provide redress for and thus disincentivize "consumer frauds at their incipiency" Karlin, 93 NY2d at 290. Given the Legislature's remedial purpose in enacting section 349, judicial application of the statute "has been correspondingly broad." Id.

Courts, however, balance this statute's remedial intent and breadth with concern for risking an unintended "tidal wave of litigation against businesses" City of New York v Smokes-Spirits.Com, Inc., 12 NY3d 616, 621 (2009), quoting Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A., 85 NY2d 20, 26, 623 N.Y.S.2d 529 (1995). To that end, and to avert undue "remoteness" between a plaintiff's claim and the allegedly deceptive business practice (see Smokes-Spirits.Com, Inc., 12 NY3d at 621; Blue Cross and Blue Shield of N.J., Inc. v Phillip Morris USA, Inc., 3 NY3d 200, 208 & n3 [2004] [collecting cases]), a plaintiff can prevail on a section 349(h) private cause of action only upon alleging and demonstrating that such plaintiff "suffered injury as a result of the [defendant business's allegedly] deceptive act." Stutman v Chemical Bank, 95 NY2d 24, 29, 709 N.Y.S.2d 809 (2000).

"A plaintiff under section 349 must prove three elements; first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive action." Stutman, 95 NY2d at 29. Moreover, "it is possible to engage in deceptive trade practices through omissions as well as affirmative representations, particularly where, as here, it is alleged that 'the business alone possess material information that is relevant to the consumer and fails to provide this information.'" Krobath v. South Nassau Communities Hosp., 178 A.D.3d 807, 809, 115 N.Y.S.3d 389 (2d Dept. 2019). "Deceptive or misleading representations or omissions are

defined objectively as those 'likely to mislead a reasonable consumer acting reasonable under the circumstances,' i.e., the plaintiff's circumstances." Solomon v. Bell Atlantic Corp., 9 A.D.3d 49, 52, 777 N.Y.S.2d 50 (1<sup>st</sup> Dept. 2004).

In addition, a plaintiff must prove "actual" injury to recover under the statute, though not necessarily pecuniary harm. Oswego Laborers' Local 214 Pension Fund, 85 NY2d at 26. Further, reliance is not an element of a section 349 claim, and section 349 contains "no requirement that an injured party show reasonable reliance on erroneous statements...in order to obtain relief." Stutman, 95 NY2d at 29. "The plaintiff, however, must show that the defendants' 'material deceptive act' caused the injury." Id.

Applying the law as set forth herein, and for the following reasons, the Court finds triable issues of fact which require denial of both Gateway's summary judgment motion and Plaintiff's cross-motion with respect to the remaining cause of action for a violation of GBL Section 349. As an initial matter, no party disputes that the first requirement-that the challenged act or practices were consumer-oriented- has been satisfied. Turning next to the issue of whether the statements and omissions of Gateway regarding "competitive energy prices" mis-led Ms. Bell, "as a reasonable consumer acting reasonably under the circumstances", the Court finds a triable issue of fact sufficient to deny summary judgment.

A triable issue of fact exists as to whether Gateway's 2014 communication, coupled with the omission that a variable rate would not be competitive, induced plaintiff to expect that upon automatic conversion of her energy-supply service from a fixed rate plan to a variable rate plan, Gateway's energy prices still would be "competitive." Although Ms. Bell testified that she did not intend to enter into a variable rate plan as she had concerns about fluctuation, she also testified that she believed that all plan rates would be competitive and that going with Gateway would provide her with savings as compared to Orange & Rockland. As the Court of Appeals instructed in distinguishing between reliance and causation for section 349 purposes, a consumer plaintiff "need not additionally allege that [such plaintiff] would not have

entered into the [underlying business] transaction” but for the deceptive business practice alleged. Stutman, 95 NY2d at 30.

The Court also finds a triable issue of fact as to whether Plaintiff sustained damages. A monetary loss is an actionable “injury” under GBL Section 349. Spagnola v. Chubb Corp., 574 F.3d 64, 74 (2d Cir. 2009). Here, Plaintiff alleges that damages in this matter is the difference between what Gateway customers paid versus what they would have paid had they purchased electricity and /or natural gas from their local utilities. Such a claim has been found to suffice as a monetary loss caused by defendant’s deceptive acts. See Yang Chen v. Hiko Energy, LLC, 2014 WL 7389011 (S.D.N.Y. 2014). Additionally, comparison to the rates of Orange & Rockland is appropriate under the circumstances given that the utility’s share of the market is 80%, the rates of other ESCO’s are not readily available and Defendant’s employees, themselves, have engaged in a comparison of their own rates to that of the local utility.

Contrary to Gateway’s contention, the Court finds that there exists a live controversy sufficient to confer standing. Defendant’s reliance on a single 78 year old case, Tractor & Equipment Corp v. Chain Belt Co., 50 F. Supp. 1001, 1004 (S.D.N.Y. 1942), for the proposition that her retention of a check for an unreasonable period of time constitutes acceptance of an offer, is simply misplaced. In Tractor and Equipment Corp., the Court did not rule that plaintiff had accepted the offer based upon retention of the check, but rather, that this raised a triable issue of fact to be determined by the jury. In the instant matter, however, a plain reading of the letter accompanying the check and gift cards- which stated that there were “no-strings attached”- make clear that no settlement offer was being made. If there was no settlement offer being made, Plaintiff’s failure to cash the check could not constitute an acceptance of an offer, rendering the Tractor and Equipment Corp. case inapplicable to the instant facts.

The Court finds that there are triable issues of fact as to whether Gateway’s promise of “competitive” energy rates was “deceptive or misleading in a material way.” Here,

the term "competitive" is not merely opinion or puffery, and was in fact measured by its own employee who compared Gateway's rates to that of the local utility, noting in an email that "we are 190% of the utility rate over the last 15 months in New York. We have not been competitive with the utility in any LDC." Likewise, Gateway never differentiated between its fixed rates and variable rates in making its competitive rate promises and never promised Ms. Bell or other similarly situated customers that it would only provide competitive fixed energy rates. As such, there are triable issues of fact as to whether Gateway's promises were material because they were the only measurable indication of how much its variable rates would be and its customers did not know what the variable rates would be in advance.

As multiple triable issues of fact exist as to whether Defendant Gateway violated GBL Sec. 349, its summary judgment motion must be denied in its entirety. As to Plaintiff's cross-motion, the Court finds that it is ripe for determination at this time, as Plaintiff's certification motion is simultaneously being determined. Notwithstanding that the cross-motion is ripe for determination, the cross-motion for summary judgment must be denied as similar triable issues of fact exist with respect to liability.

Accordingly, it is hereby

**ORDERED** that Defendant's Notice of Motion to for summary judgment and dismissal of the Complaint is DENIED in its entirety; and it is further

**ORDERED** that Plaintiff's Notice of Motion for summary judgment as to liability against Defendant is DENIED in its entirety (Motion #3); and it is further

**ORDERED** that the parties are directed to appear for a conference via Microsoft Teams on February 18, 2021 at 2 p.m. The Court shall provide the link for the conference the day prior.

The foregoing constitutes the Decision and Order of this Court on Motion #12.

Dated: New City, New York  
January 8, 2021



HON. SHERRI L. EISENPRESS, A.J.S.C.

To: All Counsel via NYSCEF