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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

RAY MARSHALL, individually and on  
behalf of all others similarly situated,

Plaintiff,

v.

VERDE ENERGY USA, INC.,

Defendant.

Civil Action No. 18-1344 (JMV)(JBC)

**SECOND AMENDED CLASS  
ACTION COMPLAINT AND JURY  
DEMAND**

Plaintiff Ray Marshall (“Plaintiff”), by and through his undersigned counsel, Brown, LLC, Kohn, Swift & Graf, P.C., Whitfield Bryson & Mason, LLP, and Greg Coleman Law PC, on behalf of himself and all other persons similarly situated, brings this Second Amended Class Action Complaint against Verde Energy USA, Inc. (“Verde” or “Defendant”), and alleges as follows upon personal knowledge as to himself and his own acts and experiences and, as to all other matters, upon information and belief based upon, *inter alia*, investigations conducted by his attorneys.

### **NATURE OF THIS CASE**

1. This action is brought as a class action on behalf of Plaintiff and a putative class of New Jersey consumers seeking redress for the deceptive and bad faith pricing practices of Defendant that have caused at least tens of thousands of consumers to pay considerably more for their electricity than they should otherwise have paid.

2. Verde, an Energy Service Company or “ESCO,” has exploited the deregulation of the retail electricity market by luring consumers into switching electricity suppliers using a bait-and-switch scheme designed to deceive reasonable consumers. Verde entices customers into switching to its electricity supply services by offering, for a limited period of time, teaser rates that are initially lower than the local (or “public”) utilities’ rates and other competing independent energy companies’ (“ESCOs”) rates for electricity. Once the initial rate expires, however, Verde automatically switches its customers over to its variable generation rate. Verde represents that its variable generation rate each month is based on “market conditions.” A reasonable consumer thus expects that after the initial rate expires, he or she will pay a variable rate that reflects (or varies with) market conditions -- the wholesale cost of electricity (wholesale electric prices) and retail electricity market pricing (other local competitors’ retail rates), all of which include the same transmission costs and utility charges.

3. Despite its explicit representations, the rates Verde charges its customers are substantially higher than retail electricity market rates (i.e., the local utilities and other ESCOs); the rates are invariably higher than Verde’s own initial teaser rates; and the rates are wholly disconnected from wholesale and retail electricity market pricing. In short, nothing indicates that the Verde rates rise and fall with any discernable indicator of “market conditions.”

4. Although reasonable consumers would not expect guaranteed savings each month, which Verde disclaims, they would reasonably expect that Verde set its variable rate in a manner that comports with its own variable rate pricing methodology.

5. Indeed, as set forth below, Verde routinely charges its consumers up to almost *three times* the underlying market rate, notwithstanding Verde's representations that the customer will receive electricity from Verde at a variable generation rate, and that its variable rates "fluctuate" monthly with market conditions. Specifically, even when the market price goes down, Verde's rates do not decrease, but instead remain at an inflated level several times higher than wholesale or retail electricity market pricing.

6. Verde makes additional representations that it offers "low-cost," "competitive" electric rates, and "cost effective" power. But Verde does not inform customers that its variable rate is always substantially higher than, and not competitive with, other rates available in the market.

7. Verde's unfair and deceptive scheme of charging inflated electric prices that match increases in the underlying market price while failing to pass along corresponding decreases is intentionally designed to maximize revenue for Verde. Consumers, such as Plaintiff and the Class, were deceived into believing that Verde would provide market-based rates when, in reality, Verde only increases, but does not decrease, its prices based on wholesale or retail electricity market pricing.

8. No reasonable consumer, including Plaintiff, would understand Verde's pricing representations as granting Verde unfettered discretion to raise its variable rate as high as it pleases in order to maximize profits, such that the variable rate bears no resemblance to either wholesale or retail electricity market pricing. Indeed, any contrary interpretation would render the contract's variable rate pricing terms meaningless.

9. As a result of Verde's unfair and deceptive overcharging scheme, New Jersey consumers are being fleeced millions of dollars in exorbitant charges for electricity.

10. Plaintiff, on behalf of the Class he seeks to represent, brings this lawsuit based on Verde's breach of contract and breach of the implied covenant of good faith and fair dealing, as well as Verde's unlawful and unconscionable consumer practices under the New Jersey Consumer Fraud Act, N.J.S.A. §§ 56:8-1 *et seq.*, the Electric Discount and Energy Competition Act, N.J. Stat. Ann. § 48:3-49, *et seq.*, and its violations of the New Jersey Truth-in-Consumer Contract, Warranty and Notice Act, N.J.S.A. § 56:12-15 (the "TCCWNA"). Through its deceptive and unconscionable practices, upon information and belief, Verde bilked the class of tens of thousands of current and former customers with variable rate electricity plans out of millions of dollars. Accordingly, this lawsuit seeks, *inter alia*, injunctive relief, actual damages and refunds, treble damages, punitive damages, attorneys' fees, and the costs of this suit.

### **PARTIES**

11. Plaintiff Ray Marshall is a resident of Wayne Township in Passaic County, New Jersey. Mr. Marshall was a customer of Verde from August 2012 until January 2018, and as a result of Defendant's deceptive conduct, he incurred excessive charges for electricity during that period.

12. Defendant Verde Energy USA, Inc. is a corporation organized under the laws of the State of Delaware whose principal place of business is located at 101 Merit Seven Corporate Park, Norwalk, CT 06851. Verde has thousands of customers in New Jersey and earns tens of millions of dollars of revenue each year.

### **JURISDICTION AND VENUE**

13. This Court has subject matter jurisdiction under the Class Action Fairness Act, 28 U.S.C. §§ 1332(d), 1453 and 1711 - 1715. Plaintiff and all members of the Putative Class are

citizens of New Jersey, while Verde is a citizen of Delaware with its principal place of business in Connecticut. the amount in controversy exceeds \$5,000,000. This Court has personal jurisdiction over Defendant, in that Verde is registered to do business in New Jersey, conducts business in New Jersey, and otherwise has sufficient contacts with New Jersey that jurisdiction over it is proper in this District.

14. Venue is proper in this District because Plaintiff is a citizen of New Jersey, Defendant does business in New Jersey, and the transactions that are the subject of this action took place in New Jersey and had their effects in New Jersey.

### **OPERATIVE FACTS**

#### **A. Background on Energy Supply Companies (“ESCOs”)**

15. Prior to 1997, energy utility companies sold electricity and delivered it through their power lines to individuals and businesses. Thus, consumers did not have a choice to buy energy from alternative suppliers. In 1997, 17 states began to deregulate energy. This allowed independent energy supply companies (“ESCOs”) or Third Party Suppliers (TPSs) to supply electricity to homes and businesses at prices based on current market values. One of the primary goals of deregulation was increased competition in the industry, with a focus on achieving greater consumer choice and reduced energy rates.

16. In an energy deregulation state like New Jersey, the utility company, or “LDC”, is not allowed to profit from buying or selling energy. Whatever the energy costs the utility company to produce or procure is what they may charge the customer. They can profit only from the delivery. They own the wires the energy is sent through and get paid for the delivery of the energy no matter where it comes from. Of course, utilities still must cover for ordinary operating expenses, such as rent, payroll, supplies, marketing, and overhead. Thus, local utilities

cannot simply buy electricity at the wholesale market rate and sell it to their customers at that same rate.

17. In contrast, ESCOs can profit from buying and selling energy to customers, because they are not subject to the same regulations as utility companies. Thus, deregulation enables energy customers to shop for electric services by separating the supply and delivery portion of these services, and opening up the supply portion to competition from ESCOs. This supposedly enables consumers to shop around for the best price on their energy supplies and in turn, save money on their energy bills.

18. In deregulation states, ESCOs may compete to supply the energy services, but the local electric companies continue to deliver power through their wires regardless of which company supplies them. In addition, the local public utility may continue to supply metering, billing, and related administrative services to the consumer, regardless of who supplies the energy services. Thus, the public utility continues to generate and send periodic bills directly to the consumer for the energy it supplies, even after a consumer has enrolled in or “switched” to an ESCO. The fact that the energy services for which the customer is being billed are now being provided by an ESCO is noted on the bill, often in very fine print that is easily overlooked. The bill otherwise looks substantially the same as it did before the switch.

19. Although deregulation may increase competition for energy supply services, because there is no regulatory authority over the prices that ESCOs charge their customers, these unregulated suppliers are not required to purchase long-term energy contracts, as required of local utility companies, that would help insulate residential customers from sharp price fluctuations.

20. Because the prices they charge their customers are not regulated, ESCOs often choose to offer variable rate contracts, giving them the ability to change their rates to meet

market conditions. When market conditions cooperate, an ESCO is able to offer potential customers significant cost savings in order to entice them into entering into a contract.

**B. The Failure of Energy Deregulation and Resulting Harm to Consumers**

21. Almost all states that deregulated their energy markets did so in the mid- to late-1990s. This wave of deregulation was frantically pushed by then-corporate behemoth Enron. For example, in December 1996 when energy deregulation was being considered in Connecticut, “the most aggressive proponent” of deregulation, Enron CEO Jeffrey Skilling, said:

Every day we delay [deregulation], we’re costing consumers a lot of money . . . . It can be done quickly. The key is to get the legislation done fast.<sup>1</sup>

22. Changing the industry under this sense of urgency and with inadequate protections against abuse resulted in serious harm to consumers in deregulated states, and has spawned a return to sensible regulation. The number of full or partially deregulated states has dwindled to only seventeen and the District of Columbia, down from forty-two states in 2001 that had started or were considering deregulation. Even some deregulated states have recognized deregulation’s potential harm to everyday consumers and now only allow large-scale consumers to shop for their energy supplier.

23. Responding to shocking energy prices often paid by ordinary consumers, many key supporters of deregulation now regret the role they played. For example, reflecting on Maryland’s failed deregulation experience, a Maryland Senator commented: “Deregulation has failed. We are not going to give up on re-regulation till it is done.”<sup>2</sup>

24. A Connecticut leader who participated in that state’s experiment with energy deregulation was similarly regretful:

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<sup>1</sup> Christopher Keating, *Eight Years Later ... “Deregulation Failed”* HARTFORD COURANT, Jan. 21, 2007.

<sup>2</sup> David Hill, *State Legislators Say Utility Deregulation Has Failed in its Goals*, THE WASHINGTON TIMES, May 4, 2011.

Probably six out of the 187 legislators understood it at the time, because it is so incredibly complex . . . . If somebody says, no, we didn't screw up, then I don't know what world [they] are living in. We did.<sup>3</sup>

25. Massachusetts Attorney General Maura Healey has also expressed serious concerns about deceptive practices of competitive electric suppliers like Verde. In March 2018, Attorney General Healey issued a report calling for an end to the competitive electricity supply market for individual residential customers in Massachusetts, as a result of the false and deceptive promises made by competitive electric suppliers like Verde: “Competitive electric suppliers promise big energy savings but are actually burdening customers with hundreds of dollars in extra costs.”<sup>4</sup>

26. This class action seeks to recover for New Jersey residents the amounts above and beyond reasonable market rates that Verde deceived Plaintiff and the Class into paying.

**C. The History Of New Jersey's Energy Industry**

27. In 1999, New Jersey deregulated the market for electricity supply, a major break with past policy. Prior to deregulation, electricity was supplied and distributed solely by local utility companies. Over the last several years, a number of states, including New Jersey, have begun to change the regulations in the energy industry purportedly to enhance competition between energy providers. The theory was that competition would result in ESCOs being more aggressive than the utilities in reducing wholesale purchasing costs and thereby lower retail residential rates – saving customers money on their energy bills.

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<sup>3</sup> Keating, *supra* note 5.

<sup>4</sup> See Report, Office of the Attorney General, Commonwealth of Massachusetts, *An Analysis of the Individual Residential Electric Supply Market in Massachusetts* (March 2018), <https://tinyurl.com/Mass-Analysis>, at viii.

28. The market for wholesale electricity in New Jersey is under the administration of an independent, not-for-profit corporation formed in accordance with the recommendations of the Federal Energy Regulatory Commission, called PJM Interconnection LLC (“PJM”).

29. PJM coordinates and directs the generation and flow of electricity throughout its regions, including New Jersey, ensuring that electric supply exactly meets demand throughout the network.

30. PJM manages the market and determines where and when electricity will be made by generation companies and the wholesale prices that will be paid for that electricity through competitive bids.

31. ESCOs such as Verde have various options to buy electricity at wholesale for resale to retail customers in New Jersey, including: owning electricity production facilities; purchasing electricity from wholesale marketers and brokers at the price available at or near the time it is used by the retail consumer; and purchasing electricity in advance of the time it is used by consumers, either by purchasing electricity to be used in the future or by purchasing futures and forward contracts for the delivery of electricity in the future at a predetermined price. The point of deregulation is to allow ESCOs to use these and other innovative purchasing strategies to reduce electricity costs.

32. If a customer switches to an ESCO, his or her energy will be “supplied” by the ESCO, but still “delivered” by their existing utility. The customer’s existing utility 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.

33. As part of the deregulation plan, ESCOs (like Verde) are not required to file either their electricity rates or the method by which they set those rates with the New Jersey Board of Public Utilities (“NJBP”).

34. Verde's prices are not approved by the NJBPU. Rather, Verde and other ESCOs set their own rates for supplying energy to consumers. And Verde, like all other suppliers, relies upon the local utilities to deliver the energy it purchases on the wholesale market to its customers.

35. Under New Jersey Law, "Power procured for basic generation service by an electric public utility shall be purchased, at prices consistent with market conditions." N.J.S.A. § 48:3-57(a)(1). Therefore, the rates electric public utilities charge, such as PSE&G who provides basic generation service, must be reflective of market conditions.

36. PSE&G is required to submit its rates to the NJBPU for approval, and the charges assessed to customers for basic generation service "shall be regulated by the NJBPU." N.J.S.A. § 48:3-57(a)(1). PSE&G is Verde's largest competitor per the company's 2017-2018 investor fact book, which states that PSE&G is "New Jersey's largest electric and gas utility." *See* <https://tinyurl.com/PSE-GFactbook>, at 5. PSE&G currently serves nearly three quarters of New Jersey's population in a service area consisting of a 2,600 square-mile diagonal corridor across the state from Bergen to Gloucester Counties. Indeed, PSE&G is the largest provider of electric service, serving 2.2 million electric customers in more than 300 urban, suburban and rural communities, including the state's six largest cities. *See* <https://power2switch.com/utility/pseg/>.

37. Similarly, ESCOs, such as Verde do not have unfettered discretion to set their rates as they please in any manner they wish.

#### **D. Verde Violates New Jersey's Retail Choice Consumer Protection Laws**

38. In 2008, New Jersey adopted a statutory scheme designed to protect consumers from deceptive business practices in the energy industry. *See generally* N.J. Admin. Code § 14:4-7.1 *et seq.* (the "Retail Choice Consumer Protection laws"). The energy industry-specific consumer protection standards were prompted by regulators noticing a failure in the deregulated

marketplace arising out of a lack of transparency on the part of ESCOs, as well as a lack of knowledge on the part of consumers. As a result of the information imbalance, ESCO consumers were often deceived into paying substantially more for electricity supply than if they had continued to receive supply from their utilities, all the while thinking they are getting a better deal.

39. In order to address the deregulated marketplace's failures, the energy industry-specific consumer protection statutes set forth stringent marketing, disclosure, and contractual requirements for TPS.

40. For example, TPS are "prohibited from [m]aking false or misleading advertising claims to a potential residential customer." N.J. Admin. Code § 14:4-7.3(d)(1); *accord* N.J. Admin. Code § 14:4-7.4(n)(1) (same).

41. Moreover, following an TPS' initial solicitation of a potential retail customer, the ESCO must provide the customer with a contract, which must "clearly and conspicuously state that the purpose of the document is to authorize a change in the customer's TPS, and include explicit terms and conditions."

42. Verde was also obligated to follow—but instead violated—Section 14:4-7.6(b) of New Jersey's Administrative Code, which mandates that Verde's Terms of Service (the "Agreement") provide "a clear and unambiguous statement of the precise mechanism or formula by which the price will be determined[.]" N.J. Admin. Code § 14:4-7.6.

43. This provision is designed to protect customers from precisely the type of predatory behavior in which Verde indulges but cannot justify.

44. Thus, by requiring that that ESCOs "clear[ly] and unambiguous[ly]" describe the components of their variable rate pricing methodologies, New Jersey law prohibits ESCOs from providing customers with vague and non-descript pricing factors. As such, the pricing

disclosures prevent ESCOs, like Verde, from claiming that their pricing methodologies provide them with unfettered authority or discretion to set variable rates.

45. Simply put, only one clause in Verde's Agreement describes the basis of its variable rate, and it states that the "customer will receive electricity from Verde at a variable generation rate" that "may fluctuate monthly with market conditions." Verde's Terms of Service are attached hereto as **Exhibit A**.

46. The vague and non-descript factor – "market conditions" – is neither clear nor unambiguous and thus, violative of the New Jersey Retail Choice Consumer Protection Laws.

47. Verde's deceptive practices emerge from, and attempt to exploit, the deregulation of the electricity supply market in New Jersey. In doing so, Verde's Agreement directly contravenes its legal obligations to consumers, including Mr. Marshall.

48. Verde is prohibited from arbitrarily setting its rates, *see* N.J. Admin. Code § 14:4-7.6(b), but that is exactly what Verde did.

49. Thus, the Agreement, interpreted in the light of N.J. Admin. Code § 14:4-7.6(b), does not afford Verde the unfettered discretion it uses to set its rate based on unspecified market conditions.

50. Moreover, the Agreement is silent as to any discretion Verde may have in setting its variable rates. As such, the discretion Verde uses to set its rate based on unspecified market conditions must be reasonable.

51. When Verde promised prospective customers that they would be charged a variable generation rate based on "market conditions," the company knew that its promise was false.

52. By making promises it does not intend to honor and engaging in unfair dealings, Verde subverts the purpose of the deregulation of utilities in New Jersey and prevents its

customers from receiving the benefits they were promised by Verde. In reality, most customers, including Mr. Marshall, would be far better off staying with their local utilities or any other energy suppliers than switching to Verde because all Verde does is abuse its discretion to charge unreasonable rates to profiteer off its customers.

53. Instead of benefitting from switching to Verde, typical customers lose out – to the tune of hundreds or even thousands of dollars per year. Thus, Verde deceptively causes its customers to pay considerably more for electricity services than they should have and otherwise would have paid.

**D. Plaintiff Marshall's Experience**

54. In August 2011, Plaintiff was solicited by Discount Energy Group, LLC to switch his electricity service from his local utility, PSE&G, with the promise that he would save money on his electricity bills if he switched. Induced by this promise, Plaintiff made the switch shortly thereafter.

55. Plaintiff's service with Discount Energy Group, LLC was short-lived. In July 2012, Plaintiff received a notice in the mail that his electricity service was being reassigned from Discount Energy Group, LLC to Verde.

56. Plaintiff also received in the mail a Welcome Letter from Verde, dated July 31, 2012, in which Verde made three specific, material misrepresentations. *See* Verde Welcome Letter, attached as **Exhibit B**.

- a. **First**, Verde represented that “[W]e have a strong focus on enabling our customers to save money on their monthly electric bills and in the past three years have helped our over 250,000 customers save an estimated 17 million dollars on their bills.”
- b. This representation was made to induce Plaintiff not to reject the switch over to Verde's plan because a reasonable consumer like Mr. Marshall would understand that if he remained in Verde's service that he would in fact save money and not be overcharged thousands of dollars. Based upon the comparisons in the chart

below, that has not happened. Even if the past savings claim is true, Verde did not save Mr. Marshall money after he was switched over to Verde's plan.

- c. **Second**, Verde promised in its solicitation letter that it was lowering Plaintiff's Discount Energy Group, LLC rate of \$0.114704/KWH to Verde's rate of \$0.1065/KWH.
- d. Tellingly, this promise contained no durational requirement – a clear violation of N.J. Admin. Code § 14:4-7.6(b). As such, reasonable consumers, including Mr. Marshall, expected that this promise of savings was permanent rather than of limited duration. Verde purposely left this durational requirement open-ended and vague in order to induce Plaintiff to enroll in its plan, leading Plaintiff to believe the savings would continue throughout his service with Verde.
- e. **Third**, Verde represented that they “look forward to saving you money on your monthly electric bill in the months to come.”
- f. This promise is demonstrably false because Plaintiff did not save money on his electric bill “in the months to come.” Instead, as discussed below, Plaintiff was overcharged thousands of dollars when he paid his electric bills.

57. The representation that Verde would offer Plaintiff a competitive market-based rate was reinforced and confirmed by Defendant's standard Terms of Service. *See* Exhibit A. The Agreement represents, “**Price**: Customer will receive electricity from Verde at a variable generation rate. Customer agrees and understands that the rate may fluctuate monthly with market conditions.” (emphasis in the original). These Terms of Service were reproduced on the back of the above-referenced Welcome Letter, *see* Exhibit B, which Plaintiff read.

58. Accordingly, any reasonable consumer would understand that Verde's variable rates would be reasonably related to and fluctuate in a manner correlated with the underlying wholesale and retail electric prices. In other words, a reasonable consumer would infer a direct link between the two. Indeed, there would be no conceivable reason for a consumer to sign up for Verde's energy plan if s/he did not believe s/he would receive a better overall deal on their electricity, based on its competitive advantage in obtaining prices in the energy marketplace.

59. In addition, in the very first paragraph in Verde's Agreement under the bold title, “**1. Price**”, Verde states “Customer will receive electricity from Verde at a variable generation

rate . . . . Please see Verde's website **www.lowcostpower.com** for current rates and updates.”

*See* Exhibit A § 1 (emphasis added in website address).

60. Reading these statements along with the website name, which Verde chose to place at the top of its Agreement in the first paragraph – the same paragraph where it describes the basis for its variable rate pricing, Plaintiff and other consumers reasonably concluded that Verde was offering them “low cost power” at low variable rates relative to other prices offered in the market.

61. The Agreement provided Mr. Marshall with a seven-day rescissionary period (or, pursuant to the Agreement, the “confirmation period”) during which he could rescind the Agreement prior to its commencement should he not agree to its terms. Specifically, the Agreement states that, “[t]his Agreement will not be binding on the Customer until the 7-day confirmation period has expired.” *See* Exhibit A, § 2. Thus, during that rescissionary period, the Agreement served as a solicitation in which Defendant identified the basis upon which the promised variable rate would be determined.

62. Based on Verde's misrepresentations, Plaintiff chose to not rescind the transfer to Verde for electricity and switched over to Verde for electricity in August 2012. As a result, Plaintiff was placed on Verde's variable rate plan.

63. However, rather than providing low-cost, competitive electric rates that were tied to the market at large, Verde charged Plaintiff exorbitant monthly rates that were far higher than competitors' rates and did not decrease with market conditions.

64. Mr. Marshall expected that Verde would price its variable rate as obligated under the Agreement. The variable rate was consistently higher than his initial rate, failed to fluctuate in accordance with wholesale and retail electricity market pricing, and was often substantially higher than PSE&G's and other ESCOs' retail electricity prices. Unfortunately, Mr. Marshall's

knowledge concerning commodity markets and prices -- like that of any other typical residential energy consumer -- was limited and prevented him from recognizing that Defendant was engaged in unauthorized pricing practices.

65. Plaintiff overpaid for electricity because of Verde's unfair and deceptive acts and practices. He would not have enrolled in Verde's plan but for its false representations. Had Plaintiff known that Verde's rates would be significantly higher than the wholesale and retail electricity market prices, that the rates would not decrease in line with wholesale and retail electricity market rates, or that Verde would not provide him with a competitive, low-cost electric rate, he would not have made the decision to enroll in Verde's plan.

66. Plaintiff paid Verde's variable rate until January 2018, when he canceled his service with Defendant. The following table identifies the billing periods during this time, the variable rates Defendant charged Plaintiff, the corresponding rates PSE&G would have charged for electricity ("Public Utility Rate"), and the then-prevailing PJM wholesale rate for electricity. The chart demonstrates that Verde did not provide Plaintiff with (a) low-cost power; (b) a competitive rate – both, or (c) a rate which decreased in line with whole and retail electricity market rates—all of which it promised to Plaintiff and other consumers.

<b>Billing Period End Date<sup>5</sup></b>	<b>Verde's Rate (\$/kWh)</b>	<b>Public Utility Rate<sup>6</sup> (\$/kWh)</b>	<b>PJM Wholesale Rate<sup>7</sup> (\$/kWh)</b>
10/14/2016	\$0.1799	\$0.1184	\$0.0360
11/14/2016	\$0.1799	\$0.1161	\$0.0398
12/15/2016	\$0.1899	\$0.1160	\$0.0570
1/18/2017	\$0.1999	\$0.1186	\$0.0569
2/15/2017	\$0.1999	\$0.1190	\$0.0464

<sup>5</sup> Billing Period begins approximately thirty days prior.

<sup>6</sup> This is the PSE&G supply rate.

<sup>7</sup> This is the PJM Wholesale Rate, which was calculated by adding the Weighted Locational Marginal Pricing (LMP) and other PJM Charges, such as capacity, ancillary services, etc. based upon Plaintiff's Utility load zone for the applicable period.

3/17/2017	\$0.1949	\$0.1194	\$0.0560
4/18/2017	\$0.1949	\$0.1217	\$0.0515
5/17/2017	\$0.1949	\$0.1263	\$0.0507
6/16/2017	\$0.1949	\$0.1248	\$0.0468
7/18/2017	\$0.1949	\$0.1250	\$0.0516
8/16/2017	\$0.1949	\$0.1190	\$0.0452
9/15/2017	\$0.1949	\$0.1131	\$0.0439
10/16/2017	\$0.1949	\$0.1067	\$0.0470
11/14/2017	\$0.1949	\$0.1084	\$0.0492
12/15/2017	\$0.1999	\$0.1197	\$0.0738

**E. Verde's Public Misrepresentations**

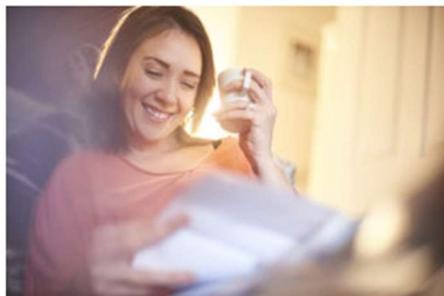
67. The home page of Verde's website contains numerous representations, including representations that Verde provides "competitive pricing" and "competitive electricity rates."

68. As such, Plaintiff and other consumers reasonably understood that Verde was promising to provide its customers with "low cost power" and "competitive" rates for electricity—namely, rates competitive with the local utility and other ESCO rates in the market at large.

69. The website's misleading and deceptive misrepresentations not only support the deceptions in Verde's Agreement and contracts with Plaintiff, but are also independent deceptive acts or practices, in and of themselves.

70. A screenshot of the landing page of Verde's website, [www.lowcostpower.com](http://www.lowcostpower.com), is shown below. The representations there reinforce Verde's promise to provide competitive, low-cost rates to Plaintiff and all Verde customers.

## KEEPING ENERGY CHOICE SIGNIFICANT



Join other smart consumers who have selected Verde Energy for 100% renewable energy. Make real changes in your everyday cost of living and your impact on the environment starting

with your electric bill. Green energy is a smart and sustainable decision that makes sense. We are proud to offer competitive electricity rates for 100% renewable energy. Simply, the right choice for you and the environment, and with our \$100 Rebate, it makes sense for your wallet too!

Enter your Zip Code

FIND YOUR BEST RATE

71. Based on these public representations, any reasonable consumer would understand that Verde’s variable rate would reflect Verde’s cost for purchasing electricity at wholesale, and that the variable rate would be competitive with the rate offered by the local utility and other ESCOs.

72. Any reasonable consumer would understand based on Verde’s representations in its Agreement that the “[c]ustomer will receive electricity from Verde at a variable generation rate” that “may fluctuate monthly with market conditions,” to mean that the Verde’s variable generation rate for electricity would reflect wholesale and retail electricity market prices and local competitors’ rates (i.e., the local utility – PSE&G for Plaintiff Marshall – and other ESCOs).

73. PSE&G is required to set its electricity generation rates at prices consistent with market conditions.” *See* N.J.S.A. § 48:3-57(a)(1). Verde’s contract states that all of its customers will receive electricity at a “variable generation rate . . . [that] may fluctuate monthly with market conditions”. The variability component of Verde’s rate is therefore tied expressly to

the generation rate. Thus, a reasonable consumer, like Plaintiff Marshall and the Putative Class Members would expect that Verde's variable generation rate would at least be commensurate with, if not lower than PSE&G's generation rate, because both Verde and PSE&G purchase electricity from generators who sell at wholesale.

74. PJM runs the wholesale electricity market that generators sell (offer) into, and generators are paid the wholesale price of energy based on the PJM market. Thus, there is simply no reasonable explanation for Verde's variable generation rate to always remain consistently higher than PSE&G's generation rate other than to price gouge its customers and reap exorbitant profits.

75. In fact, Verde's rate should be competitive with, if not beat, PSE&G's rate because, as discussed above, ESCOs, such as Verde, have various options to buy electricity at wholesale for resale to retail customers in New Jersey. The entire point of energy deregulation is to allow ESCOs, like Verde, to use these and other innovative purchasing strategies to reduce electricity costs thereby lowering the electricity rates that customers pay.

76. But instead, Verde's variable rates always remain substantially higher than PSE&G's rates. In fact, in numerous months Verde's rate remained at a level **80% higher** than PSE&G's rate.

77. Not only does PSE&G's supply rate serve as the ideal comparator in this case, but PSE&G is also Verde's primary electric supplier and competitor in Mr. Marshall's service area.

78. And because the utility is the primary electricity supplier and competitor in virtually all utility regions, including in Mr. Marshall's utility region, its rates by definition represent retail electricity market pricing.

79. Battling on the same playing field, Verde has a tactical advantage over PSE&G in providing lower electricity prices to its customers because it can purchase electricity from any

number of markets using any number of purchasing and hedging strategies. And inevitably, these markets are controlled by suppliers who base their wholesale rates on the PJM wholesale market price. Therefore, while Verde's rates may not precisely match PSE&G's rates<sup>8</sup>, Verde's rates should be commensurate with – if not lower than – PSE&G's generate rate. But, as evidenced in the table in paragraph 66, *supra*, they are always considerably higher and instead wildly disparate.

80. That Defendant's variable rate is not based at all on market conditions is also demonstrated by the fact that Defendant's rate always remained significantly higher than and was not reflective of the changes in the PJM wholesale price. For example, the average wholesale price dropped from \$0.0560 in March 2017 to \$0.0515 in April 2017 to \$0.0507 in May 2017 to \$0.0468 in June 2017, while Verde's price remained constant at \$0.1949 in those same months. Furthermore, in numerous months Defendant's rate remained at a level *more than triple* the wholesale rate.

81. A reasonable consumer, like Plaintiff, would understand that Verde's variable generation rates fluctuate in a manner correlated with the underlying PJM wholesale market rate, and that, although prices would go up when wholesale prices rose, they would also go down when wholesale prices decreased, enabling consumers to take advantage of market lows.

82. That Defendant's variable generation rates do not reflect market costs for wholesale electricity is demonstrated by the disconnect between changes in wholesale electricity prices and Defendant's costs. While the PJM wholesale rate might show more short-term fluctuations than Defendant's costs, over time the PJM wholesale rate is an accurate reflection of wholesale market costs.

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<sup>8</sup> Because, after all, PSE&G's price may include a retail margin. *See* N.J.S.A. § 48:3-57.

83. The cost of wholesale electricity is the primary non-overhead cost that Defendant incurs in order to sell electricity to its customers. Moreover, Verde expressly ties the variability component to the “generation rate” because its contract states that all of its customers will receive electricity at a “variable generation rate . . . [that] may fluctuate monthly with market conditions.” But, as evidenced in the chart above, Verde’s variable rate always remains significantly higher than the PJM wholesale market rate – one of the plausible indicators of “market conditions.”

84. The other factors Defendant identifies in the Terms of Service other than the wholesale cost of electricity that encompass the price of electricity (such as applicable taxes and charges) are relatively small in terms of the overall costs Defendant incurs to provide retail electricity. Therefore, these other cost factors cannot explain the drastic increases in Defendant’s variable rate or the reason its rates are so disconnected from changes in wholesale costs.

85. A reasonable consumer would also understand a variable rate based upon market conditions to be competitive with other rates available on the market, i.e., Verde’s other rate offerings, the local utility’s rate, and other local ESCOs’ rates. In addition to the PJM wholesale rate, these are other plausible indicators of market conditions.

86. But instead, and contrary to reasonable consumer expectation, Verde’s variable rate:

- always exceeded Mr. Marshall’s initial rate of \$.1065/kWh;
- always exceeded Verde’s other fixed rate offerings;
- always remained significantly higher than PSE&G’s rate – an ideal comparator of a rate based on market conditions; and
- was higher than *all* of the 67 ESCOs providing residential electricity services in New Jersey in 2017. *See* 2017 Retail Power Marketers Sales – Residential, U.S. Energy Information Administration, <http://bit.ly/2pgWXpO> (last visited April 12, 2019).

87. Verde used its variable rates as a pure profit center, increasing the rates charged to Plaintiff and class members when wholesale prices rose, but staying at a level almost *four times* the wholesale market rates when the wholesale prices fell. And Plaintiff's variable rate was consistently higher than his initial rate and often substantially higher than PSE&G's and *all other* competing ESCOs' rates.

88. Verde's unfair and deceptive acts and practices, and its misstatements and omissions, caused injury to Plaintiff and other reasonable consumers because they believed that by switching to Verde's electricity plan, they were contracting for a competitive, low-cost variable generation rate tied to the wholesale market rate.

89. Verde breached its consumer contracts as evidenced by Verde's drastic rate disparities with those of the public utility and the fact that Verde's rates were always higher than PSE&G's rates during the time Plaintiff was enrolled in Verde's plan. Verde does not charge a rate based on market conditions as it states in its solicitations and contracts with consumers, but rather gouges its customers by charging outrageously high rates.

90. Indeed, Verde's customers are charged variable generation rates that are substantially higher than those of its local competitors, higher than Verde's own initial rate offerings, and invariably higher than the PJM wholesale rate – all reasonable and plausible indicators of market conditions – a term which is undefined in Verde's Terms of Service. Verde intentionally fails to disclose this material fact to its customers because no reasonable consumer, including Plaintiff, who knows the truth about Verde's exorbitant rates would choose Verde as an electricity supplier.

91. Verde's statements and omissions regarding its electricity rates are materially misleading, as the most important consideration for any reasonable consumer when choosing an energy supplier is price. No reasonable consumer, including Plaintiff, who knew the truth about

Verde's exorbitant rates would choose Verde as an electricity supplier – but no reasonable consumer, including Plaintiff, could be expected to uncover the truth until after they have paid Verde's exorbitant rates and had the opportunity to compare them to other rates charged during the same time period and in the same location.

92. Verde knowingly and intentionally made misleading statements regarding its electric rates so that reasonable consumers like Plaintiff would be induced to enroll in Verde's electricity plan.

93. Verde's only product is electricity delivered by local utility companies, which has the exact same qualities as electricity supplied by other electric suppliers or local utilities. There is nothing to differentiate Verde from other electric suppliers or local utilities as to warrant higher rates, and the potential for a price based on market conditions is the only reason Plaintiff or any other reasonable consumer would enter into a contract for electricity with Verde.

94. Verde knows its rates are unconscionably high, and the misrepresentations it makes about its Variable Rates being market-based were made for the sole purpose of inducing consumers to sign up for Verde's electricity supply. Verde reaps outrageous profits to the direct detriment of New Jersey consumers without regard to the consequences high utility bills cause such consumers. As such, Verde acted with actual malice or with wanton and willful disregard for consumers' well-being.

95. As a direct result of Verde's misrepresentations, Plaintiff and members of the Putative Class overpaid for electricity and therefore suffered common injuries, for which damages can be calculated.

96. Had Verde charged Plaintiff a rate that was actually based on market conditions, Plaintiff would have been charged a substantially lower rate for his electricity. Accordingly, he was injured when he paid his inflated bill.

**F. Plaintiff Suffered Injury Due To Verde's Improper and Fraudulent Business Practices**

97. Plaintiff paid Verde's variable rate from August 2012 through January 2018. Verde's rates consistently remain significantly higher than the local utilities' rates and the wholesale market rate. For example, in October 2017, Plaintiff paid a variable rate of 19.49 cents per kWh, *nearly four times* the average wholesale rate and *nearly double* the utility rate.

98. Verde's conduct, as alleged herein, was unfair and deceptive. Defendant portrayed itself as providing Plaintiff and the Class with an opportunity to purchase low, or lower, energy at competitive rates compared to other rates in the market, when, in fact, the company did the opposite: it charged Plaintiff and the Class more than the underlying retail market rates for energy.

99. Plaintiff paid Verde's exorbitant variable electricity rates and thereby suffered an ascertainable loss. Verde's conduct as alleged above was the cause of Plaintiff's loss, which was a reasonably foreseeable result of that conduct.

100. Similarly, other members of the Putative Class have routinely paid substantially more for their energy needs since switching to and enrolling in Defendant's electricity plans.

101. Verde's unfair and deceptive scheme as alleged herein constitutes a continuing violation over the course of each and every time Plaintiff (or any other class member) was overcharged for electricity. Further, Verde actively concealed its wrongful conduct by maintaining to Plaintiff and other members of the Putative Class, through Verde's marketing, invoicing, and other communications directed to consumers, misrepresenting that the prices Verde charged for electricity were the result of competitive market forces when, in reality, they were the result of Verde's fraud. Plaintiff and other members of the class could not discover

through reasonable diligence the nature of Verde's wrongful conduct earlier by virtue of Verde's active concealment of its wrongdoing.

### **RULE 9(b) ALLEGATIONS**

102. Federal Rule of Civil Procedure 9(b) provides that “[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.” As detailed in the paragraphs above and below, Plaintiff has satisfied the requirements of Rule 9(b) by establishing the following elements with sufficient particularity:

103. **WHO:** Verde, acting through its corporate personnel, makes material misrepresentations and omissions of fact in the marketing, advertising, promotion, and sale of electricity.

104. **WHAT:** Verde makes material misrepresentations and omissions by marketing, advertising, promoting, and selling its variable rate as a rate that “Customer will receive electricity from Verde at a variable generation rate. Customer agrees and understands that the rate may fluctuate monthly with market conditions.” The language that Verde uses in its solicitations falsely and deceptively creates the impression that its variable rate would vary based on changes in the wholesale cost of electricity and competitors' rates. Verde makes these misrepresentations with respect to its variable rate even though it knows that its variable rate will not vary based on market conditions as the variable rate does not fluctuate based on changes in competitors' rates or wholesale rates. Verde fails to inform customers that there are numerous factors it considers that are not disclosed in its solicitations or contract, despite legally-mandated variable pricing disclosure requirements. No reasonable consumer exposed to Verde's representations would expect that there would be no connection between wholesale and retail electricity market pricing and Verde's variable rates.

105. **WHERE:** In Verde's standard Agreement, which, by its own terms, constitutes a solicitation during the rescission period, Verde intended that Plaintiff and other prospective consumers rely on the solicitation's terms.

106. **WHEN:** Verde made the material misrepresentations and omissions when it solicited Mr. Marshall in July of 2012 by providing him with its deceptive standard Agreement.

107. **WHY:** Knowing that price is the most fundamental factor in choosing an energy supplier, Verde makes these claims with respect to its variable rate with the purpose of inducing Mr. Marshall and other prospective customers to enroll in its electricity supply services. By deceptively inducing customers to switch to its energy supply, Verde has successfully reaped millions in profits at the expense of its unsuspecting customers.

108. **HOW:** Verde makes material misrepresentations and fails to disclose material facts concerning its variable rate when marketing, advertising, promoting, and selling its variable rate as a "low-cost" and "competitive" rate that "may fluctuate monthly with market conditions". In reality, Verde does not price its variable rate competitively with either the local utilities or competing ESCOs, and there is no correlation between Verde's variable rate and market conditions. Instead, Verde's rate is consistently higher than that of its primary competitor (the local utility) as well as rates charged by *all* other ESCOs and is invariably higher than its own teaser and fixed rates, all of which represent retail electricity market prices. Verde's variable rates are likewise significantly higher than, and fail to fluctuate in accordance with, wholesale electricity market pricing.

#### **CLASS ACTION ALLEGATIONS**

109. Plaintiff brings this action on his own behalf and additionally, pursuant to Rule 23(b)(2) and (3) of the Federal Rules of Civil Procedure, on behalf of the following Class:

**All persons enrolled in a Verde Energy USA, Inc., variable rate electric plan in connection with a property located within New Jersey at any time within the applicable statutes of limitations preceding the filing of this action through and including the date of class certification (the “Class”).**

110. Plaintiff reserves the right to modify or amend the definition of the proposed Class or to propose sub-classes as might be necessary or appropriate.

111. 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, legal representative, predecessor, successor, or assignee of Defendant.

112. This action is brought as a class action for the following reasons:

- a. The Class consists of thousands of persons and is therefore so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
- b. There are questions of law or fact common to the Class that predominate over any questions affecting only individual members, including:
  - i. whether Defendant violated N.J.S.A. §§ 56: 8-1 *et seq.*;
  - ii. whether Defendant violated N.J. Stat. Ann. § 48:3-49, *et. seq.*;
  - iii. whether Defendant breached its contract with New Jersey consumers by charging variable generation rates unrelated to the market values;
  - iv. whether Defendant’s actions and omissions violated the New Jersey TCCWNA, N.J.S.A. § 56:12-15;
  - v. whether Defendant breached the covenant of good faith and fair dealing by exercising its unilateral price-setting discretion in bad faith, *i.e.*, to price gouge;
  - vi. whether Plaintiff and the Class have sustained damages and, if so, the proper measure thereof; and
  - vii. whether Defendant should be enjoined from continuing to charge variable generation rates unrelated to the market values;
- c. The claims asserted by Plaintiff are typical of the claims of the members of the Class;

- d. Plaintiff will fairly and adequately protect the interests of the Class, and Plaintiff has retained attorneys experienced in class and complex litigation, including class litigation involving consumer protection and ESCOs;
- e. Prosecuting separate actions by individual class members would create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for Defendant;
- f. Defendant has acted on grounds that apply generally to the Class, namely representing that its variable rates are reflective of market conditions, *i.e.*, competitive and reflective of the wholesale market, when Defendant's rates are in fact substantially higher, so that final injunctive relief prohibiting Defendant from continuing its deceptive practices is appropriate with respect to the Class as a whole;
- g. A class action is superior to other available methods for the fair and efficient adjudication of the controversy, for at least the following reasons:
  - i. Absent a class action, Class members as a practical matter will be unable to obtain redress, Defendant's violations of their legal obligations will continue without remedy, additional consumers and purchasers will be harmed, and Defendant will continue to retain its ill-gotten gains;
  - ii. It would be a substantial hardship for most individual members of the Class if they were forced to prosecute individual actions;
  - iii. When the liability of Defendant has been adjudicated, the Court will be able to determine the claims of all members of the Class;
  - iv. A class action will permit an orderly and expeditious administration of Class claims, foster economies of time, effort, and expense, and ensure uniformity of decisions;
  - v. The lawsuit presents no difficulties that would impede its management by the Court as a class action; and
  - vi. Defendant has acted on grounds generally applicable to Class members, making class-wide monetary and injunctive relief appropriate.

113. Defendant's violations of N.J.S.A. §§ 56:8-1 *et seq.* and 56:12-15, and the common law, are applicable to all members of the Class, and Plaintiff is entitled to have Defendant enjoined from engaging in illegal and deceptive conduct in the future.

**CLAIMS FOR RELIEF**

**FIRST CAUSE OF ACTION**  
**VIOLATION OF THE EDECA AND RETAIL CHOICE CONSUMER  
PROTECTION REGULATIONS  
(FAILING TO ADHERE TO ADVERTISING AND MARKETING STANDARDS)  
(N.J. Stat. Ann. § 48:3-49, *et. seq.*)**

114. Plaintiff repeats and re-alleges the allegations contained in the previous paragraphs above as if fully set forth herein.

115. The Electric Discount and Energy Competition Act (“EDECA”), N.J.S.A. § 48:3-49 *et seq.*, authorized the New Jersey Board of Public Utilities (“Board”) to adopt consumer protection standards for electric power suppliers and/or gas suppliers including, but not limited to, the marketing and advertising of utility services. N.J.S.A. § 48:3-85(a).

116. The Retail Choice Consumer Protection Regulations, N.J.A.C. § 14:4-7.1 *et seq.*, apply to all electric power suppliers and gas suppliers.

117. The Retail Choice Consumer Protection Regulations, specifically N.J.A.C. § 14:4-7.4, concern marketing standards and provide, in relevant part:

- (b) The marketing materials provided by the TPS [third party supplier] shall also include either of the following:
  - 1. 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 LDC [local distribution company]; or
  - 2. If a TPS does not offer a fixed price or guaranteed price electric generation service or gas supply service, the TPS shall describe in clear and conspicuous language the mechanism or formula by which the price is determined, and provide detailed customer bill comparison, which demonstrates for a residential customer for 250 kWh, 500 kWh, 1,000 kWh and 2,000 kWh plus any monthly fixed and/or variable charge(s) for each month of the year, the customer’s total electric bill under the proposed contract with the customer’s total electric bill at the same electricity usage levels for each month of the year if the customer were to remain on basic generation service; and for 50 Therms, 100 Therms, 150 Therms and 200 Therms plus any monthly fixed and/or variable charge(s)

for each month of the year, the customer's total gas bill under the proposed contract with the customer's total gas bill at the same gas usage levels for each month of the year if the customer's total gas bill at the same gas usage levels for each month of the year if the customer were to remain on basic gas supply service, for the term of the contract being offered, such TPS shall also clearly indicate the period of time for which the savings offer is valid, and the term (duration) of the contract being offered.

118. In their offering for sale and sale of electric generation service, Verde has violated the Retail Choice Consumer Protection Regulations, N.J.A.C. § 14:4-7.4, by:

- a. Failing to include in marketing materials clear and conspicuous language regarding the mechanism or formula by which Verde's variable electric rate is determined;
- b. Misrepresenting in its advertising materials how much money consumers will save if they switch to Verde;

119. Each violation by Verde of the Retail Choice Consumer Protection Regulations, N.J.A.C. § 14:4-7.4 constitutes a per se violation of the EDECA, § 48:3-83.

**SECOND CAUSE OF ACTION**  
**VIOLATION OF THE EDECA AND RETAIL CHOICE CONSUMER**  
**PROTECTION REGULATIONS**  
**(FAILING TO ADHERE TO CONTRACT STANDARDS)**  
**(N.J. Stat. Ann. § 48:3-49, et. seq.)**

120. Plaintiff repeats and re-alleges the allegations contained in the previous paragraphs above as if fully set forth herein.

121. The EDECA, N.J.S.A. § 48:3-85(a) authorized the Board to adopt contract standards for electric power suppliers and/or gas suppliers as follows:

- (1) Contract standards shall include, but not be limited to, requirements that electric power supply contracts or gas supply contracts must conspicuously disclose the duration of the contract; state the price per kilowatt hour or per Therm or other pricing determinant approved by the board; have the customer's written signature; the customer's electronic signature; and audio recording of a telephone call initiated by the customer; independent, third-party verification, in accordance with section 37 of P.L. 1999, c.23 (C. 48:3-86), of a telephone call initiated by an electric power supplier, gas supplier or private aggregator, or such alternative forms of verification as the board, in consultation with the Division of Consumer Affairs, may permit for switching electric power suppliers or gas suppliers and

for contract renewal; and include termination procedures, notice of any fees, and toll-free or local telephone numbers for the electric power supplier or gas supplier and for the board.

122. The Retail Choice Consumer Protection Regulations, specifically N.J.A.C. § 14:4-7.6 concern contract standards and provide, in relevant part:

(b) A TPS contract shall clearly and conspicuously state that the purpose of the document is to authorize a change in the customer's TPS, and include explicit terms and conditions, which shall include, at a minimum:

1. A clear statement of the duration of the contract;
2. The price per kWh or Therm or, if a fixed pricing mechanism or formula by which the price will be determined; if the contract contains no particular pricing terms, but rather, expresses the charges for service rendered on a percentage savings basis, the contract language shall clearly and conspicuously state that the percentage savings being guaranteed, as well as the price or charges to which the percentage savings is being compared;
6. No statement that asks any customers to waive any rights they have under New Jersey or Federal Consumer Protection laws.

123. In their offering for sale and sale of electric generation service and/or gas supply service, Verde has violated the Retail Choice Consumer Protection Regulations, N.J.A.C. 14:4-7.6 by:

- a. Failing to disclose the duration of the contract.
- b. Failing to disclose the formula for its variable electric rate.

124. Each violation by Verde of the Retail Choice Consumer Protection Regulations, specifically N.J.A.C. § 14:4-7.6, comprises a per se violation of the EDECA, N.J.S.A. § 48:3-83 and § 48:3-85(a).

**THIRD CAUSE OF ACTION**  
**VIOLATION OF THE NEW JERSEY CONSUMER FRAUD ACT**  
**(N.J.S.A. §§ 56:8-1 *et seq.*)**

125. Plaintiff repeats and re-alleges the allegations contained in the previous paragraphs above as if fully set forth herein.

126. The 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.

127. The New Jersey Consumer Fraud Act “was intended to be one of the strongest consumer protection laws in the nation ... [and] should be construed liberally in favor of protecting consumers.” *Homa v. Am. Express Co.*, 558 F.3d 225, 232 (3d Cir. 2009) (quoting *Huffman v. Robinson*, 221 N.J. Super. 315 (L. Div. 1986)).

128. Plaintiff and other members of the class are “persons” within the meaning of N.J.S.A. § 56:8-1(d).

129. Defendant’s conduct alleged herein constitutes a “sale” within the meaning of N.J.S.A. § 56:8-1(e).

130. The EDECA, specifically N.J.S.A. § 48:3-84, provides as follows:

a. The rights, remedies and prohibitions accorded by the provisions of this act are in addition to and cumulative of any right, remedy or prohibition accorded by the common law or any statute of this State and nothing contained herein shall be construed to deny, abrogate or impair any such common law or statutory right, remedy or prohibition.

131. Verde has engaged in unconscionable commercial practices by inducing consumers to switch electric or gas suppliers by promising savings, which did not occur.

132. Verde’s unlawful conduct in violation of the CFA includes, but is not limited to:

- a. Promising, the failing, to provide consumers with savings on electric generation service;
- b. Misrepresenting that Verde's electric variable rate would correlate with market conditions, when it would not;
- c. Misrepresenting that Verde would provide "low cost power" on its website, when it did not;
- d. Violating the contract requirements of the EDECA, specifically the Retail Choice Consumer Protection Regulations, N.J.A.C. 14:4-7.6, as discussed herein.

133. Defendant Verde has engaged in unfair, unlawful and deceptive acts in trade and commerce which have the capacity and tendency to deceive and, in fact, did deceive Plaintiff and the class, and damaged Plaintiff and class members.

134. Defendant's misrepresentations and false, deceptive, and misleading statements and omissions with respect to the variable rates it charges for electricity, as described above, constitute affirmative misrepresentations in connection with the marketing, advertising, promotion, and sale of electricity in violation of the Consumer Fraud Act.

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

136. By misrepresenting that its variable rates for electricity were competitive market-based rates, Verde made material representations of fact that it knew, or should have known, were false and misleading and that had the tendency and capacity to be misleading.

137. By repeatedly referencing the website **www.lowcostpower.com** in Verde's Terms of Service, Defendant willfully misrepresented to reasonable consumers that its variable prices for power were "low cost" when in fact they were not.

138. Verde represents on its website that its rates are "competitive" and "competitively priced" with the rates otherwise available in the market. Verde further represents that its energy is "low cost". These representations are false and misleading.

139. Indeed, Verde's website address and content knowingly misrepresented to consumers that its pricing was a "competitive" option when it was in fact dramatically higher than wholesale prices, the local utility price and *all other* ESCOs' prices.

140. Defendant also failed to inform customers that its variable rates for electricity are substantially higher than those based on the market conditions in the electricity market and do not reflect the wholesale cost of purchasing electricity. That information would have been material to any consumer deciding whether to purchase electricity from Defendant.

141. Defendant further deceptively and consciously misrepresented the most determinative factors it uses to set variable rates.

142. Defendant knew at the time it promised prospective customers that they would be charged a variable rate based on market conditions that this promise was false.

143. Defendant made these false, deceptive, and misleading statements and omissions with the intent that consumers rely upon such statements.

144. Defendant's intentional concealments were designed to deceive current and prospective variable rate customers into believing that rates will be commensurate with market conditions in the Terms of Service. Defendant benefits from reliance and deprives consumers from informed purchasing decisions and savings.

145. Verde's conduct as alleged above constitutes a deceptive act or practice. Verde's variable electric rate representations as set forth above were and are likely to mislead consumers and Verde intended that consumers rely upon those representations. Plaintiff and other reasonable consumers reasonably interpreted Defendant's representations to mean that Verde's variable rates track the underlying wholesale power rates (when in fact they do not). Plaintiff and other reasonable consumers reasonably interpreted Defendant's representations to mean that Verde's variable rates were competitive (when in fact they were not). Verde's representations

were material to a reasonable consumer and likely to affect consumer decisions and conduct, including purchases of power from Verde pursuant to variable rate contracts.

146. Defendant's affirmative conduct and omissions constitute unlawful practices beyond a mere breach of contract. Rather, Defendant's practices are unconscionable and outside the norm of reasonable business practices. No reasonable consumer would enter into an energy contract in which the ESCO is permitted to charge whatever rates it wants. Yet, by deceiving consumers, Verde has managed to convince them to enter into exactly this kind of contract. This is plainly an unconscionable result.

147. Substantial aggravating circumstances are present here because Verde's business behavior in question stands outside the norm of reasonable business practice in that it has victimized Plaintiff and the Putative class members, who are average consumers.

148. Defendant's unlawful conduct was further aggravated by its violations of the Retail Choice Consumer Protection laws. Specifically, Defendant engaged in false and deceptive marketing in violation of N.J. Admin. Code § 14:4-7.3(d)(1). Defendant likewise failed to provide "a clear and unambiguous statement of the precise mechanism or formula by which the price will be determined," as required by N.J. Admin. Code § 14:4-7.6(b), and consequently deceived Plaintiff into consenting to a variable rate.

149. Verde has committed unconscionable business practices by setting its rates in bad faith in exercising its discretion to charge unreasonable rates to profiteer off its customers, who reasonably expected to pay Verde low-cost, competitive prices for electricity.

150. Verde also intentionally misrepresented its pricing methodology – that its rates would be competitive with other rates in the market and based on market conditions – to induce customers to sign up for Verde's electricity supply.

151. Plaintiff and other reasonable consumers interpreted and understood Verde's terms to offer rates that would vary based on the market and changes in the wholesale costs, and the affirmative representations or omissions discussed above may be construed as misleading and outside of reasonable business practices.

152. Plaintiff and the other members of the Putative Class entered into agreements to purchase electricity from Defendant for personal use and suffered ascertainable losses as a direct and proximate result of Defendant's actions in violation of the Consumer Fraud Act.

153. As a consequence of Defendant's wrongful actions, Plaintiff and the other members of the Putative Class suffered an ascertainable loss of monies based on the difference in the rate they were charged versus the rate they would have been charged had Defendant charged a competitive rate based on market conditions as represented by Verde, or had they not switched to Defendant from their previous supplier.

154. Plaintiff and other members of the Putative Class 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 their rates had been known.

155. Therefore, Defendant is liable to Plaintiff and the other members of the Putative Class 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.

156. Defendant knows that it charges a rate that is unconscionably high, and the misrepresentations it makes with regard to competitive, low-cost rates the fluctuate with market conditions were made for the sole purpose of inducing consumers to sign up for Defendant's electricity supply so that it can reap outrageous profits to the direct detriment of New Jersey consumers without regard to the consequences high utility bills cause such consumers. As such,

Defendant's actions were unconscionable and actuated by bad faith, lack of fair dealing, actual malice, or accompanied by wanton and willful disregard for consumers' well-being. Defendant is therefore additionally liable for punitive damages, in an amount to be determined at trial.

157. Defendant is also liable under the Consumer Fraud Act because it violates a regulation promulgated by the Division of Consumer Affairs and the NJBPU for the purpose of protecting consumers from being victimized by false or misleading rate claims by a TPS like Verde.

158. N.J. Stat. Ann. § 48:3-85(f) provides that "in consultation with the Division of Consumer Affairs in the Department of Law and Public Safety, [the NJBPU] shall adopt . . . interim advertising and marketing standards for electric power suppliers . . . which standards shall include, but not be limited to, prohibiting electric power suppliers, gas suppliers, brokers, energy agents, marketers, private aggregators, sales representatives, and telemarketers from: (a) making false or misleading advertising claims to a potential residential customer . . ."

159. Accordingly, pursuant to N.J. Admin. Code § 14:4-7.3(d)(1), ESCOs are "prohibited from [m]aking false or misleading advertising claims to a potential residential customer." *Accord* N.J. Admin. Code § 14:4-7.4(n)(1) (same).

160. One of the standards adopted to prohibit TPS from engaging in false and misleading marketing and advertising includes the requirement that a "TPS shall not make misrepresentations, in its solicitations or its marketing materials or any way, in violation of any standards implemented by the Board pursuant to the Act, of any other consumer protection laws or rules implemented or enforced by the Division of Consumer Affairs, or of the mechanics of the customer enrollment process adopted by the Board." N.J. Admin. Code § 14:4-7.4(i).

161. Another standard implemented by the BPU to ensure that consumers have all of the information they need to make an informed choice, rather than being induced to enter into an

agreement with a TPS for electricity service based on false and misleading rate claims, is that “[a] TPS contract shall clearly and conspicuously . . . include explicit terms and conditions, which shall include, at a minimum . . . a clear and unambiguous statement of the precise mechanism or formula by which the [variable] price will be determined.” N.J. Admin. Code § 14:4-7.6(b)(2).

162. Verde violated that requirement because its variable rate term does not contain a clear and unambiguous statement of the precise mechanism or formula by which the [variable] price will be determined, but instead contains an ambiguous statement that its rates would be based on undefined “market conditions”. Had Verde disclosed the precise mechanism or formula by which the variable price will be determined, namely that Verde charges a rate primarily based on undisclosed factors and its desire to reap outrageous and unreasonable profits, and that its rate would be many multiples higher than wholesale prices, then Plaintiff would not have entered into an agreement to purchase electricity from Verde.

**FOURTH CAUSE OF ACTION**  
**BREACH OF CONTRACT**

163. Plaintiff repeats and re-alleges the allegations contained in the previous paragraphs above as if fully set forth herein.

164. Plaintiff and the other members of the Putative Class entered into valid contracts with Defendant for the provision of electricity (the “Agreement”).

165. The act of imposing unreasonable and exorbitant energy prices – unrelated to wholesale and retail electricity market prices – in violation of the company’s representations amounts to a breach of a valid contract which caused Plaintiff and class members to suffer actual, ascertainable losses.

166. Plaintiff and other members of the class have performed all material obligations imposed on them in the contract. Defendant has not performed the obligations imposed on them in the contract.

167. No reasonable consumer, including Mr. Marshall, would interpret the contract as granting Defendant unfettered discretion to maximize profits at the expense of its customers.

168. Plaintiff and the members of the Putative Class were injured as a result because they were billed, and they paid, a charge for electricity that was higher than it would have been had Defendant based on the agreed-upon wholesale and retail electricity market prices.

169. By reason of the foregoing, Defendant is liable to Plaintiff and the Putative Class for the damages that they have suffered as a result of Defendant's actions, the amount of such damages to be determined at trial.

**FIFTH CAUSE OF ACTION**  
**BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**

170. Plaintiff repeats and re-alleges the allegations contained in the previous paragraphs above as if fully set forth herein.

171. Every contract in New Jersey contains 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 a contract's express terms. Under this covenant, we are not to suppose that one party is put at the mercy of the other but will read in any necessary conditions to ensure a mutuality of obligation under fair terms.

172. Under its Agreement, Defendant had limited unilateral discretion to set the variable rate for electricity based on wholesale and retail electricity market prices.

173. When a contract contains an indefinite price term – such, as here, Defendant's variable, market-based pricing – the seller does not have unfettered discretion to set the price.

174. Here, Defendant has failed to satisfy this obligation. Instead of setting its rates in good faith consistent with the market, Defendant has unilaterally imposed exorbitant, undisclosed rates on its customers, including Plaintiff and the members of the Putative Class. In actuality, Defendant's rates bear no reasonable relationship to wholesale and retail electricity market prices. While Defendant represents that its variable generation rates may fluctuate monthly according to market conditions, its rates will be low-cost and competitive with the market at large (as represented by the local public utilities – Verde's main competitors – and other ESCOs), in reality, Verde's rates generally far exceed wholesale and retail electricity market prices.

175. Under the covenant of good faith and fair dealing, Verde should have billed customers like Plaintiff at a reasonable, market-based rate as promised – that is, a rate similar, competitive, or equivalent to the rate charged by the class members' local public utilities during the class period. All monies paid above this reasonable amount should be restored to the class as damages.

176. Additionally, Defendant's conduct violated the marketing and pricing disclosure consumer protection standards promulgated in the Retail Choice Consumer Protection laws, and thereby violated our community standards of decency, fairness, and reasonableness.

177. Verde breached the implied covenant of good faith and fair dealing by arbitrarily and unreasonably by exploiting its unilateral access to information (namely, its actual pricing practices) to price gouge and frustrate Plaintiff and other Putative Class members' reasonable expectations that the variable rate for electricity would be commensurate with wholesale and retail electricity market prices..

178. Verde's performance of its discretionary functions under the Terms of Service, as alleged herein to maximize its revenue from variable electric rates, impedes the right of Plaintiff

and other members of the Putative Class to receive benefits that they reasonably expected to receive under the contract.

179. Verde acted in bad faith by abusing its discretion and purposefully hiding that its variable generation rates would never be based on wholesale and retail electricity market prices – vital information that is material to the Plaintiff and the Putative Class Members’ decisions to enroll in and remain enrolled in Verde’s plans – to ensure that the Plaintiff and Putative Class Members continued to perform under the contract even though the defendant knew its variable generation rates would never be based upon the agreed upon wholesale and retail electricity market prices, and always significantly higher than the local utilities’ rates and all other ESCOs’ rates in the market at large.

180. In fact, Verde’s rates varied from the competition so significantly and did not react to other indicators of market conditions. As such, Verde charged Plaintiff and the Putative Class commercially unreasonable rates and in doing so acted in bad faith or with improve motive.

181. Plaintiff and the class have been damaged by Verde’s breach of the covenant of good faith in an amount to be determined at the trial of this action.

**SIXTH CAUSE OF ACTION**  
**VIOLATIONS OF THE TRUTH-IN-CONSUMER CONTRACT,  
WARRANTY, AND NOTICE ACT (“TCCWNA”)**  
**(N.J.S.A. § 56:12-15)**

182. Plaintiff repeats and re-alleges the allegations contained in the previous paragraphs above as if fully set forth herein.

183. Plaintiff and those similarly situated are “consumers” within the meaning of N.J.S.A. § 56:12-15.

184. Defendant Verde is a “seller” within the meaning of N.J.S.A. §§ 56:12-15 and -17.

185. Defendant violated the TCCWNA with respect to Plaintiff and the Class by inducing Plaintiff and the members of the Putative Class to switch electric suppliers to Verde using tactics that violate the CFA, as alleged above and in the First Cause of Action. Thus, Defendant violated Plaintiff’s and the Putative Class Members’ clearly established legal rights or responsibilities of Defendant under the CFA and, therefore, Defendant violated the TCCWNA.

186. As a result of Defendant’s violations of the TCCWNA, Plaintiff and those similarly situated are entitled to statutory damages of not less than \$100 for each of Defendant’s TCCWNA violations, as provided by N.J.S.A. § 56:12-17.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment against Defendant as follows:

- A. Certifying this matter as a class action for money damages pursuant to Fed. R. Civ. P. 23(b)(3);
- B. Appointing Plaintiff as class representative, and appointing Plaintiff’s attorneys as class counsel;
- C. Awarding compensatory and punitive damages in favor of Plaintiff and the other Class Members against Defendant for all damages sustained as a result of Defendant’s wrongdoing in an amount to be determined at trial;
- D. Awarding Plaintiff and the Class Members the maximum civil penalties for each and every violation of the EDECA, in accordance with N.J.S.A. § 48:3-82(a)(2) and 48:3-83, and the TCCWNA, pursuant to N.J.S.A. § 56:12-17;
- E. Awarding Plaintiff and the Class Members actual damages, compensatory damages and treble damages pursuant to the CFA at N.J.S.A. § 56:8-19;
- F. Awarding Plaintiff and the Class their reasonable attorneys’ fees and costs pursuant to the CFA (N.J.S.A. § 56:8-19) and the TCCWNA (N.J.S.A. § 56:12-17);
- G. Awarding pre-judgment and post-judgment interest and costs of suit; and

H. Awarding any and all other relief that this Court may deem to be just and practicable.

**DEMAND FOR TRIAL BY JURY**

Pursuant to Fed. R. Civ. P. Rule 38, Plaintiff hereby demands a trial by jury.

Dated: January 21, 2020

Respectfully Submitted:

*/s/ Jason T. Brown*

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*\*Admitted pro hac vice*

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the Putative Class*

**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing document was served upon all parties and/or attorneys of record to the above cause herein at their respective addresses as disclosed on the pleadings on January 21, 2020 via the Court's ECF system.

/s Jason T. Brown  
Jason T. Brown