UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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LORI SANBORN	:	No. 3:14CV-1731 (SRU)
	:	915 Lafayette Boulevard
vs.	:	Bridgeport, Connecticut
	:	
	:	April 1, 2015
VIRIDIAN ENERGY, INC.	:	

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MOTION HEARING

B E F O R E:

THE HONORABLE STEFAN R. UNDERHILL, U. S. D. J.

A P P E A R A N C E S:

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(2:15 O'CLOCK, P. M.)

THE COURT: Good afternoon. We're here in the matter of Sanborn v. Viridian Energy, Inc. Could I have appearances, please?

MR. IZARD: Good afternoon, Your Honor. Robert Izard and Seth Klein for the plaintiffs.

THE COURT: Thank you.

MR. BLYNN: Dan Blynn and Shahin Rothermel from Venable on behalf of Viridian Energy. And with us is Adam Burns, In-house Counsel for Viridian.

THE COURT: Very good. Okay. We're here on the motion to dismiss, which I've reviewed, and perhaps I'll just let you do a traditional argument. Sometimes I start with questions but feel free to get started, if you like. Mr. Blynn.

MR. BLYNN: Thank you, Your Honor.

May it please the Court, Your Honor, this case is the quintessential square peg, round hole. Plaintiff tries to jam Viridian's express claims about its variable rate into a fourth complaint that's been filed in three other cases pending before this Court, which alleges that Viridian represents that its rate is exclusively and rigidly tied to the wholesale market rate for electricity.

Plaintiff plays fast and loose with Viridian's actual statements. None of the documents that form the

basis for this case even reference a wholesale market rate; rather, they clearly explain that Viridian's rate can change from month month for any number of reasons, including market conditions, Viridian's operating costs and there is a catch-all of other factors, and that that rate can be higher or lower than the utilities in any given month. Just --

THE COURT: Let me press you a little bit on that.

MR. BLYNN: Sure.

THE COURT: It seems to me there are two statements that you're referring to now. One is found in the terms and conditions sheet, which says, quote, "Your price may fluctuate from month to month based on wholesale market conditions applicable to the DC's service territory." So, based on wholesale market conditions.

The other statement is a little more broad and it basically says a variety of factors, including the wholesale market.

So, you're not suggesting that the second statement somehow cures the first?

MR. BLYNN: I think it elaborates the first, Your Honor. Both documents, the first statement comes from a contract -- well, what's called, what's referred to by the parties as a contract. The second comes from the

Massachusetts terms and conditions of service, which is really a disclosure statement. Both documents are provided to you -- to the plaintiff and every other Viridian customer.

THE COURT: Right. So I'm looking at the terms and conditions sheet. What I've got is a statement that says, that says the product is going to be based on wholesale market conditions, so I have an allegation that that's not in fact what happened and it was known that that wasn't going to happen. Why isn't that unfair?

MR. BLYNN: That allegation, Your Honor, to be very clear, is the wholesale market rate, and it's an important distinction because that is why this case is different than Chen, and similar to the Slack case, which has been briefed extensively in the papers.

In Chen, Your Honor, the contractual term, the representation at issue was that the variable rate would reflect the wholesale cost of electricity. And in that complaint, the plaintiff said, in fact, the defendant is not -- its variable rate is not based on the wholesale cost of electricity.

Here, Viridian says our rate is based on wholesale market conditions, a very broad topic that includes, possibly includes market rates, prices in the wholesale market and any number of other, other items.

THE COURT: What else could it -- I mean what else would a reasonable consumer understand the term "wholesale market conditions" means other than the wholesale market rate?

MR. BLYNN: Well, I think it means, you know, any number of conditions in the marketplace. It means what's going on with the extreme weather, what's going on --

THE COURT: But how would that affect -- you mention that a couple times in your brief. I didn't understand how extreme weather has any bearing on wholesale market conditions or rate.

MR. BLYNN: Well, Your Honor, the reason it has a bearing is because when, during the -- let's take the polar vortex back in the beginning of 2014 -- that forced a number of generators offline, generators shut down, there was a constraint on the ability to get electricity.

THE COURT: And so the price goes up.

MR. BLYNN: The price goes up and there's a host of other costs that go into Viridian's rate. This isn't simply a pass-through. There are renewable energy credits, there are ancillary costs, operating costs, capacity costs and so on and so forth.

THE COURT: But your typical residential electric consumer reads this -- it's plausible, isn't it,

that they read "based on wholesale market conditions" to mean based upon wholesale market price, that is, the price that Viridian's having to pay to get the energy that it's been supplying?

MR. BLYNN: But, respectfully, Your Honor, I don't think it is plausible. I think that that is a somewhat -- it's not a tortured reading but it's not a straight understanding of what the market condition is. "Condition" is a very broad idea. A market rate is a very specific component of an overall price.

THE COURT: Well, I have to look at it in a light most favorable to the plaintiff and draw all reasonable inferences. Isn't it -- you're saying it's an unreasonable inference to say that wholesale market conditions means principally wholesale market rate.

MR. BLYNN: I think it's unreasonable and I think that the Court in Clouston found it unreasonable. When you have a written document --

THE COURT: Right.

MR. BLYNN: Plaintiff can't take that document and claim that it says something other than what it says. In that case, that would be an unreasonable interpretation.

THE COURT: So, in your reading it's impossible for Viridian to violate this contract, regardless of what

its price is, because no one can figure out what is meant by "wholesale market conditions." That could include anything they decide it means.

MR. BLYNN: Your Honor, the District of New Jersey in a strikingly similar case involving very similar language, has said yes, it is unreasonable. There's no unfairness claim when you say based upon market fluctuations and other factors. That gives discretion to a propane supplier to set the price as it pleases.

And the facts in that case, this is the Slack case, were very egregious, Your Honor. There, the contract did not explain how a price was set, the methodology, and in fact, the defendant wouldn't even provide that price to consumers until after they already received their propane supply.

So, in both Slack and Faistl, the Court, the Court in the District of New Jersey, found no unfairness claim and no deception claim; indeed, no claim under the consumer protection statute of that state, which was New Jersey, could lie. This case squares with both of those cases. Where it doesn't -- go.

THE COURT: Well, the question is whether those cases are persuasive; they are not controlling.

MR. BLYNN: They are not controlling, Your Honor, but the reasoning is very detailed and in my

opinion, very persuasive. And especially when you look at the contractual language involved in those cases, this is why this case is incredibly different from Chen.

In Chen, it really tied the allegations in the complaint, matched the contractual language. There's no implied claim here, Your Honor. They haven't alleged that Viridian implied by saying wholesale market conditions, there's a replied representation of wholesale market rates. In fact, "implied" only comes up twice in the complaint and that's in the breach of the implied covenant claim.

THE COURT: Well, they don't have to come out and say it's alleged. They can make an allegation about what the representation was and say that it was false. In other words, it all comes down to whether, based on wholesale market conditions, there's a reasonable inference that that means based on wholesale market rate or price, and I guess, you know, we disagree about that one.

MR. BLYNN: I suppose, Your Honor, and unfortunately I think I'm going to be on the losing side of that disagreement -- but, Your Honor, I will say that these very similar facts have been evaluated in very detailed decisions by the District of New Jersey, not binding but very persuasive in my opinion.

But, regardless, there are other problems with their CUTPA and MCPA claims. Let's deal with some of the low hanging fruit, I guess, immediately and hopefully this can help explain why neither claim should survive dismissal.

The CUTPA claim, one of the essential elements that the deceptive or unfair conduct had occurred in this case, within Connecticut.

THE COURT: That is alleged.

MR. BLYNN: I'm sorry?

THE COURT: That's been alleged.

MR. BLYNN: I haven't seen it, Your Honor. We have a Massachusetts plaintiff.

THE COURT: Right.

MR. BLYNN: And she brings a CUTPA claim on her own behalf and on behalf of a class.

THE COURT: Well, she's bringing it on behalf of the class of folks who have Connecticut residence, who are serviced by Viridian in Connecticut.

MR. BLYNN: I think it would be a different story if there was a plaintiff from Connecticut who receive service here.

THE COURT: Well, it would be a different story, we wouldn't have this argument, but the question is whether the case gets dismissed because of that, and it

seems to me there's a couple of approaches.

One is she's making, she's making a claim as a class representative to represent those people who are Viridian customers who are subject to this in both Massachusetts and in Connecticut. And the law that would apply to the folks in Massachusetts and the law that would apply to the folks in Connecticut may well be different. And so you'd have two subclasses, a Connecticut subclass and a Massachusetts subclass.

But why would I dismiss this claim? I mean, worst case scenario would be tell the plaintiff, maybe you should come up with a Connecticut named plaintiff, but in the meantime, it doesn't seem appropriate to dismiss just because she individually can't bring a CUTPA claim.

MR. BLYNN: Well, actually this issue has squarely been addressed by the Connecticut Court of Appeals in Western Dermatology. In that case -- which was cited in both our moving brief and ur reply brief but not addressed in the opposition brief -- in that case you had a New Mexico plaintiff who alleged that a Delaware corporation with its principal place of business in Connecticut, misrepresented certain attributes of its software product, and the Connecticut Court of Appeals said, no, you can't have a CUTPA claim in that situation. It just doesn't lie.

And the Country Club v. Shaw's Supermarket case is similar.

THE COURT: Class actions.

MR. BLYNN: I can't recall, Your Honor.

THE COURT: I can't recall either but I doubt it. In other words, sure, somebody from New Mexico sues under CUTPA, I get that, but here we have a suit brought on behalf of thousands of people.

MR. BLYNN: The Hydroxycut litigation, the MDL that I handled at my former firm, in that case, Your Honor, it was cited, it was cited by the plaintiffs in their opposition brief and addressed an earl decision from that same MDL was addressed in our reply brief.

In the decision we cite, Judge Moskowitz said you can't state a claim -- in that case, the New York general business law -- you can't state, a plaintiff can't state a claim under the New York general business law on behalf of, on the behalf of a theoretical class of New York consumers without there being a named plaintiff in that case.

Now, in the Hydroxycut decision the next year, that's cited by the plaintiff, Judge Moskowitz didn't -- simply noted that there is a disagreement among the courts whether or not you can in fact do that. In case the judge said, yeah, I'm going to let this get through a motion to

dismiss, but that was in 2011, I believe.

Since then the Western Dermatology case came out, 2013, where the Connecticut Court of Appeals squarely addressed this issue.

THE COURT: Right, but why is the remedy for any problem here not a direction to the plaintiff, you have 45 days within which to move to amend to add a Connecticut plaintiff?

MR. BLYNN: And maybe that is the remedy, Your Honor, but that, that deals with a, with a theoretical complaint that could be alleged later. It's not the complaint that we're dealing with now.

THE COURT: Well, it is the complaint, it's not the same plaintiff.

MR. BLYNN: Okay.

THE COURT: In other words, if another plaintiff gets added, it's exactly the same operative document and that would cure the problem, right?

MR. BLYNN: It might, Your Honor.

THE COURT: All right. I'll ask Mr. Izard about that.

MR. BLYNN: And I suspect they have a Connecticut plaintiff or two already lined up.

THE COURT: I wouldn't be surprised.

MR. BLYNN: The MCPA claim also is easily

dismissible because the pre-suit notification that is a required element to state an MCPA claim wasn't made.

THE COURT: Now, the opposition to that says the statute only requires it when there's no -- when there's a Massachusetts corporation or there's assets in Massachusetts.

MR. BLYNN: That's right.

THE COURT: Okay.

MR. BLYNN: And they haven't alleged that, they aren't alleged that there's -- what they try and do is they try to shift the burden to Viridian to say that, to prove that they are not, that, that the plaintiff is not exempt from this notice requirement. They could have alleged upon information and belief.

And, in fact, Your Honor, having a governmental license is an asset within the state. Viridian operates within Connecticut. It has a license to operate so it clearly has some asset. Doesn't excuse the failure to provide a pre-suit notice. And the pre-suit notice is --

THE COURT: So, your argument is any corporation that is authorized to do business in Massachusetts has an asset in the state? I don't think that's the plain reading of the statute.

MR. BLYNN: Your Honor, I think --

THE COURT: Otherwise, they would just say that

requirement applies to any corporation authorized to do business in the state.

MR. BLYNN: Your Honor, I think the -- first of all, I think the Supreme Court in Lambert Timber v. Lambert (ph), a 1985 case, did find that a license is an asset.

But, regardless, you know, the pre-suit notice, even if they were confused or questioned whether it was even required, it's easy to send and it's an important, it's an important step in an MCPA litigation. It allows the defendant to investigate that individual plaintiff's claim and settle without being forced into a class action.

It's an important step that wasn't followed here, Your Honor, and it's an essential element that must be pled and proved. They haven't pled it and they haven't pled that they are exempt. It was raised in an opposition brief which isn't in the complaint.

THE COURT: So you want the complaint amended to indicate specifically that they are exempt from your requirement?

MR. BLYNN: I think, I think they either need to provide the pre-suit notice or, yeah, amend the complaint.

But there are a host of other reasons to dismiss the CUTPA and MCPA claims, and they've been detailed extensively. The unfairness claim, they are missing an

essential element in their complaint. There are three levels to an unfairness claim: Immoral, oppressive, unethical conduct, substantial injury, as well as, as well as that the challenged practice offends public policy. There's no allegation of offensive public -- that the challenged practice offends public policy. That's raised in their opposition brief which, again, is not the complaint.

But beyond that, again, the Faistl and Slack courts found no unfairness claim can lie when you have a contract that's very similar to Viridian's, which provides the supplier discretion to set its price based on market conditions or other factors.

And, Your Honor, as we noted in our reply brief, when you parse through and read the unfairness allegation carefully, it's really one rooted in deception and falsity. Indeed, in the reply brief they even say, the plaintiff even argues that it's defendant's misrepresentations which caused the unfairness.

That's not an unfairness claim, that's a deception claim. And deception claims have to satisfy Rule 9(b) which hasn't even remotely been satisfied here.

THE COURT: Well, help me understand that argument, because not only do you know the precise statement that is claimed to be deceptive, you provided it

as an attachment to your brief.

This is not a situation where there's a vague "they made false statements to us and we relied upon them," you attached the terms and conditions to your brief and we've been talking about the statement that's at issue, so what more do you need under Rule 9(b)?

MR. BLYNN: I think we need to know Ms. Sanborn saw those statements. If she didn't see them before she enrolled with Viridian, then she couldn't have relied upon them and the deception claims fail.

THE COURT: Right, but that's not a 9(b) issue. That is an issue on the merits, that she didn't rely on them and she doesn't have a claim.

MR. BLYNN: But it is a Rule 9(b) argument because the "when" is important here. And also, Your Honor, besides those two contracts, the two documents we attach to our motion to dismiss, she's also alleged some sort of phantom marketing materials that she's -- that where these representations were made as well, and there's nothing in the complaint addressing any marketing materials other than one reference to marketing materials. That's also a real problem. It puts us -- we're, Viridian is charged with defending this case and responding to these allegations and it has no direction.

THE COURT: Okay, well, there's two different

issues here. One is whether the complaint gets dismissed, and the second is whether the complaint is perfect.

And it seems to me that you're saying we need more detail on the marketing effort to actually make this claim, and I think that it's a fair argument. But the question whether the complaint gets dismissed is does it satisfy 9(b) and it's pretty hard to say it doesn't satisfy 9(b) when you provided the very statement they are relying on, or at least some of them.

MR. BLYNN: Right, but there's more to it than the when and where they occurred, it's the explanation of how these statements are deceptive. As I said, the complaint focuses on this concept of this wholesale market rate or this allegation of wholesale market rate, but that's not what Viridian represented.

THE COURT: Well, it says -- again, we're going back to the same argument --

MR. BLYNN: Right.

THE COURT: Wholesale market conditions. I think a reasonable consumer is going to read that and think, oh, if the wholesale market goes down, my rate is going to go down, too. And it it doesn't, and it's been clearly alleged that it didn't, that seems deceptive and unfair.

MR. BLYNN: Again, Your Honor, I point to

Clouston where this Court says where you have an expressed written statement, it's unreasonable for a consumer to interpret that beyond the specific terms of that statement.

And so, when you have market conditions, wholesale market conditions, and then another document that elaborates wholesale market conditions, operating costs and other factors, you can't, you can't construe it -- it's patently unreasonable to say wholesale market rate.

THE COURT: Well, we just disagree about that. I think that's the crux of the case or crux of this motion. I think we just disagree about that.

MR. BLYNN: Turning quickly to the unjust enrichment claim, there's not been a single variable rate case where one of these, an unjust enrichment claim has not been dismissed with prejudice or without prejudice.

The problem here is there's clearly a valid contract. Plaintiff has alleged a valid contract. When you have a valid contract, you can't have unjust enrichment. It can only be pled in the alternative when the question of the validity of the contract is at issue and that's clearly not here.

And so, Your Honor -- and not to mention for unjust enrichment, Viridian must have been unjustly

enriched. The plaintiff received the electricity service she contracted for. There's no enrichment. She paid the money and received the electricity, so --

THE COURT: Well, I think your first argument is better than your second, because if you take her allegations as true, she was overcharged and an overcharge is an unjust enrichment, so it seems to me the plaintiff probably has a problem with the first argument.

MR. BLYNN: And then, Your Honor, the final cause of action alleged in this case is the breach of the implied Covenant of Good Faith and Fair Dealing and, Your Honor, there are two elements really to that claim.

The first is that the plaintiff must show or allege that she had a right to receive benefits that was impeded by the defendant and that Viridian acted in bad faith. And this is really important. Bad faith, Your Honor, is a very high standard, it's a sinister motive or dishonest purpose. And both the Court in Hoffnagle, the Connecticut Superior Court, that's the case cited by the plaintiff in her opposition brief, and the Faistl Court, both warn that courts should not construe breach of implied covenant claims too broadly or bad faith too broadly. And in Hoffnagle, the Court even made clear that beach of implied covenant should not be a catch-all cause of action.

"The mere disagreement in contractual interpretation isn't bad faith," and that comes from the 19 Perry Street case. It's a Connecticut Supreme Court case, also cited in the opposition brief.

Here, the plaintiff received the benefits, she got the 100 percent green energy, this premium product she selected. She's claimed that the bad faith, the bad faith is Viridian's goal of maximizing its profits or allegedly overcharging. But maximizing profit is not, as a matter of law, is not bad faith. And the Hoffnagle Court and Faistl all have said that.

And finally, Your Honor, the Connecticut Supreme Court just in two years in the Capstone case, Capstone Building Corporation v. American Motorist Insurance, held that "Where a contract vests discretion in a party, that party exercises its discretion, it can't be bad faith."

THE COURT: Right. The problem is it vests it in one place and not in another, and so the question is do you indefinitely win under those circumstances.

MR. BLYNN: We do. It squares completely with Capstone where the contract vested 100 percent discretion in the insurance company to investigate whether or not --

THE COURT: Right.

MR. BLYNN: -- an insurance claim could be made. And they decided not to.

THE COURT: So you're saying the Viridian contract says Viridian can charge whatever it wants to charge. It has 100 percent discretion to charge as much as it wants to for its energy.

MR. BLYNN: Well, as long as its tied to market conditions, as long as there's some bearing on market and wholesale market conditions in its operating costs or in some other factors. I mean that's exactly where Faistl and Slack came out.

THE COURT: Okay. All right, thank you.

MR. BLYNN: Thank you, Your Honor.

THE COURT: Mr. Izard?

MR. IZARD: Yes, thank you, Your Honor.

Your Honor, if I might just hand up two documents, I've already provided to counsel. One is just a copy of the chart in the complaint regarding the movement of price, and the second is the document -- this is the report of independent system operator of New England; it's cited in footnote four of defendant's reply brief. They have a web cite to it, and I just printed it out. So if I might approach Your Honor?

THE COURT: Sure.

(Hands Court.)

THE COURT: So, why don't you have a Connecticut plaintiff here?

MR. IZARD: We actually have retainer agreements signed with three and we are prepared to amend. We didn't want to amend right now before this hearing, but we can very quickly after today. And we thought to the extent that the Court had other issues that it thought we should address, we would do that simultaneously.

THE COURT: Okay.

MR. IZARD: Your Honor, I'd like to talk briefly about the market condition issue, because that's, as you pointed out, Your Honor, the question is the contract ties the rate to either wholesale market conditions or market conditions. And really this case is on all fours with the Yang Chen case, because if you look at the contract in Chen, it talks about the rate reflecting the wholesale costs of electricity, and then it lists a lot of related costs and then it talks about other transmission and distribution charges, and then it says "other market-related factors." That, to me, sounds a lot like market conditions.

And I think the real question here is when you're looking at variable rate contract, what market conditions could change which could affect the price of retail power, and the only material factor that could change is the wholesale cost of electricity. And the independent system operator report clarifies that, at

least with respect to the power side of the equation.

And just to give you a little background, this is described in the report, but ISO New England is basically the nonprofit entity that both operates the grid and it operates the market and the market is reviewed by FERC, the Federal Energy Regulatory Commission, to make sure it's competitive and fair, and that's discussed a little bit more on page one.

But if you go to page 16 of the report, you can see the price structure in Connecticut. There's a chart up there, and that's in megawatt hours so to convert to kilowatt hours, you would have to divide it by a thousand. But the top line is the total wholesale rates. That would include capacity and the ancillary costs that the defendant referenced in the reply brief.

The second next line is the pure energy costs, and we didn't actually have this document when we filed our complaint so we could tweak it. The second is the energy cost, and that's the at graph and the information related to in our complaint, and then the last items are the types of costs that the defendant references in their reply.

For example, capacity. The capacity charges that it's allocated among all market participants to make sure that the grid is built up, that there's transmission

wires and all that sort of stuff going into the future.

The ancillary charges that defendant references is basically the charge to keep a plant running when it was not operating full capacity.

And then if you look across this grid, you'll see that the, by far the biggest charge is the energy cost, and more importantly, it's really the only variable charged, so that's the only thing that could effect changes in prices.

You look at February 2014, the total cost is -- this would be in megawatt hours -- is 158-dollars. The energy charge is 150-dollars. All the other charges are only $7.33.

If you go to this lowest charge, which is in August 2014, the total charge is 37.55. The energy charge is 30.44 and all the other charges are only 7.11. So basically the only thing that can cause variability is the wholesale cost of electricity.

And so, when we look at what a reasonable person would expect, even if they know a lot about the electricity market, their expectation is that the thing that can drive their rate up and down would be the wholesale price of electricity, because that's the only thing that really varies.

And if you look at the orange line on the chart,

that is also a market-based rate. We have that listed as the CL&P rate, but the way that the CL&P rate is worked out is it's a fixed rate for either six or twelve months, so basically the utility bears all of the risk of variability in the price, but the way that price is determined is by the market.

So, an entity like CL&P will get bids from the market as to what is the cost for delivery of power over six or twelve months. That price structure is approved by the regulators but that's a no risk rate to a consumer.

So basically if the consumer wants to bear the risk of price variability, they get something like the orange line. If they want to transfer the risk to the supplier of electricity, they get something like the yellow line.

What's fraud about this case is Viridian is the green line, so with Viridian they are transferring all the risk to the consumer, yet their rate is sky high relevant to the no risk rate, relevant to the wholesale rate, relevant to any reasonable metric existing anywhere.

So that's really the basis of our claim that their rate is not tied to wholesale market conditions or anything else.

And if you look at paragraph 33 of our complaint, you know, we talk about what their other costs

could be. They've got to pay for rent. They've got to pay for computers. There's nothing in there that could vary significantly. So we think at least for purposes, especially for purposes of reasonable inferences under 12(b)6, we've met the standard we need to meet.

As to the unfairness issue on a CUTPA claim, now -- and this really ties to the 9(b) argument, too -- as we noted in our brief under Connecticut law there must be disclosure in the contract in advance as to the circumstances under which the contract will change, and that has to be provided to the customer.

So, if the customer never got the contract, there's an admission of an unfair trade practice. So I doubt that argument is going to hold up for very long. And the same is true in Massachusetts. And we cited in our brief 220 CMR 11.064a, which talks about the terms of service have to be given to the customer before the service begins.

We didn't cite another CMR to the Court but I would like to reference it now. It's 220 CMR 11.063a and that says the terms of service referenced in 4a must state an explanation of price variability and price level adjustments that can cause price to vary.

So we think that these contracts fail to do that, which is by definition an unfair trade practice.

THE COURT: So what you're really saying is this is what amounts to a fraudulent inducement situation, that Viridian customers were wrongfully induced to sign up with Viridian based upon representations based upon how the rate would be calculated.

MR. IZARD: I think that's one aspect of it, but I think there's much more because we have a contract term here, and in our view it's also a breach of a contract. We're viewing the contract to be determined under an implied covenant analysis, but when a contract says you've got to calculate your rate based upon wholesale market conditions, and you're not calculating your rate based on wholesale market conditions, that's a contract problem. It's not just a misrepresentation problem.

THE COURT: Well, but you haven't made a breach of contract claim.

MR. IZARD: Well, our view -- from our perspective, the implied covenant is actually part of the contract, and our view is that the contract gives Viridian some discretion within the parameters of the allegations, within the parameters of the terms of their contract, and that they failed to do that.

Now, Yang Chen analyzed it as a breach of express contract issue. Frankly, you know, courts could go either way. We can amend to add an express contract

claim as well, but however you want to look at it, whether it's the implied covenant term built into the contract or the words themselves, we have a scenario where the rating is meant to be determined based on wholesale market conditions and it wasn't and that violates the contract.

And so we think there is definitely a contract theory here, but obviously under our CUTPA, Massachusetts unfair trade practice claim, we have two problems. We have the unfairness prong because they failed to meet the statutory requirements for explaining how the rates work, and then we have the deceptive prong because we think, as the Court mentioned, they basically lured people into these arrangements by misstating how they were calculating their rates.

THE COURT: So, to the extent that you're relying on a wrongful inducement theory, are you relying only on the contract language as being the inducement or are you relying on marketing materials, solicitations done by mail, et cetera? Because if you're doing the latter, then there is a 9(b) issue because nobody knows what you're relying on, so --

MR. IZARD: Right. Well, we're for purposes of that, we are -- for purposes of this complaint right now, we're relying on the contract terms. Terms and conditions do need to be provided in advance of providing service.

Terms and conditions are on the websites of Viridian. So, as I understand the way that Viridian --

THE COURT: Well, let me push you, because we need to understand whether you're relying on marketing materials or not, because if you are, there's a 9(b) problem. If you're not, then you shouldn't be -- you should make it clear what you're relying --

MR. IZARD: Right. Our complaint is not relying on marketing materials. We allege that -- we have one sentence in there that's more of a background thing, but we have not alleged any specific marketing material that we believe class members are relying on. So we are relying on contracts, but we do believe that the contracts are a representation because they have to be provided to customers.

THE COURT: I understand.

MR. IZARD: Okay. As to the -- the other point I'd like to make out is when we look at the implied covenant issue, there are a couple cases -- for example, the Faistl case cited in defendant's brief, I mean the real question and the standard to articulate there is that, was the defendant using its discretion for a reason either inside or outside the contemplated range of activities based on what the parties expected, or was the discretion being used in a way to transfer a risk to the

plaintiff that was beyond the risks assumed by the plaintiff. And that really is governed by the language of the contract.

Here, we view that the risk and the obligation that a plaintiff is reasonably expected to be assumed is that the risk would be a based on market conditions and that limits the scope of the discretion. When you start to impose rates for reasons beyond market conditions and transfer to the plaintiff a price risk beyond that contemplated by market conditions, that violates the implied covenant.

And we really disagree with the defendant's reading of the Capstone case. The Capstone case, that was a bad faith insurance claim case, and the Court said, you know, when you're looking at an insurance claim the issue is whether did the defendant pay or not. You know, the claim there was that, oh, the defendant insurance company didn't do an adequate investigation. And the Court was saying that's not really the issue. I mean, for example, if the insurance company paid 100 percent of the claim, it wouldn't matter whether the insurance company did an investigation or not.

Here, the discussion, in our case the discussion is tied to a specific contract term which is setting the market rate. And in that scenario, I think Capstone would

say that the discretion -- the implied covenant applies. I mean Capstone says at 308, the implied covenant concerns discretionary application of a contract term.

Here, we have a contract term setting the rate based upon marketing conditions, and our argument relates to discretionary application of that term.

On the 93(a) issue, you know, we did a search for assets. The license issue was a new one, that we just heard today, but we couldn't find any assets in Massachusetts, we couldn't find a location in Massachusetts, and so we would believe --

THE COURT: So are you going to plead the exemption?

MR. IZARD: We could plead the exemption. Again, we heard about this license issue today, and a month ago we asked the defendants for any information on assets and received nothing. And if we can't plead the license exemption, the notice exemption, there's case law in Massachusetts that says you can withdraw the claim, serve the notice and refile it a month later.

So to me, this kind of seems like a lot to do about nothing. I'm not -- I guess I'll talk to the defendant afterwards and see kind of how big a deal this is, but -- I'm not sure this is moving the case forward, this whole issue.

So, if we can't plead the exemption in good faith, we can withdraw and refile if that's what everybody wants to do, but it's not going to effect the case going forward.

However, on the unjust enrichment, you know, that's obviously an alternative claim. We believe the other claims are strong.

THE COURT: Help me understand how that alternative could possibly ever arise. In other words, for you to have an unjust enrichment claim, you cannot have a contract.

MR. IZARD: Right.

THE COURT: You haven't alleged that the contract is void or voidable, so how do you get there?

MR. IZARD: If the contract is illusory, and we believe the contract would be illusory if there were no parameters at all on defendant's discretion concerning determination of the market rate. If the contract is illusory, then there is no contract and then we would move to an unjust enrichment analysis. That's the sole basis of it.

And we cite to Wilson in there about how a contract, if the promise is meaningless and if the defendant can do whatever we want, we would argue that the contract is meaningless and illusory and, therefore, there

is no contract.

But that is not our main claim and so it's strictly a fall-back and there number of cases that allow this alternative pleadings, depending on how that shakes out.

I'm not sure I answered your question.

THE COURT: Well, no, I mean, I think that's pretty creative. I don't thinking it necessarily works. It seems to me you've got a contract here, it's not illusory. The question is what does it mean, and your CUTPA good faith claim covers the circumstance you're describing. In other words, it violates an implied covenant of the contract if they have unfettered discretion to set this rate, in effect.

MR. IZARD: I agree with that. As I say, that's our principal claim, but if we lose on that one, this is a fall-back basically.

THE COURT: Yes, but how are you going to -- that's what I was trying to get at. How are you going to lose that claim and still win an unjust enrichment claim? How does that happen?

MR. IZARD: Well, I think that if -- I don't think it should happen. I think theoretically, I think that if the Court could conclude that, even with the implied covenant, and even if the Court accepts the

defendant's interpretation of Capstone, which I disagree with, and concludes that, you know, there is no limit on discretion at all, then I think the contract becomes illusory. I don't think that's a correct analysis. Again, we want to make sure we cover all the bases.

THE COURT: Okay.

MR. IZARD: Thank you, Your Honor.

THE COURT: Thank you. All right.

Mr. Blynn, anything further, quickly?

MR. BLYNN: Just quickly, Your Honor, sure. Just a couple quick points.

First of all, the Connecticut statute 16-245o(f)(2), and then the Massachusetts regulation 940 CMR Section 19.04(d), which Mr. Izard mentioned, is in their opposition brief, that expressly requires an energy supplier to disclose the circumstances of the rate. I believe it's the language in the statute, in the regulation perhaps, but certainly in the statute. There's not been a single case decided under that statute, and in another, in another case, Your Honor, involving a similar New York disclosure provision, the Southern District of New York found that, in fact, you just have to disclose, you have to inform the consumer that they have a variable rate. You don't have to explain how the variable rate is set.

That is the Wise v. Energy Holdings case. It hasn't been briefed in this case, Your Honor, but I do want to make clear that that case is out there and that issue has been decided, at least under the New York analogue to the Connecticut and Massachusetts regulation, cited.

Your Honor mentioned if you have a contract, the question is that, here, the issue is you have a contract but the question is what does it mean. Well, that's exactly what the Connecticut Supreme Court said in 19 Perry Street. When you have a mere disagreement in interpretation of a contract, that can't be bad faith.

And again, in Capstone, the Supreme Court in 2013 said where a contract that is pure discretion with one party, there can't be, it can't be bad faith.

Finally, Your Honor, if the contract is illusory, is found to be illusory, and I do think that's an interesting argument, but that would gut their breach of implied covenant claim which can't exist without a valid contract.

Finally, Your Honor, just one point about, about the statement Mr. Izard made about asking for discovery about the assets, averting assets in Connecticut after --

THE COURT: Massachusetts.

MR. BLYNN: I'm sorry, Massachusetts. After the

motion to dismiss is filed, that kind of foreshadows, and you see it throughout the opposition brief, plaintiffs think they can just file some sort of complaint and automatically get to discovery, and it's just not that simple. If it were, you would never have any cases going out on a motion to dismiss. They have to make a good faith investigation before they file their complaint; it can't coming afterwards. Thank you, Your Honor.

THE COURT: Okay, thank you.

All right. I'm going to rule on the motion to dismiss at this point. In doing that, I have to take the allegations of the claimant as true, draw all reasonable inferences in favor of the plaintiff and decide, looking at the complaint in that light, whether it states a plausible claim for relief.

And I'm going to deny the motion in substantial part. I'm going to grant it with respect to the unjust enrichment claim.

The complaint should be amended within 45 days to add a Connecticut plaintiff, to allege an exemption to the requirement under 93(a) that there be a pre-suit notice, and make any other adjustments that the plaintiff chooses to make.

But the, the unjust enrichment claim fails because -- and I'm granting the motion without prejudice

to any, to a revision of the complaint in the event that there's ever a holding that the contract is illusory. That's such an unlikely prospect that there's no reason to think it's ever going to happen and, therefore, I think the law is, is on the defense side on this one.

There is a contract. It's going to be either enforced or not, fair or not, violative of unfair trade practice law or not, but it seems very unlikely that it's going to be held to be an illusory contract and, therefore, the unjust enrichment claim, I think, fails.

The other arguments made in the motion to dismiss I think are without merit at this point.

The two kind of winning technical arguments would be resolved by the amendment, forthcoming amendment of the complaint and the other arguments fail.

I think there is a valid claim stated here for for an unfair trade practices violation. The sheet indicates, quote, "Your rate may fluctuate month to month based on wholesale market conditions," quote/unquote. That I think gives rise to a reasonable understanding in the ordinary consumer that the price that the consumers charged for electric supply will in fact be based upon the wholesale market rate for electricity.

And it may turn out that the claim lacks merit, but I think it survives a motion to dismiss. That will be

true under either the Connecticut or the Massachusetts statutes.

There is, I think, each of the, each of the elements of a unfair trade practices claim has been properly stated in the complaint. The complaint does not fail Rule 9(b), even to the extent that it pleads a fraudulent inducement claim. As I noted, the exact document alleged to have fraudulently induced the named plaintiff has been attached to the opposition brief. That terms and condition sheet had to be provided to the plaintiff before she entered into her contract, and it has language that arguably fraudulently reduced her into entering into the contract.

So, I think 9(b) has been satisfied by the fact that everybody knows the precise statement in the exact form it was made and the fact it had to have been made by law to the plaintiff before she entered into the contract with Viridian. The date of that contract is well known to both sides and need not be, in my view, expressly stated in the complaint.

The Covenant of Good Faith and Fair Dealing I think survives the motion to dismiss. I think that the principal attack on that claim is that there's not sufficient allegations of bad faith here. I disagree. I think, read as a whole and taken in the light most

favorable to the plaintiff, the complaint does allege bad faith on the part of Viridian with respect to the establishment of electric supply rates that are a multiple of the wholesale price that's prevailing in the market, and that seems to be at least potentially done in bad faith, i.e., in an effort to price-gouge.

I don't think that it's possible to argue that price gouging is not something that's done in bad faith and if this price gouging complaint survives summary judgment and trial, then I think there's no doubt that that would be, that would satisfy the bad faith requirement.

Mr. Blynn, I don't know if there's other arguments that I haven't touched upon?

MR. BLYNN: No, Your Honor.

THE COURT: Okay. I don't intend to write. Does anybody want me to further explain the ruling at this time?

MR. IZARD: No, Your Honor.

MR. BLYNN: No, Your Honor.

THE COURT: All right. Mr. Izard, we're going to get a new complaint within the next -- how many days?

MR. IZARD: Say 15?

THE COURT: That's fine. Okay. Is there anything we can do to, any issues we can take up as long

as we're all in the same room? Deadlines, discovery?

MR. IZARD: Well, Your Honor, there's one issue on the 26(f) report where the Court approved the 26(f) report but there is a -- the plaintiffs and defendants have different positions on the class certification issue. Plaintiffs propose that they file their brief 30 days following the close of expert discovery, and I think the defendant wanted to bifurcate and so we just need to clarify at some point whether that will work.

And the second is we had received an email from the Clerk, I don't know if the Court's been following the issue of offers of judgment and how that relates to class actions, but there's some authority around the country that the filing of an offer of judgment can moot a class action if it's served before the motion or class certification is filed.

THE COURT: Yes, I've rejected that in a number of cases.

MR. IZARD: Okay. So, we had filed a motion for class certification just to deal with that issue. What we have proposed is we do the briefing once we have the 26(f) schedule in place, and I don't get a sense that the defendant has an issue with that, so I just wanted to raise that with the Court, and at some point I think we probably should nail down the schedule of when our class

cert motion would be due. As I say, our proposal is 30 days after expert discovery, defendants want bifurcation -- fact expert discovery.

THE COURT: All right. I'm not sure I understand what the defendant's proposal is. Bifurcate meaning you want the class cert motion filed after fact discovery?

MR. BLYNN: Your Honor, that was filed by, by predecessor counsel. I need to find out exactly what their intention was.

THE COURT: All right, let me suggest this. I think that -- is the motion for class cert that you filed as a protective matter still pending?

MR. IZARD: Yes.

THE COURT: I'm inclined to deny that as moot -- or not as moot but without prejudice. You're going to add a plaintiff. I mean there ought to be, the motion ought to reflect the reality of the case.

MR. IZARD: Sure.

THE COURT: As I said before, I rejected this idea that comes out of the 7th Circuit that you can moot a case by filing a, by a class action by filing an offer of judgment to the individual plaintiff. I don't think that makes a lot sense frankly. And so there's no need to file a protective motion for class certification. We ought to

do it on whatever schedule makes sense for the case.

And in the first instant, why don't you go back and renegotiate what makes sense. I've had class motions early, I've had them late. I think in general the class cert motion should come as early in the case as possible, because I do think it affects the scope of discovery and potentially the scope or the nature of your settlement discussions.

MR. IZARD: Our concern is the whole Walmart, Comcast issue, how much -- what kind of factual support do you need. You know, years ago, it's a little more streamlined than it is now, so that was done --

THE COURT: No, you're entitled to some class discovery, if that's the concern. You can have some class discovery, absolutely. But you ought to get the class discovery done as quickly as possible, even if, in fact, expert discovery is continuing at the same time.

MR. IZARD: And we may have an expert on damages to deal with Comcast, for purposes of class cert.

THE COURT: That's fine. Again, why don't you two discuss that in the first instances and submit a proposal if you can agree. If you can't, then I'll resolve it.

MR. BLYNN: Just a practical concern, you said 15 days? Might want to take 30?

MR. IZARD: Thirty is fine. Okay.

MR. BLYNN: I think whatever MCPA requires, that --

MR. IZARD: Well, we'll talk about that. Complaint in 30 days then.

THE COURT: All right, that's fine.

Anything else?

MR. BLYNN: No, Your Honor.

THE COURT: All right, thank you all. We'll stand in recess.

(Whereupon the above matter was adjourned at 1:15 o'clock, p. m.)

C E R T I F I C A T E

I, Susan E. Catucci, RMR, Official Court Reporter for the United States District Court for the District of Connecticut, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/S/ Susan E. Catucci

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