



2. By this action, plaintiff seeks to remedy the harm caused by Robison's wrongful and deceptive conduct. As set forth below, plaintiff and all those similarly situated should be awarded declaratory relief, compensatory damages, restitution and/or other relief to redress defendant's deceptive and unlawful conduct.

### **JURISDICTION AND VENUE**

3. This court has jurisdiction under Civil Practice Law and Rules ("CPLR") § 301, because defendant is a domiciliary corporation whose principal executive offices are located within the County of Westchester, State of New York, and which conducts business with a fair measure of permanence and continuity sufficient to satisfy the requirements of CPLR § 301.

4. Venue is appropriate in this court under CPLR § 503, because defendant maintains its principal executive offices in Westchester County, and also because plaintiff resides in Westchester County.

### **PARTIES**

5. Plaintiff VINCENT J. EMILIO is an individual who, at all times relevant hereto, has resided in Mount Vernon, County of Westchester, State of New York. In 2000, Emilio entered into Robison's standard form annual fixed-price electric supply service contract for his residential property. Robison unilaterally, and wrongfully and deceptively, increased plaintiff's electric rate during the middle of the first renewal period and continued to bill him at excessive rates thereafter, causing Emilio to suffer hundreds of dollars of damages by requiring him to pay Robison substantially more for electric supply services than the rate required under the renewal term of plaintiff's contract.

6. Defendant ROBISON is a New York corporation with, at all times relevant hereto, its principal executive offices located at 500 Executive Boulevard, Elmsford, NY 10523.

Robison is an Energy Services Company (“ESCO”) which, according to the Robison website (www.robisonoil.com), is Westchester’s largest full service oil company, serving the community since 1921. Since Robison changed ownership in 1984, it has grown to nearly 22,000 customers and 200 employees, with a fleet of more than 100 vehicles based out of 5 separate locations throughout Westchester County. According to its website, “Robison provides a variety of home services ranging from fuel oil delivery, oil heat service, HVAC service, Natural Gas supply, natural gas service and Electricity.” Among its purported strengths is its “Distribution Network and purchasing power to guarantee [its] customers a consistent supply of fuel at competitive prices.” Indeed, according to the Robison website, “Robison is one of the only ESCO’s to offer both natural gas and electricity supply to residential customers.”

#### **CLASS ALLEGATIONS**

7. Plaintiff brings this action as a class action pursuant to Article 9 of the CPLR, on behalf of all persons and entities within the State of New York who, for the period beginning six years before the commencement of the action and continuing to the present, were wrongfully and deceptively required to pay Robison amounts in excess of the electric rates required under the terms of their annual fixed-rate electric supply service contracts with Robison (the “Class”).

8. The members of the Class are so numerous that joinder of all members is impracticable. Although the precise number of Class members is unknown to plaintiff at this time and can be determined only by appropriate discovery, it is reasonably estimated based on the investigation by plaintiff’s counsel to date and information contained on the Robison website (www.robisonoil.com) that the Class is comprised of as many as one thousand or more persons and entities geographically dispersed throughout lower New York State.

9. Plaintiff's claims are typical of the claims of other members of the Class. The harm suffered by plaintiff and all other Class members was caused by the same conduct by defendant, including uniformly failing to comply with the terms of their annual fixed-price contracts and the covenant of good faith and fair dealing implied thereunder, in connection with defendant's wrongful and deceptive collection of hundreds of thousands or more dollars of payments from plaintiff and the Class in excess of the rates required under the terms of their annual fixed-price contracts.

10. Plaintiff will fairly and adequately represent and protect the interests of the Class, in that plaintiff does not have interests antagonistic to, nor in conflict with, the Class, and intends to prosecute this action vigorously. Plaintiff has retained competent counsel, experienced in commercial and consumer class action litigation, to further ensure such vigorous prosecution and protection.

11. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Because the harm suffered by individual Class members will be relatively small, the expense and burden of individual litigation make it virtually impossible for individual Class members to seek redress for the wrongful conduct alleged. If Class treatment of these claims were not available, Robison would likely retain hundreds of thousands or more dollars in connection with its wrongful and deceptive practices in the State of New York, or would otherwise escape liability for its wrongdoing and deception as alleged in this Complaint.

12. Common questions of law and fact exist as to all members of the Class which predominate over any questions affecting individual members of the Class. Among the questions of law and fact common to the Class are:

a. whether Robison has breached the terms of its annual fixed-price contracts with the Class, and/or the covenant of good faith and fair dealing implied thereunder by, inter alia, its failure to comply with the terms of these annual fixed-price contracts;

b. whether defendant's unilateral failure to comply with the annual fixed-price terms of its contracts with plaintiff and the Class and its collection of additional amounts from plaintiff and the Class in excess of the rates for electric supply services required under their annual fixed-price contracts constitute deceptive acts and practices in violation of GBL § 349; and

c. the appropriate measure of damages and/or other relief.

13. The Class is readily definable, and prosecution of this action as a Class action will reduce the possibility of repetitious litigation. The names, addresses and amounts of excessive payments for substantially all Class members are available from defendant. Plaintiff knows of no difficulty that will be encountered in the management of this litigation that would preclude its maintenance as a Class action.

### **FACTS**

14. New York and twenty-three other states plus the District of Columbia have either enacted enabling legislation or issued regulatory orders to implement deregulation of the home energy industry. As noted on the Con Edison website ([www.coned.com](http://www.coned.com)), these industry changes encourage competition, by enabling energy customers to “shop around and compare energy prices, various pricing options as well as other offerings” of ESCOs, and thus to be “smart shopper[s].”

15. Under deregulation, Con Edison continues to be responsible for the delivery of electricity to residential and business properties, at delivery rates regulated by the New York

State Public Service Commission. ESCOs, by contrast, do not actually generate electricity, but rather provide to their customers the services necessary to obtain the supply of electric power generated elsewhere and ultimately delivered by Con Edison.

16. The first/front page of Robison's two page, standard form, annual fixed-price electric supply contract confirms the nature of the electric supply services that Robison and other ESCOs provides, as follows: "THIS CONFIRMS THAT [customer] Has authorized Robison to perform all of the nominating, scheduling and other electrical control functions that are prescribed by Con Edison's Retail Access and Implementation Plan and Statement of Operating Procedures (as amended from time to time), and has read the Customer Service Agreement on the reverse side and has agreed to its terms."

17. The front page of the electric contract includes a blank for a "Price" and "Start Date," and also provides that it "shall be effective 24 hours after receipt by Robison and shall remain in effect until 24 hours after Robison received written notice from the customer that the agreement has been terminated." The second page/reverse side of Robison's annual fixed-price electric contract contains 15 pre-printed provisions, including, inter alia, provisions entitled "Basic Service," "Term" and "Amendment of Agreement or Change of Provider."

18. Provision 2 of Robison's annual fixed-price electric contract, entitled "Term," states as follows:

Service will begin on or about the next Con Edison Billing Cycle closest to \_\_\_\_\_ and continue until \_\_\_\_\_ and year to year after that, subject to credit approval, except that service may be terminated for non-payment or failure of credit acceptability upon 30 days prior notice to CUSTOMER. CUSTOMER will be responsible for notifying Robison if they wish to discontinue service after the anniversary date. **CUSTOMER may be subject to pricing changes effective on the anniversary date.** The CUSTOMER may cancel the Agreement by written notice only no later than 30 days prior to the anniversary date. (emphasis added)

19. Provision 3 of Robison's annual fixed-price electric contract, entitled "Price," states as follows:

**Robison shall provide a fixed price of \_\_\_\_\_ cents per KwHr. Energy, capacity, ancillary services, transmission, congestion service and changes in applicable tariffs may have an effect on future prices. (emphasis added)**

20. Similar to Robison's annual fixed-price electric supply service contract, the "Term" renewal provision of its standard form gas supply service contract provides in relevant part as follows:

Service will begin on \_\_\_\_\_ and continue until \_\_\_\_\_ and year to year after that, subject to credit approval, except gas service may be terminated for non-payment or failure of credit acceptability upon 30 days prior notice to CUSTOMER. **CUSTOMER will be notified as to its Anniversary Date. At least 45 days before the end of the term of the Agreement [sic]. Robison will provide CUSTOMER with notice of any price or other changes. Any such changes shall become effective on Anniversary Date, unless CUSTOMER cancels the Agreement by written notice to Robison at least 30 days before the Anniversary Date. (emphasis added)**

21. That Robison's electric contracts with its customers are intended to be and are annual fixed-price contracts is confirmed by the sworn testimony of Robison's Vice President, David Singer, proffered in prior court proceedings in this very matter:

Each time a prospective customer approaches Robison to enter into a supply agreement, Robison contacts its wholesaler to obtain a price for a year's supply of electricity for that particular customer. If, based upon the existing market conditions, Robison is satisfied with the rate quoted by its wholesaler, Robison will quote that rate to its prospective customer[.] If the customer accepts the rate quoted, and agrees to become a customer, Robison locks in with the wholesaler and purchases a year's supply of energy in advance. Each year, Robison evaluates the rate [at that time] for its customers and, once again, commits to a year's supply in advance. Accordingly, Robison's fixed rate to customers can, and generally does, vary from year to year, depending upon the market. (emphasis added)

22. That Robison's electric contracts with its customers uniformly are intended to be and are annual fixed-price contracts is additionally confirmed by the sworn testimony of

Robison's Director of Sales and Services, Anthony Lisanti, also proffered in prior court proceedings in this very matter:

Robison offers its customers fixed rate electric supply prices. . . . We do not offer, nor have we ever offered, our customers a variable electric supply price[.]

23. In April, 2000, Emilio entered into Robison's annual fixed-price electric contract, with a start date to begin with the May electric cycle at a fixed price of \$.0725/Kilowatt hour ("kWh").

24. By its terms, plaintiff's contract with Robison automatically renewed on or about May 1, 2001 and May 1, 2002, and Robison continued as plaintiff's electric ESCO throughout 2001 and into 2002. From the time of the initial renewal in May, 2001 until July, 2001, Robison continued to charge plaintiff the same price of \$.0725/kWh as prescribed for the prior fixed-price annual term of the contract. Thus, at renewal, the \$.0725/kWh price was the price that was "effective on the Anniversary Date," and should have continued throughout the first and subsequent annual renewal periods unless changed by agreement between plaintiff and Robison on or about the Anniversary Date.

25. However, beginning in August, 2001 (during the middle of first renewal term), Robison unilaterally increased the price it charged plaintiff by almost \$.04, from \$.0725 to \$.1100/kWh, a more than 50% increase. Robison continued to bill plaintiff at this \$.1100 rate throughout 2001 and 2002 until September, 2002. Based on the investigation of counsel, Robison also unilaterally increased the rates charged other Class members by comparable or even higher amounts for their electric supply services during the same period.

26. By comparison, the average rate/kWh charged by Con Edison for electric supply services in Westchester County during the comparable period was only \$.057, with that average rate going as low \$.035 during the same lower demand winter months when Robison charged

plaintiff \$.1100/kWh because of its wrongful and deceptive failure to comply with the terms of its annual fixed-price contract.

27. During the thirteen month period in which Robison charged plaintiff \$.1100/kWh, Emilio paid for over 8500 kWh at that extraordinarily high rate. Thus, based on renewal rate in effect on the first anniversary date, plaintiff overpaid more than \$300. The charges by Robison to other Class members were comparably excessive. Furthermore, Robison continued to charge plaintiff in excess of \$.0725/kWh even when it unilaterally reduced his rate from \$.1100/kWh during the second annual renewal period, even though Robison never had the right to charge plaintiff more than \$.0725/kWh unless changed by agreement between plaintiff and Robison on or about the Anniversary Date.

28. But for a billing issue that arose late in 2002, plaintiff would never have even known about the wrongful and deceptive overcharges in connection with his Robison electric service contract. When plaintiff Emilio called Robison to complain, he was offered a measly \$50 “courtesy discount” credit and a “free” service contract in resolution of the issue, both of which plaintiff rejected outright and never accepted.

### **FIRST CAUSE OF ACTION**

#### **[Breach of Contract, Including the Implied Covenant of Good Faith and Fair Dealing]**

29. Plaintiff realleges and reincorporates herein each and every allegation set forth in the preceding paragraphs of this Complaint as if set forth verbatim.

30. Under the terms of the electric contracts of plaintiff and the Class, any renewal and change in price for their annual fixed-price contracts was limited to “pricing changes effective on the anniversary date.” Defendant, however, wrongfully increased the electric prices

of plaintiff and the members of the Class after the anniversary date, during the middle of the renewal term.

31. Plaintiff and the Class have been injured as a result of defendant's breach of the terms of the annual fixed-price contracts and/or the covenant of good faith and fair dealing implied thereunder.

32. Defendant is liable to plaintiff and the Class for damages sustained as a result of its breaches.

### **SECOND CAUSE OF ACTION**

#### **[Violations of GBL § 349]**

33. Plaintiff realleges and reincorporates herein each and every allegation set forth in the preceding paragraphs of this Complaint as if set forth verbatim.

34. Defendant's unilateral increases in the electric rates charged during the middle of the annual term of the annual fixed-price contracts of plaintiff and the Class constitute deceptive acts or practices in the conduct of business, trade or commerce or in the furnishing of services in this State which affects the public interest under GBL § 349.

35. Plaintiff and the Class were injured by defendant's conduct.

36. Defendant is liable for actual damages sustained by plaintiff and the Class and/or disgorgement or restitution as allowable under GBL § 349.

### **PRAYER FOR RELIEF**

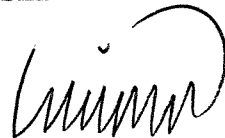
WHEREFORE, plaintiff, on behalf of himself and the Class, prays for relief, an order and judgment against defendant as follows:

A. Certifying this case as a class action pursuant to the provisions of Article 9 of the CPLR, with plaintiff certified as representative of the Class;

- B. Awarding compensatory and/or actual damages, and/or disgorgement and/or restitution in favor of plaintiff and the Class in an amount to be determined at trial;
- C. Declaring that defendant's actions in connection with the service contracts of plaintiff and the Class violate GBL § 349 and breach the terms of their annual fixed-price contracts and/or the covenant of good faith and fair dealing implied thereunder;
- D. Awarding the costs and disbursements incurred in connection with this action, including reasonable attorneys' fees and expenses;
- E. Awarding pre- and post-judgment interest; and
- F. Granting such other and further relief as the Court deems just and proper.

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