SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

……x GREG WALKER, DAWNMARIE AMBROSINO, EILEEN ABEL, ZACHARY NADLER, BRETT BUTLER, and HELENA COSTAKIS, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, -against- CENTRAL HUDSON GAS & ELECTRIC CORP., Defendant. ……x	:	**ORAL ARGUMENT REQUESTED** Index No. 2023-50074 Hon. Christi J. Acker **ELECTRONIC CASE FILING**

PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

LOWEY DANNENBERG, P.C.
Andrea Farah
Alesandra Greco
44 South Broadway, Suite 1100
White Plains, NY 10601
Telephone: (914)-997-0500
Email: afarah@lowey.com
agreco@lowey.com

Plaintiffs Greg Walker, DawnMarie Ambrosino, Eileen Abel, Zachary Nadler, Brett Butler, and Helena Costakis, ("Plaintiffs"), on behalf of themselves and all others similarly situated, respectfully submit this Memorandum of Law in Opposition to Defendant's Motion to Dismiss, or in the Alternative, Motion to Strike Plaintiffs' Class Allegations ("Def.'s Br." or "Motion") filed by Defendant Central Hudson Gas & Electric Corp. ("Central Hudson" or "Defendant").[1]

[1] Unless otherwise noted herein: (i) all capitalized terms shall have the same meanings ascribed in them in the Class Action Complaint (NYSECF Dkt. No. 1) ("Complaint"); (ii) "¶" refers to paragraphs in the Complaint; and (iii) internal citations and quotations marks are omitted, and all emphasis is added.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

I. PRELIMINARY STATEMENT

Central Hudson publicly admitted its improper and deceitful conduct, resulting in public furor, regulatory probes by the New York Public Service Commission ("PSC"), the resignation of its CEO, and calls for more investigations by non-profit organizations, third parties, and politicians. Yet, Central Hudson seeks to avoid liability by claiming that it did nothing but *follow* the PSC's instructions. Its efforts must fail.

Via this action, Plaintiffs seek to redress the unlawful conduct of Central Hudson in violation of their statutory and common law rights. In doing so, Plaintiffs do not dispute that the PSC has the authority to regulate Central Hudson, nor do Plaintiffs challenge the reasonableness of its filed rates (*see infra,* Sec. III.B.-C.). Just the opposite is true: Plaintiffs seek to recover the excessive charges and fees extracted by Central Hudson from consumers through the use of unlawful tactics, including overcharges, unauthorized repeated charges billed to customers in the same month, charges based on false consumption estimates, and unauthorized withdrawals from consumers' bank accounts. ¶¶ 55-56. This Court, not the PSC, has the expertise to adjudicate Plaintiffs' causes of action and has the sole authority to grant Plaintiffs the relief they request. *See infra,* Sec. III.C. Put differently: Plaintiffs allege unlawful conduct by Central Hudson that is *separate from* Central Hudson's provision of services as required by the PSC.

Plaintiffs have adequately pled their causes of action. *First*, Plaintiffs easily satisfy the requirements of N.Y. Gen. Bus. Law § 349 (McKinney 2021) ("GBL § 349" or § 349") by alleging that Central Hudson unlawfully extracted fees and charges from its customers by releasing flawed billing system Central Hudson knew would cause irreparable harm to consumers, a fact that Central Hudson actively concealed from the public and the regulators. *Id.*; *see infra*, Sec. III.D. *Second,* Plaintiffs' breach of contract claim is likewise sufficiently pled as Plaintiffs identify the contract that governs the relationship between Plaintiffs and Central Hudson, as well as the specific provisions that Plaintiffs claim were breached by Central Hudson. *See infra,* Sec. III.E. *Third,* Plaintiffs sufficiently allege their common law claims for breach of good faith and fair dealing, unjust enrichment, and negligence. *See infra,* Sec. III.F. While breach of good faith and fair dealing

and unjust enrichment are pled in the alternative (*see infra,* Secs. III.F.i.-ii.), Plaintiffs' negligence claim is sufficiently pled based on Plaintiffs' allegation of Central Hudson's separate and independent duty of care owed to Plaintiffs and Class Members. *See infra,* Sec. III.F.iii. Plaintiffs are also entitled to declaratory relief because the alleged harm is continuing in nature and the equitable relief is distinct from other relief sought by Plaintiffs. *See infra,* Sec. III.G.

Central Hudson's last-ditch effort in asking the Court to strike Plaintiffs' class allegations (Def.'s Br. at 26-27) must fail. Not only is this remedy extremely disfavored and unusual in New York courts, but Central Hudson utterly fails to demonstrate that a class action is not a superior method of adjudicating Plaintiffs' claims. *See infra*, Sec. III.H.

II. FACTUAL ALLEGATIONS

Central Hudson is a natural gas and electric corporation organized under the laws of the State of New York. ¶ 15. It provides gas and electricity to roughly 400,000 residential and commercial customers throughout the State of New York. *Id.* The PSC is a state agency and is statutorily charged by state law with, among other things, regulating electric utilities in New York, including establishing the different categories of electric service and the rates to be charged for each such category. *Id.* The rates to be paid by consumers of electric service supplied by Central Hudson are set forth in sets of rules, commonly referred to as "tariffs" which are formally proposed, accepted, and approved by the PSC. *Id.* Tariffs applicable to Central Hudson are set out in a number of documents, including Central Hudson's own Operating Procedures Manual and other materials filed with the State of New York. ¶¶ 37-40. Additionally, Central Hudson is subject to the Home Energy Fair Practices Act ("HEFPA"), which is incorporated into Central Hudson's tariffs. ¶¶ 33-36.

On or around August 2021, Central Hudson introduced an $80 million customer billing system that was intended to accommodate the increasing complexities associated with billing consumers for energy supply. ¶ 16. As was later revealed, Central Hudson's new billing system was far from ready at the time of its official live release. ¶ 28. According to an Investigative Report ("OIE Report") released in December 2022 by the New York Office of Investigations and

Enforcement of the New York State Department (the "OIE") (¶ 27), the billing system suffered from "hundreds of programming errors and defects" that Central Hudson was well aware of, including "critical bugs" that directly pertained to the proper functioning of the system. ¶¶ 29-30. Despite its knowledge that the system was riddled with errors, Central Hudson nevertheless proceeded to hastily launch the system. *Id.* To make matters worse, Central Hudson failed to provide any training to its staff regarding the resolution of complex billing issues, net metering, or managing retail choice suppliers. ¶ 30.

Shortly after its implementation, Central Hudson customers, including residential, small business and commercial customers, began to experience significant billing issues. ¶ 18. At that time, Central Hudson admitted that about 11,000 Central Hudson customers received bills for unpredictable or incorrect amounts and experienced unauthorized automatic withdrawals from their accounts, causing overdrafts fees to incur on their personal banking accounts. ¶¶ 18-20. Meanwhile, as thousands of Central Hudson customers were drowning in exorbitant energy bills while spending hours on the phone with Central Hudson's customer representatives who lacked any direction and ability to remedy customers' issues, Central Hudson was running a public campaign to conceal the real truth behind the fiasco. ¶ 31. Instead of informing its customers of the root causes of the billing issues — *i.e.*, Central Hudson's inadequate and crippled billing systems — Central Hudson blamed its high prices on "energy supply prices," "cold weather," "increased global demand," and even the war in Ukraine; conduct that the regulators harshly criticized as a manifest of Central Hudson's lack of candor with customers and the public. *Id.*

III. ARGUMENT

A. Legal Standard Governing Central Hudson's Motion to Dismiss

On a motion to dismiss, pursuant to CPLR 3211, a pleading is afforded a liberal construction and the facts as alleged are presumed to be true. *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). The Court must draw all reasonable inferences in favor of the plaintiff. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977); *Maddicks v. Big City Properties, LLC*, 34 N.Y.3d 116, 123 (2019). "The complaint must be liberally construed in the light most favorable to the plaintiff and

all allegations must be accepted as true." *Wilner v. Allstate Ins. Co.*, 71 A.D.3d 155, 159 (2d Dept. 2010) (*citing Pacific Carlton Dev. Corp. v. 752 Pacific, LLC*, 62 A.D.3d 677 (2d Dept. 2009)). If it is shown that "plaintiff can succeed upon any reasonable view of the facts stated,'" then the Court should deem the pleading legally sufficient. *Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 318 (1995). Furthermore, in deciding a motion to dismiss, it is not the function of the Court to evaluate the merits of the case or to express an opinion as to a plaintiffs' ability to establish the truth of the averments. Rather, plaintiffs must be "given the benefit of every possible favorable inference" and the motion to dismiss will fail if, "from [the pleading's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Khan v. Newsweek, Inc.*, 160 A.D.2d 425, 426 (1st Dept. 1990). Accordingly, a court should deny a motion to dismiss under CPLR 3211 where "affidavits or other documentary evidence submitted by the plaintiff demonstrate that a cause of action may exist." *Johnson City Cent. Sch. Dist. v. Fid. & Deposit Co. of Maryland*, 263 A.D.2d 580, 581 (3d Dept. 1999).

B. The Filed Rate Doctrine Does Not Barr Plaintiffs' Claims

Notwithstanding the abundance of legal authority to the contrary, Central Hudson argues that Plaintiffs' claims are barred by the filed rated doctrine. Def.'s Br. at 11-16. Central Hudson is wrong. The filed rate doctrine exclusively applies to cases challenging rates that are filed — and approved — by a regulatory body. *Beller v. William Penn Life Ins. Co. of New York*, 8 A.D.3d 310, 313 (2d Dept. 2004). New York law is crystal clear that where, as here, the complaint does not challenge the reasonableness of the filed rates, the doctrine simply has no application. *Id.; see infra,* Sec. III.B. Furthermore, since Plaintiffs are not challenging the reasonableness of the filed rates, the Court's adjudication of Plaintiffs' claims does not threaten the principles underlying the doctrine, namely (i) the uniformity of rate regulation; and (ii) enmeshment of courts in rate-setting. *Beller,* 8A.D.3d at 313; *Gelb v. Am. Tel. & Tel. Co.*, 813 F. Supp. 1022 (S.D.N.Y. 1993); *see infra,* Sec. III.B.ii.

i. Plaintiffs Do Not Challenge the Reasonableness of the Filed Rate

The filed rate doctrine holds that any "filed rate — that is, one approved by the governing

regulatory agency — is *per se* reasonable and unassailable in judicial proceedings brought by ratepayers." *Beller*, 8 A.D.3d at 313. Where, as here, the plaintiff is not challenging the reasonableness of the filed rate, courts in New York uniformly reject the application of the filed rate doctrine. *See, e.g., Gelb*, 813 F. Supp. 1022 (the doctrine did not bar a suit for fraudulent misrepresentation against AT&T because plaintiffs were not challenging the reasonableness of AT&T's filed rates nor did they seek to have any individual card holder pay a different rate for their calling cards.); *Delaware Cnty. Elec. Co-op. Inc. v. Power Auth. of State of N.Y.*, 96 A.D.2d 154, 160 (4th Dept. 1983), *aff'd,* 62 N.Y.2d 877 (1984) (the doctrine did not apply to the court's consideration of the Power Authority's obligation to conduct public hearings because the question "did not directly affect the reasonableness of the rates."); *Lauer v. New York Tel. Co.*, 231 A.D.2d 126 (3d Dept. 1997) (affirming that the doctrine did not preclude customers' claims alleging willful misconduct and gross negligence where the telephone company's tariff contained liability limitation provision for "direct and indirect" harm). In *Beller* — which is instructive on the issue — plaintiff brought a § 349 claim based on defendant's deceptive practice of increasing insurance costs in contravention of the insurance policy. *Id.* The lower court dismissed the claim based on the filed rate doctrine because the insurance rate did not exceed the maximum insurance rate allowed by contract. *Id.* In reversing the lower court's decision, the Second Department reasoned that "[t]he plaintiff does not challenge the reasonableness of the maximum rate set forth in the policy, nor does she claim that she should have been treated differently from any other subscriber." *Id.* at 313. The same result is warranted here.

Central Hudson's Motion rests on the false assumption that Plaintiffs are challenging the reasonableness of the filed tariffs approved by the PSC. Def.'s Br. at 11. Contrary to Central Hudson's assertion, however, Plaintiffs are neither challenging the reasonableness of the filed rates nor questioning the PSC's authority to regulate Central Hudson. Rather, Plaintiffs are challenging Central Hudson's unlawful conduct in connection with overcharges, repeated bills to customers within the same month, charges based on false consumption estimates, unauthorized withdrawals from consumers' bank accounts resulting in imposition of late fees, among other things (¶¶ 18-21,

28) which were not filed, let alone, approved by the PSC and which grossly deviated from its mandate. *Krasner v. New York State Elec. & Gas Corp.*, 90 A.D.2d 921, 457 N.Y.S.2d 927, 929 (3d Dept. 1982) (defendant's intentional "termination" of service was not within the scope of tariff which only contemplated "interruption of service"). Under these circumstances, the doctrine simply does not apply. *See Beller*, 8 A.D.3d 310*; Lauer*, 231 A.D.2d 126.

Not surprisingly, every case Central Hudson cites in support of the filed rate doctrine (Def.'s Br at 11-13) involved circumstances where the plaintiff paid the actual rate that was filed and approved. *See Wegoland, Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112, 1115 (S.D.N.Y. 1992), *aff'd,* 27 F.3d 17 (2d Cir. 1994) (claims by plaintiff that it paid inflated rates which the regulatory agencies approved while the agencies were being misled into believing that those rates were justifiable); *Purcell v. New York Cent. R. Co.*, 268 N.Y. 164 (1935) (a brick distributor seeking reimbursement between the rate he previously paid and the new rate where each rate was approved by the PSC); *Porr v. NYNEX Corp.*, 230 A.D.2d 564, 567 (2d Dept. 1997) (plaintiff paid the rate filed and approved by the PSC); *Marcus v. AT & T Corp.*, 938 F. Supp. 1158, 1170 (S.D.N.Y. 1996), *aff'd sub nom.*, 138 F.3d 46 (2d Cir. 1998) (the doctrine barred plaintiff's challenge to AT&T's rates based on rounding up was a practice that was filed and approved by the FCC); *Doyle v. AT & T Corp.*, 304 A.D.2d 521, 522 (2d Dept. 2003) ("It is undisputed that the plaintiff was not charged the higher rates until after AT&T properly filed its new tariff with the [FCC]."); *Van Dussen-Storto Motor Inn, Inc. v. Rochester Tel. Corp.*, 42 A.D.2d 400, 403 (4th Dept. 1973), *aff'd sub nom.*, 34 N.Y.2d 904 (1974) (applying filed rate doctrine where plaintiff challenged the "reasonableness" of rates that were "mandated" and "duly filed" with the PSC); *W. Park Assocs., Inc. v. Everest Nat. Ins. Co.*, 113 A.D.3d 38, 47 (2d Dept. 2013) (the Insurance Department approved the subject rates as appropriate); *City of New York v. Aetna Cas. & Sur. Co.*, 264 A.D.2d 304 (1st Dept. 1999) (the rates at issue were filed with, and approved by, the Superintendent of Insurance). Central Hudson's cases stand for the unremarkable proposition that the filed rate doctrine bars claims that challenge the reasonableness of the filed rate – a point that Plaintiffs do not dispute.

Moreover, Central Hudson's self-serving assertion that it "charges and operates based upon the tariff *approved by the PSC*" (Def.'s Br. at 12) (emphasis in original) is a factual contention that directly contradicts Plaintiffs' allegations that Central Hudson operates in violation of the applicable regulatory mandates, including those imposed by the PSC (¶¶ 26, 28-40). Tellingly, in support of the assertion that it adheres to the filed tariff, which it does not, Central Hudson vaguely points to a URL address in the footnote within the "[b]ackground" section of its Motion (Def.'s Br. at 7), purporting to reference two 600+ pages-long documents filed with the PSC in December 1999. *Id.* Within these two documents — which Central Hudson failed to ask the Court to take judicial notice of — Central Hudson fails to identify any rule, section, page number, leaf, policy, or any specific rate that purportedly proves that Central Hudson's conduct was compliant with the filed tariff. *Id.* This omission is fatal to Central Hudson's filed rate doctrine defense on which, as the party invoking it, Central Hudson bears the burden of proof. *Right Aid Med. Supply, Corp. v. State Farm Mut. Auto. Ins. Co.*, 56 Misc. 3d 681, 683 (N.Y. Civ. Ct. 2017).[2] *F.T.C. v. Verity Int'l, Ltd.*, 443 F.3d 48, 62 (2d Cir. 2006) ("We hold that the filed-rate doctrine does not apply in this case because the defendants-appellants point to no tariff that covers the actual service rendered to users of their billing system."). Central Hudson's cases where the defendant actually proved at summary judgment that the utility was charging the filed rate only reinforces Plaintiffs' position here. *See Hollander v. Metro. Transp. Auth.*, 48 Misc. 3d 1206(A) (N.Y. Sup. Ct. 2015) (summary judgment after extensive discovery); *W. Park Associates, Inc.*, 113 A.D.3d at 42 (summary judgment based on defendants' submission of the papers filed with the Insurance Department); *Sisters of St. Dominic v. Orange & Rockland Power Co.*, 79 A.D.2d 1021, 1021 (2d Dept. 1981) (reversal of jury verdict based on an ambiguous instruction of the jury). Plaintiffs' entire allegation is that Central Hudson was *not following* the PSC's required procedures – a factual dispute

[2] Even if the Court was to consider and credit Central Hudson's purported "evidence" of compliance with the filed tariffs, it cannot be grounds for dismissal. In New York, a motion to dismiss can only be granted if the documentary evidence offered by defendant "utterly refutes" the allegations of fact, "conclusively establishing a defense as a matter of law." *Goshen v. Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314, 326 (2002); *Doe v. Ascend Charter Sch.*, 181 A.D.3d 648, 121 N.Y.S.3d 285, 288 (2d Dept. 2020) ("Yet, affidavits submitted by a defendant 'will almost never warrant dismissal under CPLR 3211 unless they 'establish conclusively that [the plaintiff] has no cause of action'").

inappropriate for resolution at the pleading stage.

ii. The Principles Underlying the Filed Rate Doctrine Are Not Implicated

The chief concern for the application of the filed rate doctrine is that adjudication of the asserted causes of action will threaten two principles underling the doctrine: (i) the principle that regulatory agencies are designed to set uniform rates, and thus allowing individual ratepayers to attack the filed rate "would undermine the congressional scheme of uniform rate regulation" (*Beller*, 8 A.D.3d at 313); and (ii) the principle that an attack on the filed rate would "necessarily enmesh the courts in the rate-making process," a function that the regulatory agencies, and not courts, are more competent to perform. *Id.* Where, as here, neither of these two principles is implicated, courts readily decline to apply the doctrine. *See Beller*, 8 A.D.3d at 313 (sustaining GBL § 349 claim where plaintiff's cause of action would not compromise the scheme of uniform rate regulation, nor did it require the court to engage in rate-making process); *See Lentini v. Fid. Nat. Title Ins. Co. of New York*, 479 F. Supp. 2d 292, 300 (D. Conn. 2007) ("The application of the filed rate doctrine is limited [and is] to be applied strictly to prevent a plaintiff from bringing a cause of action whenever either purpose underlying the filed rate doctrine is implicated."); *Gelb*, 813 F. Supp. 1022 (declining to apply the doctrine where the nondiscrimination and nonjusticiability were not implicated in a challenge to AT&T's practice of fraudulently inducing consumers to purchase calling cards); *Black Radio Network, Inc. v. NYNEX Corp.*, 44 F. Supp. 2d 565, 574 (S.D.N.Y. 1999) ("[The] doctrine is inapplicable because plaintiffs do not challenge, either directly or indirectly, the reasonable of the rate contained in any filed tariff.").

Here, the Court's adjudication of Plaintiffs' causes of action does not threaten the regulatory scheme of uniform rate regulation. *See Beller*, 8 A.D.3d at 313. Plaintiffs are not suing to alter the approved rates applicable to them or the proposed Class Members, as Central Hudson erroneously posits (Def.'s Br. 13, n. 7). Rather, Plaintiffs are seeking to secure the precise opposite: to compel Defendant to correct its unlawful practices to bring itself in compliance with filed tariff and thereby with the consumer protection statutes of the State of New York, including § 349 and the New York common law such that those laws are equally applied and have the same effect on

Plaintiffs and other Class Members. *Black Radio Network, Inc.*, 44 F. Supp. 2d at 574 (the rationale underlying the filed rate doctrine was not implicated where [ ] defendants failed to comply with the terms of the tariff and [sought], in essence, to enforce the filed tariff."). As such, the intended goal of Plaintiffs' action is to ensure a non-discriminatory application of the gas and electric tariff consistent with the regulatory scheme. *Beller*, 8 A.D.3d at 313.

Neither will the Court be required to participate in the rate-setting process, as Defendant mistakenly claims (Def.'s Br. at 14) as the nature of the claims do not involve rate regulation. *Gelb*, 813 F. Supp. at 1026 ("[T]he nature of the fraud alleged here does not involve "considerations of uniformity in regulation and of technical expertise."). Put differently, Plaintiffs' damages are not measured in reference to the filed rate; rather, they are measured either by direct harm inflicted on consumers or the profits unlawfully obtained by defendant. *See infra,* Sec. III.B.iii; *Black Radio Network, Inc.*, 44 F. Supp. 2d at 575 (the nonjusticiability strand is not implicated because courts are capable of examining a tariff, deciding whether its terms have been violated, and, if so, awarding damages). Accordingly, the Court will be asked to apply principles of tort law to determine whether Plaintiffs state a cause of action for tort violations. Central Hudson cannot dispute that "[s]tandards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts." *Gelb*, 813 F. Supp. at 1030.

iii. The Filed Rate Doctrine Does Not Preclude Any Injury Claimed by Plaintiffs

Nor is there any basis for Central Hudson to claim that no injury resulted from Plaintiffs' "payment of a legal rate" (Def.'s Br. at 15) because Plaintiffs did not pay the legal rate. The damages Plaintiffs seek are not measured by the difference in the filed rate and some speculative rate that should have been charged; instead, Plaintiffs' damages are measured either by: (i) the direct economic damages inflicted on consumers by Central Hudson's unlawful scheme which are far in excess of the filed rates; or (ii) by the amount of fees and profits Defendant received and collected from consumers in addition to what it was authorized to collected pursuant to its filed rate schedules. ¶¶ 5, 64, 73; *Gelb*, 813 F. Supp. at 1026 ("[Since liability depends on whether AT&T committed fraud in inducing customers' use of its calling cards,] "a determination of what

the rate should have been can enter in (if at all) only at the point of determining damages.").

Central Hudson's cases, once again, each involve circumstances where the plaintiff sought damages against a regulated entity for the payment of a legally filed and approved rate. See *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156, 161 (1922) (allegations that every rate complaint of had been duly filed by the several carriers with the Interstate Commerce Commission); *Porr*, 230 A.D.2d at 567 (although plaintiff challenged defendants' fraudulent advertising scheme, it did pay the filed rate for the service). Thus, in determining Plaintiffs' damages, this Court will not intrude on PSC's jurisdiction in order to award damages pursuant to the state law.

C. Primary Jurisdiction Does Not Preclude Court's Resolution of Plaintiffs' Claims

Plaintiffs' claims should not be dismissed under the principle of primary jurisdiction. First, the considerations for invoking the doctrine of primary jurisdiction are similar to those evaluating the filed rate doctrine, that is whether the administrative agency is better equipped than courts to resolve the dispute. *Statistical Phone Philly v. NYNEX Corp.*, 116 F. Supp. 2d 468, 480 (S.D.N.Y. 2000), *aff'd sub nom. Black Radio Network, Inc. v. Nynex Corp.*, 14 F. App'x 111 (2d Cir. 2001) (*citing Capital Telephone Co. v. Pattersonville Telephone Co.*, 56 N.Y.2d 11, 21 (1982) (where plaintiffs do not challenge reasonableness of tariff but rather seek to enforce federal antitrust laws, PSC does not have exclusive, original jurisdiction); *Lauer*, 231 A.D.2d at 128–29 (court may hear claims against telephone company for willful misconduct and gross negligence without resort to PSC); *DeCostanzo v. GlaxoSmithKline PLC*, --- F. Supp. 3d ---, 2022 WL 17338047, at *6 (E.D.N.Y. Nov. 29, 2022) (declining to dismiss GBL §§ 349, 350 and fraud claims based on the primary jurisdiction doctrine on the grounds that U.S. Food and Drug Administration approved defendants' claims that Boostrix was "safe and effective" and noting that the claims were more analogous to "misleading labeling claims [ ] where the doctrine is rarely applied.").[3]

[3] Defendant cites to cases where plaintiffs challenged the reasonableness of defendants' rates. *See Lamparter v. Long Island Lighting Co.*, 90 A.D.2d 496, 496 (2d Dept. 1982) (plaintiff contesting both the reasonableness and application of defendant's backbilling and service discontinuance rules); *Brownsville Baptist Church v. Consol. Edison Co. of New York*, 272 A.D.2d 358, 359 (2d Dept. 2000) (challenging the reasonableness of defendant's eligibility requirements to receive lower rates); *Nat'l Energy Marketers Ass'n v. New York State Pub. Serv. Comm'n*, 33 N.Y.3d 336, 347 (2019) (concerning NYSPSC authority to impose limitations on utility rates as a condition to continued access).

Second, the doctrine of primary jurisdiction will not be applied where the relevant administrative agency has no jurisdiction over the relief sought and plaintiffs will not be provided an adequate remedy. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 302 (1976); *Brotherhood of R. R. Trainmen v. Howard*, 343 U.S. 768, 774 (1952). The PSC cannot adjudicate Plaintiffs' § 349 and common law claims and cannot award damages, as provided for in § 349, or elsewhere. *Statistical Phone Philly*, 116 F. Supp. 2d at 480 ("[W]hen an administrative agency lacks the authority to grant plaintiffs the complete relief they seek, the doctrine of exhaustion of administrative remedies is inapplicable."); *Haddad v. Salzman*, 188 A.D.2d 515, 516 (2d Dept. 1992) (dismissal for failure to exhaust administrative remedies improper where administrative body unable "to provide 'adequate and complete relief'"). Therefore, the PSC cannot provide an adequate remedy to Plaintiffs and the Class, as Central Hudson incorrectly asserts (Def.'s Br. at 16). The fact that PSC set certain rates and procedures, is not a tacit approval of the fraudulently procured excessive charges extracted from consumers, nor does it insulate Defendants from judicial resolution of Plaintiffs' claims. *Black Radio Network, Inc.*, 44 F. Supp. 2d at 575 (noting that courts are perfectly capable of examining a tariff and deciding whether its terms have been violated). Consequently, the doctrine of primary jurisdiction is inapplicable for this reason as well. *Hall v. Consol. Edison Corp.*, 104 Misc. 2d 565, 428 N.Y.S.2d 837 (Sup. Ct. Kings Co. 1980) (the tariff in question did "not relieve the defendant from its common law tort liability.").

That PSC has "established a system for complaints relating to utility rates" (Def.'s Br. at 18) does not give the PSC an exclusive jurisdiction over Plaintiffs' claims. The relevant inquiry is what facts are determinative of each proceeding in light of the substantive principles, common law or statutory, governing each. The question before the PSC — and not before the Court — is whether Defendant's failure to apply the filed rate and adhere to the billing and metering schedules violated Plaintiffs' statutory and common law rights. In contrast, the Complaint before the Court alleges, that Defendant employed deceptive practices and methods that had the effect of extracting charges from consumers that Defendant concealed, negligently failed to remedy, and even obfuscated by its billing practices and procedures. ¶¶ 55-58. The PSC will not resolve the question

of whether Central Hudson's conduct was "illegal as a matter of law" or whether it constituted breach of express and implied contracts between Class Members and Central Hudson. *Fulton Cogeneration Assocs. v. Niagara Mohawk Power Corp.*, 84 F.3d 91, 97 (2d Cir. 1996) (affirming denial of a motion to dismiss a claim for a breach of contract based on the primary jurisdiction and noting that "the issues of contract interpretation here are neither beyond the conventional expertise of judges nor within the special competence of the PSC."). Nor can the PSC determine whether Defendant unjustly enriched itself at the expense of consumers, such that consumers are entitled to recover for the harm they suffered as a result of Central Hudson's practices. *Statistical Phone Philly*, 116 F. Supp. 2d at 480 ("It is undisputed that the PSC lacked the power to award plaintiffs the monetary damages they seek from NYTel."). Put differently, it is not PSC's function to enforce state tort laws. Thus, the issues before the PSC and the Court overlap but are not identical.[4]

D. Plaintiffs Sufficiently Plead Their GBL § 349 Claim

A *prima facie* claim under § 349 requires a showing that the defendant has engaged in an act or practice that is deceptive or misleading in a material way and that the plaintiff has been injured by reason thereof.[5] *Goshen*, 98 N.Y.2d at 324; *City of New York v. T-Mobile USA*, Inc., Index No. 451540/2019, 2020 N.Y. Slip Op. 50369(U), *3 (N.Y. Sup. Ct. 2020) (held plaintiffs sufficiently pleaded fraud causes of action under § 349 "with the information available to them in a pre-discovery posture"). "Section 349 governs consumer-oriented conduct and, on its face, applies to virtually all economic activity." *DeCostanzo*, 2022 WL 17338047, at *6.[6] "Intent to

[4] Central Hudson's cases recognized that the primary jurisdiction doctrine does not apply where the complaint presents only questions of law and only applied the primary jurisdiction doctrine in light of the numerous factual disputes. *See Capital Telephone Co.*, 56 N.Y.2d at 18 (recognizing that the fact that the charges made by defendant are based on tariffs filed with the NYSPSC does not protect public utilities from tort liability, including in connection with deceptive application of those rates); *Youngja Huh v. Suez Water Westchester Inc.*, No. 16-cv-3240 (PAE), 2017 WL 1857252, at *5 (S.D.N.Y. May 5, 2017) (requiring a technical determination whether plaintiff's water meter was "functioning properly within regulatory limits" which is better considered by the PSC."); *Lamparter*, 90 A.D.2d 496 (contesting the reasonableness and application of defendant's backbilling and discontinuance rules); *Brownsville Baptist Church*, 272 A.D.2d at 359 (challenging the reasonableness of rules for eligibility to receive lower rates).

[5] Central Hudson is only challenging the deceptive practice and injury prongs, both of which Plaintiffs meet. *See Gaidon v. Guardian Life Ins. Co. of Am.*, 94 N.Y.2d 330, 344 (1999).

[6] *See also Karlin v. IVF Am., Inc.*, 93 N.Y.2d 282 (1999) (The scope of GBL § 349 is broad so as to provide the authority necessary to combat the "numerous, ever-changing types of false and deceptive business practices" that "plague consumers.").

defraud and justifiable reliance are not elements of a § 349(a) claim." *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 55 (1999). GBL § 349 is broadly construed and need only meet "bare-bones notice pleading requirement[s]." *City of New York*, 2020 N.Y. Slip Op. 50369(U).

i. Plaintiffs Allege Deceptive and Misleading Conduct by Central Hudson

The relevant question whether a representation or an omission is "materially misleading," is whether the deceptive practice is likely to mislead a reasonable consumer acting reasonably under the circumstances. *Nick's Garage, Inc. v. Progressive Cas. Ins. Co.*, 875 F.3d 107, 124 (2d Cir. 2017). In any event, whether conduct was "misleading" is a question of fact not appropriate for resolution on a motion to dismiss. *Sims v. First Consumers Nat. Bank*, 303 A.D.2d 288, 289 (1st Dept. 2003) ("whether defendants' conduct was deceptive or misleading is a question of fact"); *see infra* Sec. II.A. Plaintiffs allege Central Hudson engaged in unlawful deceptive acts and practices by: (i) hastily releasing its billing software knowing it was riddled with defects that would cause harm to consumers (¶¶ 28, 29, 30); *People ex rel. Spitzer v. Applied Card Sys., Inc.*, 27 A.D.3d 104 (3d Dept. 2005) (GBL claim upheld where defendant improperly accessed consumers' accounts and charged them unlawful fees); *Dunham v. Sherwin-Williams Company*, No. 1:22-cv-300, 2022 WL 13764806 at *3 (N.D.N.Y. Oct. 24, 2022) (upholding GBL claim where defendant omitted material information concerning its fees); (ii) deceptively charging its customers fees for gas and electricity that exceeded the amounts that Central Hudson was permitted to charge within the filed rate schedules (¶¶ 55). *Sims*, 303 A.D.2d at 289 (sustaining GBL claim where Plaintiffs were charged hidden fees); *Chiste v. Hotels.com L.P.*, 756 F. Supp. 2d 382, 406 (S.D.N.Y. 2010) (sustaining GBL claim where consumers "did not necessarily suspect" would collect more fees "than it was required to by law".); (iii) issuing bills to consumers containing unpredictable amounts, automatically withdrawing funds from customers' account causing them to incur overdraft fees. *Id.*; *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 126 (2d Cir. 2007) (vacating dismissal and noting that "New York courts have held that collecting fees in violation of other federal or state laws may satisfy the misleading element of § 349."); and (iv) contemporaneously suppressing, concealing and obfuscating consumers' ability to understand and remedy those

unlawfully-charged amounts by sending bills that are irreconcilable on their face. *Id.*; *Dunham*, 2022 WL 13764806, at *3 ("An omission is materially misleading . . . where the plaintiff would have acted differently had the defendant disclosed the information in its possession.").

Well aware of its own culpability, Central Hudson continued to lie and blame its acts on "energy supply prices," "cold weather," "increased global demand," and "International events in eastern Europe." ¶ 31. Central Hudson's purported "public admission" that it "had encountered challenges" (Def.'s Br. at 21) does not render any of its previous practices not deceptive. If anything, Central Hudson's half-truth admission underplayed the real magnitude of the problem, further misleading consumers. *Mantikas v. Kellogg Co.*, 910 F.3d 633, 637 (2d Cir. 2018) ("[R]easonable consumers should [not] be expected to look beyond misleading representations . . ."). Neither can Central Hudson candidly argue that its billing practices were "fully aired at public rate-setting hearings, and in public statements." Def.'s Br. at 22. What was "fully aired" were the filed rates and tariffs that Central Hudson was obligated to adhere to (and which Plaintiffs are not challenging (Sec. II.B.)), and not Central Hudson's systematic deviation from the rates, negligence in releasing the software, unlawful withdrawals for $16 million from consumers, and other acts Plaintiffs claim were deceptive. As the OIE observed, "*at no point* did Central Hudson advise customers of the critical defects plaguing the Company's billing system that caused errors resulting in inaccurate and delayed billing." ¶ 31; *People ex rel. Spitzer*, 805 N.Y.S.2d at 177–178. As a result of its active concealment, Central Hudson can hardly rely on *88 Blue Corp. v. Reiss Plaza Assocs.*, 183 A.D.2d 662, 585 N.Y.S.2d 14, 16 (1st Dept. 1992), where the Plaintiffs had *full knowledge of the discrepancy in question* and "means available to [them] for discovering by the exercise of *ordinary intelligence*, the true action [they are] about to enter into . . ." *Id.* This leaves Central Hudson with nothing to point to support its self-serving conclusion that the challenged deceptive practices were fully disclosed.

ii. Plaintiffs Have Adequately Alleged Injury Under GBL § 349

To sufficiently plead injury under § 349, Plaintiffs need only demonstrate they were injured as a result of the deceptive practice. *Suarez v. California Nat. Living, Inc.*, No. 17-cv-9847(VB),

2019 WL 1046662, at *1 (S.D.N.Y. Mar. 5, 2019); *Goshen*, 98 N.Y.2d at 324. Here, Plaintiffs have done precisely that by alleging that they would not have used Central Hudson's gas and electrical services had they known that Central Hudson would inaccurately charge them for consumption, bill unpredictably, and withdraw automatic payments for customers without their consent. ¶ 59. Plaintiffs and Class members were victims of Central Hudson's deceptive representations and omissions when they entered into a business relationship with Central Hudson for its electrical and/or gas services; and had no way of knowing Central Hudson would engage in the slew of unlawful activity as described herein. ¶¶ 60-61. As a result of Central Hudson's conduct, Plaintiffs and Class members have been and continue to be harmed. ¶¶ 56, 79, 84. These allegations go well beyond what is required by § 349. *Beller*, 8 A.D.3d at 314 (GBL § 349 sufficiently pled where plaintiffs alleged their rates increased in violation on the terms of defendant's policy); *Kronenberg v. Allstate Ins.Co.*, No. 18-cv-6899 (NGG)(JO), 2020 WL 1234603, at *4 (S.D.N.Y. Mar. 13, 2020) (GBL § 349 sufficiently pled where the entity "did not do what its policy said it would do and the rates [] listed . . . do not represent the prevailing competitive [] rates as they purported to."). Central Hudson's citation to *Orlander v. Staples*, 802 F.3d 289 (2d Cir. 2015) amplifies Plaintiffs' position. In *Orlander*, the Second Circuit upheld Plaintiff's § 349 claim based on plaintiffs' allegations that he paid for a service he would not have purchased had he known the defendant engaged in misleading practice and failed to render services as promised. *Id.* at 301. Here, like in *Orlander*, Plaintiffs suffered monetary losses stemming from Central Hudson's deceptive conduct and practices. ¶¶ 18, 25, 28. *Goshen*, 98 N.Y.2d at 324. Accordingly, Plaintiffs' injury allegations under § 349 are sufficiently pled.

E. Plaintiffs Sufficiently Alleged a Breach of Contract Claim

Under New York law, to plead an enforceable agreement, a plaintiff must establish the existence of an offer, consideration, and an intent to be bound. 22 N.Y. Jur. 2d Contracts § 9; *Winston v. Mediafare Entertainment Corp.*, 777 F.2d 78, 80 (2d Cir. 1985) (contract law places an emphasis on intention rather than form). Plaintiffs easily allege the formation and breach of a valid contract. Plaintiffs easily make that showing. Central Hudson offered to provide electrical and/or

gas services to Plaintiffs in exchange for monetary compensation. ¶¶ 67, 69. The offer included specific written representations regarding those services, including, but not limited to: (i) the provision of notice with respect to material changes in their billing statements; (ii) performance of relevant meter readings according to established reading cycles; (iii) billing its customers on a monthly schedule; and (iv) to acknowledgement in writing or by electronic transmission, receipts of customer inquiries within 5 days of receipt. ¶ 68. Plaintiffs and Class members accepted Central Hudson's offer and compensated Central Hudson for the services provided. Both parties thus performed their part of the contractual obligations. *Dunham*, 2022 WL 13764806, at *6 (finding contract formation where plaintiffs substantially performed all their obligations under the contract).

While challenging the existence of a contract, Central Hudson tacitly concedes the tariff itself is the basis of any contract between the parties. Def.'s Br. at 23 ("Whatever agreement supposedly exists between Plaintiffs and Central Hudson, 'the actual terms and conditions of use are set forth in the tariff which would form' its basis."). Even assuming *arguendo* that Central Hudson is correct, Plaintiffs still plead a viable cause of action for a breach of contract. The tariff and HEFPA mandate Central Hudson provide customers with bills that meet certain requirements, including that the charges for services are presented in a clear and understandable manner and that the bills contain information about, or among other things, charges or credits which are adjustments to the base charges imposed by the distribution utility's tariff for the rate classification of that consumer. ¶ 35. HEFPA also states "every unjust or unreasonable charge made or demanded for gas or electricity is prohibited." ¶ 33. As alleged in the Complaint, Central Hudson failed to do all of that, causing thousands of customers to: (i) be overcharged and double-billed; (ii) receive bills for over three months; and (iii) having funds withdrawn from their bank accounts. ¶¶ 28-29. Plaintiffs have alleged that this conduct constituted a breach of contract. ¶¶ 68-72; *see Kross Dependable Sanitation Inc. v. AT&T Corp.*, 268 A.D.2d 874, 701 N.Y.S.2d 732, 734 (3d Dept. 2000) (breach of contract claim upheld where the allegations did not "go beyond the applicable tariff").

F. Plaintiffs Sufficiently Alleged Common Law Claims

Plaintiffs' remaining common law claims are sufficiently pled and should be sustained.

i. Breach of Good Faith and Fair Dealing

"A covenant of good faith and fair dealing in the course of contract performance" is "[i]implicit in all contracts." *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995). The covenant "'embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" *Atmosphere Sciences., LLC v. Schneider Advanced Techs., Inc.*, No. 12-cv-3223 (SAS), 2012 WL 4240759, at *5 (S.D.N.Y. Sept. 19, 2012), *vacated,* 2013 WL 1719174 (S.D.N.Y. Apr. 16, 2013). Here, Plaintiffs allege that Central Hudson – was obligated to, but — breached the covenant of good faith and fair dealing by failing to address and remedy Plaintiffs' claims in timely fashion and failing to reimburse and correct the errors Plaintiffs complained of. *See Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918, 923 (2d Cir. 1977) (Contracting parties' discretion under a contract includes the parties' mutual obligation to act in good faith, and a breach of this duty constitutes a breach of the contract.). Central Hudson's failure to provide such remedy had the effect of destroying their right to receive the fruits of their contract.[7]

ii. Unjust Enrichment

Plaintiffs' unjust enrichment claim can also be pled distinct from Plaintiffs' § 349 claim. "[T]he essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." *LivePerson, Inc. v. 24/7 Customer, Inc.,* 83 F. Supp. 3d 501, 519 (S.D.N.Y. 2015); *Stanford Heights Fire Dist v. Town of Nikayuna*, 120 A.D.2d 878, 502, N.Y.S. 2d 548, 550 (3d Dept. 1986) ("[p]laintiff was simply required to allege that this defendant received a benefit which general principles of equity indicate would be unconscionable for it to retain."). *Maalouf v. Salomon Smith Barney, Inc.*, No. 02-cv-4770(SAS), 2003 WL 1858153, at *7 (S.D.N.Y. Apr. 10, 2003) ("the fact

[7] Defendants' reliance on *Petrilli v. Adirondack Ins. Exchange*, No. 600128/18, 2018 WL 2322773, at *4 (N.Y. Sup. Ct. May 16, 2018) is unhelpful. There, plaintiff's cause of action for breach of good faith and fair dealing emanated from the same set of facts and sought identical damages as the cause of action for breach of contract, rending the two claims duplicative. *Id.*

that [the plaintiff] may only recover from one claim, either contract or quasi-contract, certainly does not preclude him from pleading unjust enrichment in the alternative"); CPLR 3017(a) and CPLR 3014. Courts readily allow plaintiffs to plead alternative claims, particularly where, as here, there may be an argument regarding the existence and nature of the underlying contract, leaving open the possibility that the plaintiff might need to rely on the quasi-contractual theories in order to recover. *See U.S. Bank Nat'l Ass'n v. BFPRU I, LLC*, 230 F. Supp. 3d 253, 266 (S.D.N.Y. 2017) ("However, even though Plaintiffs may not ultimately recover under both the breach of contract and unjust enrichment claims, courts in this Circuit routinely allow plaintiffs to plead such claims in the alternative."); *Picture Patents, LLC v. Aeropostale, Inc.*, No. 07-cv-5567(JGK), 2009 WL 2569121, at *3 (S.D.N.Y. Aug. 19, 2009) ("When there is a bona fide dispute as to the existence of a contract, a party may proceed upon a theory of unjust enrichment, and an unjust enrichment claim may be alleged alongside a breach of contract claim."); *St. John's Univ., New York v. Bolton*, 757 F. Supp. 2d 144, 183 (E.D.N.Y. 2010) ("dismissal of unjust enrichment claims is inappropriate where there is a genuine dispute over the enforceability of the alleged contract").

iii. Negligence

Central Hudson argues that it is expressly exempt from liability by a waiver of liability "for any supposed negligence for the provision of utility service." Def.'s Br. at 25. As a source of that waiver, Central Hudson cites to a website that actually does not work. Like with the tariff, Central Hudson did not request the Court to take judicial notice of any document from which the Court could ascertain the existence of any liability waiver. In any event, the tariff document Defendant references on page 7 of its Motion contains language affirming the precise opposite: that Central Hudson is liable for injuries resulting from its negligence. *See* Tariff at p. 132 ("The Company will not be liable for any injury, casualty or damage resulting in any way from the supply or use of electricity . . . ***except injuries or damages resulting from the negligence of the Company.***").

Next, Central Hudson argues that Plaintiff's negligence claim sounds in contract and not tort. Def.'s Br. at 25. Not so. In a tort action, a legal duty springs from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent

upon the contract. *Rich v. New York Central & Hudson R.R. Co.*, 87 N.Y. 382 (1882). For example, in *Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540, 551 (1992), the Court of Appeals held that a fire alarm company's duty to act with reasonable care was a function of its private contract with the owner of a Manhattan building, and stems from the nature of its services. Because fire alarm companies are responsible for adhering to the comprehensive regulations set forth in the New York City Fire Code; they perform a service affecting a significant public interest. Failure to perform that service carefully and completely can have catastrophic consequences. *Id.* at 552. Here, Central Hudson's duty to act with reasonable care stems from its status as a utility company responsible for adhering to an exhaustive set of rules and regulations. *See supra, id.* Its responsibilities therefore accompany a significant public interest and failure to perform these services competently have caused catastrophic consequences for consumers. *Id.* at 963 ("It is the public policy of this State, however, that a party may not insulate itself from damages caused by grossly negligent conduct"). Plaintiffs have adequately alleged Central Hudson breached its duty of care by failing to fulfill its obligations arising from the applicable laws and regulations. ¶¶ 88-89.

G. Plaintiffs Are Entitled to Declaratory Relief

New York consumer protection statutes readily contemplate that injured consumers may sue for equitable relief in addition to damages. *Chiste*, 756 F. Supp. 2d at 406–407 (holding that "declaratory judgments . . . are remedies, not causes of action" and, because plaintiff has pled a viable GBL § 349 claim, she may pursue declaratory judgment as a remedy); *Beslity v. Manhattan Honda, a Div. of Dah Chong Hong Trading Corp.*, 120 Misc. 2d 848, 853 (N.Y. App. Term 1983) (a consumer may elect "to sue for either injunction or damages or for both"). Plaintiffs' declaratory judgement claim is not duplicative of Plaintiffs' breach of contract claim because Plaintiffs' equitable relief is distinct from the other relief they seek in this court. Def's Br. at 26; *See infra,* Sec. III.B.iii; *Myers Indus., Inc. v. Schoeller Arca Sys., Inc.*, 171 F. Supp. 3d 107, n. 11 (S.D.N.Y. 2016) ("Where a claimant is entitled to a particular category of damages on one claim but not the other, the claims are not duplicative.").

H. Plaintiffs' Allegations Should Not be Stricken

Central Hudson asks the Court to strike the class allegations from the Complaint before a class certification motion has been made or discovery has even begun. Def.'s Br. at 26-27. Central Hudson ignores that such motions are extremely disfavored and virtually always denied as premature. *See Maddicks,* 34 N.Y.3d at 126 ("Second, we agree with plaintiffs that to dismiss these class claims at this juncture [on a motion to dismiss] would be to effectively nullify CPLR 906."); *Griffin v. Gregory's Coffee Mgmt. LLC*, 191 A.D.3d 600 (1st Dept. 2021) ("In reviewing these types of motions, this Court has held that it will generally be 'premature to dismiss class action allegations before an answer is served or pre-certification discovery has been taken.'"); *Moreno v. Future Care Health Servs., Inc.*, 43 Misc. 3d 1202(A) (Sup. Ct. Kings Co. 2014) ("Defendants' request for dismissal of the class action claims are premature at this time and thus denied"); *accord Downing v. First Lenox Terrace Assocs.*, 107 A.D.3d 86, 91, 92 (1st Dept. 2013), *aff'd sub nom. Borden v. 400 E. 55th St. Assocs., L.P.*, 24 N.Y.3d 382 (2014). "A motion to dismiss should not be equated to a motion for class certification." *Maddicks*, *supra*, at 119.

Here, the Complaint adequately alleges Central Hudson engaged in a multi-faceted, deceptive scheme, which impacted similarly situated consumers. ¶¶ 38, 41-47. Central Hudson cannot conclusively demonstrate that "as a matter of law, there is no basis for class action relief." *Maddicks*, *supra*, at 122, 126 (dismissal of class claims that addressed a harm within a common systematic plan was premature); *see also Kronenberg*, 2020 WL 1234603 at *6 ("Defendant[] therefore cannot demonstrate from the face of the [c]omplaint that it would be impossible to certify the alleged class."). Central Hudson's motion to strike the class allegations from the Complaint is premature. *Maddicks*, *supra*, at 119.

IV. CONCLUSION

For the foregoing reasons, Central Hudson's Motion to Dismiss should be denied in its entirety. If the Court grants the Motion in any respect, Plaintiffs request leave to amend.

Dated: April 10, 2023

LOWEY DANNENBERG, P.C.

By: */s/ Andrea Farah*

Andrea Farah
Alesandra Greco
44 South Broadway, Suite 1100
White Plains, NY 10601
Telephone: (914)-997-0500
Facsimile: (914)-997-0035
Email: afarah@lowey.com
agreco@lowey.com

Attorneys for Plaintiffs and the Proposed Class