No. 18-3138

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUSANNA MIRKIN and BORIS MIRKIN, Individually and on Behalf of all Others Similarly Situated,

Plaintiffs-Appellants,

v.

XOOM ENERGY, LLC and XOOM ENERGY NEW YORK, LLC,

Defendants-Appellees.

Appeal From The United States District Court
For the Eastern District of New York
Case No. 18-cv-02949
The Honorable Judge Allyne R. Ross

BRIEF OF THE DEFENDANTS-APPELLEES
XOOM ENERGY LLC AND XOOM ENERGY NEW YORK, LLC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendants-Appellees hereby state that the sole member and manager of Defendant-Appellee XOOM Energy New York, LLC is XOOM Energy, LLC and the sole member and manager of Defendant-Appellee XOOM Energy, LLC is XOOM Energy Global Holdings, LLC. Defendants-Appellees further state there are no subsidiaries that are not wholly owned by Defendants-Appellees and that NRG Energy, Inc. is a publicly held company that owns 10% or more of Defendants-Appellees.

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1. Whether the District Court correctly held that Plaintiffs' Complaint failed to state a claim for breach of contract when it alleged that XOOM breached the contract by failing to charge "wholesale" or "Market Rate" prices that are not referenced in the terms of the Agreement.

2. Whether the District Court abused its discretion in declining to *sua sponte* grant Plaintiffs leave to replead, or in declining to grant Plaintiffs an amendment to the Complaint that was never requested.

3. Whether the District Court abused its discretion in denying Plaintiffs' motion to alter or amend the judgment or for relief from judgment seeking to file an amended complaint when, after considering the allegations contained in Plaintiffs' proposed amended complaint, it found that the amendment would be futile because it reiterated allegations that XOOM failed to charge "wholesale" or "Market Rate" prices that are not contained in the contract.

4. Whether the District Court abused its discretion in denying Plaintiffs' second motion for reconsideration, in which Plaintiffs expressed disagreement with the court's conclusions and argued that the District Court failed to consider the impact of its proposed amendment.

STATEMENT OF THE CASE

This appeal stems from Plaintiffs-Appellants Susanna and Boris Mirkin's attempt to manufacture a class action lawsuit against Defendants-Appellees XOOM Energy New York, LLC and XOOM Energy, LLC (hereinafter collectively "XOOM") for breach of contract related to Plaintiffs' application and enrollment to receive electricity service from XOOM. XOOM is an independent energy retailer that supplies natural gas and electricity to residential and commercial customers in competitive energy markets throughout the United States.

Plaintiffs began receiving electricity supply service from XOOM pursuant to an Electricity Sales Agreement at a price of 8.99 cents per kilowatt hour (kWh) for the first month in May 2013. Thereafter, Plaintiffs' *variable price* increased during the summer months of June, July, and August, before decreasing in September and increasing in October 2013. Plaintiffs never notified XOOM's customer service or the New York Department of Public Service about any issues with respect to their electricity service or their bill. Plaintiffs terminated their agreement with XOOM just six months later in early November 2013.

More than four years later, on April 18, 2018, Plaintiffs filed a putative Class Action Complaint alleging that XOOM breached the Electricity Sales Agreement, breached the covenant of good faith and fair dealing, and was unjustly enriched because it charged Plaintiffs more than "wholesale prices" and a

manufactured "Market Supply Rate," which were not referenced anywhere in XOOM's agreement.[1] The actual language of the Agreement indicated that XOOM's price would vary, and was based on "***XOOM's actual and estimated*** supply costs which ***may include but not be limited to*** prior period adjustments, inventory and balancing costs." Plaintiffs' Complaint improperly asked the District Court – and now asks this Court – to set aside the language of the Agreement and read into the contract an additional term that XOOM promised to charge "wholesale" or "market prices" for electricity that are consistent with prices unilaterally calculated by Plaintiffs.

XOOM moved to dismiss the Complaint on the grounds that Plaintiffs did not state a claim for breach of any actual term of the Agreement. Plaintiffs did not amend their Complaint, but instead opposed XOOM's motion. Plaintiffs made the strategic choice not to request permission to file an amended complaint in the event XOOM's motion was granted. The District Court properly weighed all of the allegations in the Complaint against the actual terms of the Agreement and granted XOOM's motion to dismiss, with prejudice. The Court issued a twenty-page,

[1] Notably, this is not the first time that these specific Plaintiffs temporarily signed up for energy services, only to terminate their agreement and file a lawsuit against their energy supply company. Indeed, Plaintiffs Susanna and Boris Mirkin and lead counsel in this action filed a lawsuit in the United States District Court for the District of Connecticut against another independent energy retailer in 2015 claiming, among other things, breach of contract, breach of the covenant of good faith and fair dealing and unjust enrichment. *See Mirkin v. Viridian Energy, Inc.*, No. 3:15-cv-1057 (SRU) (D. Conn. 2015).

comprehensive written opinion laying out all of the reasons and authority for its decision.

Plaintiffs subsequently filed a motion to alter or amend the judgment under Rule 59, or for relief from judgment under Rule 60. They expressed disagreement with the Court's decision, and argued that the District Court erred in not granting Plaintiffs relief they never asked for – permission to file an amended complaint. Plaintiffs also submitted a proposed amended complaint attempting to cure the District Court's "perceived" deficiencies with Plaintiffs' pleading. The Court evaluated all of Plaintiffs' arguments, as well as the allegations contained in their proposed amended complaint in accordance with Second Circuit precedent, and denied the motion. The Court concluded that Plaintiffs' proposed amendments were premised upon the same fundamentally flawed theory that XOOM breached the contract by failing to charge Plaintiffs a "wholesale" or "Market Supply Rate." It noted that the amendment simply referenced additional factors *Plaintiffs* relied on, but which were not contained in the Agreement. Accordingly, the Court found that Plaintiffs' proposed amendment would be futile, and that Plaintiffs had not satisfied the requirements for relief under Federal Rule of Civil Procedure 59 or 60.

Undeterred, Plaintiffs filed an untimely *second* motion for reconsideration, which reasserted the same arguments in their motion to alter or amend the judgment, and claimed that the District Court failed to consider the "impact" of

Plaintiffs' proposed amendment. Notwithstanding Plaintiffs' procedural deficiencies, the District Court considered all of Plaintiffs' substantive arguments and denied the motion on the merits. In denying the motion, the District Court issued another ten-page opinion, which referenced the specific portions of its November 2, 2018 ruling in which it did, in fact, consider and reject Plaintiffs' proposed amendment.

Plaintiffs now appeal from the District Court's grant of XOOM's motion to dismiss Plaintiffs' breach of contract claim under Rule 12(b)(6). Plaintiffs do not appeal the dismissal of their breach of the covenant of good faith and fair dealing and unjust enrichment claims. Plaintiffs also appeal from the denial of their motion to alter or amend the judgment or for relief from judgment, and the denial of their second motion for reconsideration. As set forth in detail below, the District Court properly considered all of Plaintiffs' arguments, as well as their proposed amended complaint, and correctly held that Plaintiffs could not state a claim for breach of contract under the actual language of the Electricity Sales Agreement.

The District Court's judgment and orders dismissing Plaintiffs' complaint were well-reasoned, supported by binding and persuasive authority, and should be affirmed.

I. BACKGROUND FACTUAL ALLEGATIONS RELEVANT TO THIS APPEAL

Plaintiffs' Complaint alleged that in or around March 2013, Plaintiffs applied through the XOOM website to receive electricity services at their residence in Brooklyn, New York to begin in May 2013. (A-19 at ¶ 41). Specifically, Plaintiffs alleged that they applied online to enroll in the XOOM SimpleFlex Variable Price Plan at a price of 8.99 cents per kWh for the first month of service. (A-19 at ¶ 43). The enrollment process allowed the applicant to review the product summary and terms of service and also required the applicant to fill out an application form for electricity services and provide certain information to XOOM. (A-19 at ¶¶ 41-43). After XOOM reviewed and approved Plaintiffs' enrollment application, it provided Plaintiffs with the operative Electricity Sales Agreement for Residential Service in New York, which memorialized the agreement for electricity services and governs the terms and conditions of the relationship. (A-19 at ¶ 41; A-29 to A-31).

Plaintiffs' Complaint acknowledged that the Electricity Sales Agreement was valid and binding and that it governed the terms and conditions of their receipt of electricity services from XOOM. (A-19 at ¶ 41). The Agreement also explicitly advised Plaintiffs that they would be charged a "variable" price and authorized XOOM to charge such variable prices on a monthly basis, plus taxes and fees, if applicable. (A-29, Residential Disclosure Statement). Importantly, on the first

page, in the first box of the Residential Disclosure Statement table, the Agreement provides:

> **Your rate for energy purchases will be a variable rate, per kWh, that may change on a monthly basis, plus taxes and fees, if applicable.** Your monthly variable rate is based on **XOOM's actual and estimated supply costs which may include but not be limited to prior period adjustments, inventory and balancing costs.**

(A-29, Residential Disclosure Statement: XOOM SimpleFlex Variable Price Product) (emphasis added). Furthermore, in order to quell any perceived confusion regarding pricing, the last box in the Disclosure Statement table provides: "**Guaranteed Savings:** There are no guaranteed savings in this Agreement at this time." (A-29, Residential Disclosure Statement: Guaranteed Savings) (emphasis in original). The Agreement allowed Plaintiffs to cancel their acceptance of its terms within three days of their enrollment and receipt of the document without any penalty or cancellation fee, by simply calling the listed telephone number or sending XOOM an email. (A-29, Residential Disclosure Statement).

In the event Plaintiffs had any issues with their electricity service or bill, the Agreement contained certain terms and required procedures for dispute resolution. (A-31). Specifically, the Agreement provided that:

> In the event of a billing dispute or a disagreement involving XOOM's service, you should contact XOOM's Customer Care Center at the telephone number listed above, in writing at 344 South Poplar Street, Hazleton, PA 18201 or by email at

> customercare@xoomenergy.com. You must pay the bill in full, except for the specific disputed amount, during the pendency of the dispute. If the parties cannot resolve the dispute within 45 days, either party may avail itself of all remedies available under law or equity. A dispute or complaint relating to a residential customer may be submitted by either party at any time to the DPS pursuant to its Complaint Hearing Procedures ("Procedures") by calling DPS at 1-800-342-3377 or by writing to the DPS at: New York State Department of Public Service, Office of Consumer Services, Three Empire State Plaza, Albany, New York 12223, or through its website at: www.dps.ny.gov.

(A-31, Dispute Resolution). The Agreement also contains a choice of law provision that indicates that it "shall be governed by the laws of the State of North Carolina . . . ." (A-31, Choice of Laws).

Plaintiffs confirmed their acceptance of all the terms and conditions of the Agreement and began receiving electricity services from XOOM in May 2013. (A-19, at ¶¶ 41-43). Plaintiffs were charged an initial price of 8.99 cents per kWh for their first month of service. (A-19, at ¶¶ 41-43).[2] Thereafter, Plaintiffs' variable rate increased during the summer months of June, July, and August, before decreasing in September and increasing in October 2013. (A-19 to A-20, at ¶¶ 47-48). Plaintiffs did not allege that they communicated any issues or complaints they may have had regarding this pricing to XOOM or any of its representatives during the term of the Agreement. Plaintiffs also do not allege that

[2] Plaintiffs' Complaint incorrectly added the New York State tax to the variable price charged to them.

they ever contacted XOOM's customer service department or filed a dispute or complaint with the New York Department of Public Service, pursuant to the "Dispute Resolution" clause of the contract. (A-31, Dispute Resolution). Plaintiffs terminated the Agreement with XOOM just six months later, in November 2013. (A-19 at ¶ 47).

On April 18, 2018, more than four years after Plaintiffs terminated the Agreement, Plaintiffs filed a putative Class Action Complaint alleging that XOOM breached the Electricity Sales Agreement by charging them a variable price that increased over the summer months in 2013. (*See generally*, A-5 to A-23). Specifically, Plaintiffs' Complaint alleged that XOOM breached the Agreement because it charged Plaintiffs a higher price than a "Market Supply Rate," which Plaintiffs unilaterally calculated for purposes of litigation without reference to any relevant time period and without any reference to the actual terms of the contract. (A-19 to A-20 at ¶¶ 47-49). Plaintiffs alleged that this "Market Supply Rate" was manufactured by Plaintiffs "based on the costs of a retailer supplying a residential customer for each period." (A-20 at ¶ 48). Plaintiffs also claimed that "a substantial margin to cover retailer fixed costs" was included with their "Market Supply Rate" but did not state anywhere what the margin was, how it was calculated, or how it bore any relationship to XOOM's actual or estimated supply costs or the terms of the Agreement. (A-20 at ¶ 48). In short, Plaintiffs' cause of

action was premised upon the fundamentally flawed theory that because XOOM's variable rate was, on occasion, higher than Plaintiffs' own "Market Supply Rate," calculated for the purposes of the lawsuit, XOOM somehow breached the Agreement.

XOOM filed a motion to dismiss the Complaint for failure to state a claim for breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. Plaintiffs did not amend their Complaint after XOOM served its motion to dismiss, though they could have as a matter of right under Federal Rule of Civil Procedure 15. Instead, Plaintiffs strategically chose to oppose XOOM's motion and reiterate that Plaintiffs' claims were adequately pled because XOOM's rates were higher than Plaintiffs' "Market Supply Rate." Plaintiffs also made a tactical decision not to argue that, if the Court was inclined to dismiss, the Court should permit Plaintiffs to file an amended complaint. (A-111). On September 21, 2018, the District Court Judge, The Honorable Allyne R. Ross, entered an Opinion and Order granting XOOM's motion and dismissing Plaintiffs' Complaint with prejudice.

II. THE DISTRICT COURT'S SEPTEMBER 21, 2018 ORDER DISMISSING PLAINTIFFS' COMPLAINT

On September 21, 2018, the District Court entered an Order granting XOOM's motion to dismiss with prejudice, along with an accompanying twenty-

page written opinion setting forth all of the bases and reasoning for its decision. (A-38 to A-58).

The Court accurately recognized that Plaintiffs' Complaint failed to state a claim for relief under Rule 12(b)(6) because Plaintiffs' attempt to equate XOOM's "actual or estimated supply costs" to a "wholesale" rate of electricity or any market rate used to calculate Plaintiffs' "Market Supply Rate" was contrary to the plain terms of the contract. (A-45 to A-51). The District Court correctly found that, unlike the cases relied upon by Plaintiffs which directly referenced the "wholesale market," "wholesale prices," or "market-related circumstances," XOOM's agreement with Plaintiffs did not contain any reference to such terms; the agreement makes XOOM's rate-setting decisions an "internal activity." (A-45 to A-47). As such, the Court accurately found that there is no basis to compare XOOM's rates to other utility company rates or a "Market Supply Rate," based on a wholesale rate of electricity. (A-47). Specifically, the Court reasoned:

> [P]laintiffs' agreement with XOOM does not incorporate any references to external rates or market prices. The agreement references a handful of factors that ***may*** help determine XOOM's 'actual or estimated supply costs,' but it provides customers with no clear formula for the calculation of its costs. By referencing XOOM's individual costs—as opposed to the circumstances of the broader market or the experiences of other, comparable ESCOs—the agreement makes XOOM's rate setting decisions an internal activity. Customers—at least those without any background in the electricity market or the numerous factors that may determine the costs of an

> individual electricity provider—would have no basis for predicting XOOM's actual or estimated costs. As a result customers have no mechanism for comparing their actual rates to the costs of the utility, since the agreement provides them with limited information about the factors used to determine XOOM's costs.

(A-48). The Court held that Plaintiffs' allegations fail because they conflate XOOM's internal costs with "complicated costs that appear nowhere on the face of the agreement." (A-50). It further found that XOOM's agreement "does not plausibly provide plaintiffs with a reasonable expectation that XOOM's costs are equivalent to the wholesale market rate or any of the variables that plaintiffs include in their calculations." (A-50).

The District Court then held that Plaintiffs' claim for breach of the covenant of good faith and fair dealing that was premised upon the same allegations as the breach of contract claim likewise failed. (A-52 to A-53). Last, the Court aptly reasoned that since there was no dispute as to the validity of the underlying contract, Plaintiffs' unjust enrichment claim could not be sustained. (A-56). As noted above, Plaintiffs do not appeal the dismissal of their breach of the covenant of good faith and fair dealing or unjust enrichment claims.

III. THE DISTRICT COURT CORRECTLY DENIES PLAINTIFFS' RULE 59 MOTION TO ALTER OR AMEND THE JUDGMENT OR, IN THE ALTERNATIVE, FOR RELIEF FROM JUDGEMENT

On October 19, 2018, Plaintiffs filed a motion under Rule 59 to alter or amend the judgment dismissing their claims or, in the alternative, for relief from

judgment under Rule 60. Plaintiffs argued that the District Court should have permitted Plaintiffs to amend their Complaint – even though Plaintiffs did not request such relief at any time – and attached a draft proposed First Amended Complaint to their motion. (A-63 to A-103).

On November 2, 2018, consistent with Second Circuit case law, the District Court properly considered Plaintiffs' legal arguments as well as the additional allegations contained in Plaintiffs' proposed amended complaint, and denied the motion. (A-107 to A-115). Specifically, the Court noted:

> Mindful of the Second Circuit's observation that "it might be appropriate in a proper case to take into account the nature of the proposed amendment in deciding whether to vacate the previously entered judgment," *Williams*, 659 F.3d at 213 (quoting *Ruotolo*, 514 F.3d at 191), I begin by analyzing whether plaintiffs' motion meets the standards for reconsideration, and then address the proposed amended complaint, before concluding that plaintiffs' brief fails to demonstrate that they are entitled to relief.

(A-109). The Court recognized the controlling principles that "leave to amend shall be freely given when justice requires," (A-111) and that "a court need not grant leave to amend 'when an amendment would be futile.'" (A-111) (quoting *Ellis v. Chao*, 336 F.3d 114, 127 (2d Cir. 2003)). The District Court also correctly noted that the Second Circuit has held that "'the contention that the District Court abused its discretion in not permitting an amendment that was never requested [is] frivolous.'" (A-111) (quoting *Williams*, 659 F.3d at 212). The Court found that

Plaintiffs had failed to demonstrate that they were entitled to the extraordinary remedy of reconsideration under Rules 59 or 60. (A-111 to A-112).

The Court further considered the allegations in Plaintiffs' proposed amended complaint and held that amendment would be futile. (A-113 to A-115). Specifically, the Court found that none of Plaintiffs' proposed amendments address the fundamental principle that "the contractual language allowing XOOM to set its prices in accordance with its 'actual and estimated supply costs' does not require that XOOM set its prices in accordance with any of the market-related factors identified by plaintiffs—*regardless* of new allegations about XOOM's electricity purchasing arrangements." (A-113). In addition, the Court correctly held that while plaintiffs' inclusion of some of their "Market Supply Cost calculations would provide additional context for their allegations, this information still demonstrates that the factors the plaintiffs included in their calculation *do not* appear on the face of the contract." (A-114) (emphasis in original).

Finally, the Court noted that Plaintiffs' transparent attempts to "remove all references to the expectations of a reasonable consumer" does nothing to cure the dismissal of their claims. (A-115). The Court correctly reasoned that "[r]egardless of the expectations of a 'reasonable consumer'—and regardless of whether or not a consumer actually reads the terms of the electricity sales agreement—plaintiffs can plead a breach of contract only if their proposed interpretation of the contract is

reasonable," and that "the expectations and understanding of a consumer—based on the plain language of the contract—is always relevant to the court's analysis of a contract's terms." (A-115) (citing *Salvaggio v. New Breed Transfer Corp.*, 564 S.E.2d 641, 689 (N.C. Ct. App. 2002)).

Thus, the District Court denied Plaintiffs' motion and found that amendment would be futile because "plaintiffs' proposed amendments would not alter [the] conclusion that the contract does not require defendants to set their prices in accordance with market-related factors or wholesale rates—as calculated in Plaintiffs' Market Supply Cost." (A-115).

IV. THE DISTRICT COURT CORRECTLY DENIES PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE DISTRICT COURT'S DENIAL OF PLAINTIFFS' RULE 59 MOTION TO ALTER OR AMEND OR FOR RELIEF FROM JUDGMENT.

On November 19, 2018, more than fourteen days after the District Court entered its Order denying Plaintiffs' motion to alter or amend the judgment or for relief from judgment, Plaintiffs filed *another* motion for reconsideration. Plaintiffs argued that the District Court failed to consider the impact of Plaintiffs' proposed amendments and that the District Court's decision to deny their motion to alter or amend or for relief from judgment was incorrect. (A-119 to A-120).

On December 6, 2018, the District Court entered an Order, with an accompanying a ten-page Opinion, denying Plaintiffs' second motion for reconsideration and requiring Plaintiffs to obtain leave of court before filing

additional motions. (A-119 to A-128). Despite the fact that Plaintiffs' motion was untimely under E.D.N.Y. Local Civil Rule 6.3, the Court considered the merits of Plaintiffs' application. (A-121). The District Court correctly concluded that Plaintiffs' motion did "nothing more than express continued dissatisfaction with the court's conclusions." (A-122).

Critically, the Court reiterated that "[t]he agreement does not commit XOOM to set prices based on external factors like 'market rates,' and plaintiffs' calculated 'Market Supply Cost' includes criteria that do not appear on the face of the agreement between the parties." (A-125). The Court cogently explained that:

> XOOM's promise to set prices in accordance with its "actual and estimated supply costs" allows XOOM to consider its own criteria—based on cost projections and financial models that reflect internal data specific to XOOM—when setting its electricity rates. Regardless of the method by which XOOM purchases electricity, the electricity sales agreement reveals that XOOM's costs include a number of factors that are *not* exhaustively disclosed in the contract, and the agreement authorizes XOOM to use its discretion over time to set prices that are responsive to those costs.

(A-125 to A-126). The Court explained that Plaintiffs' amendment and "Market Supply Rate," did not account for factors specifically referenced in the agreement, such as "prior period adjustments," and that the fact that XOOM's prices did not rise and fall in tandem with wholesale electricity costs does not demonstrate that

XOOM's prices were not based on its "actual or estimated" supply costs. (A-127). Moreover, the Court also correctly noted that:

> even if plaintiffs' allegations did demonstrate that XOOM was not adequately taking its "actual" supply costs into account when setting prices, plaintiffs have not sufficiently addressed defendants' contractual right to set prices based on its "estimated" supply costs—an even broader category of price setting criteria that gives defendants additional discretion to consult its own internal data before setting prices.

(A-127). In short, the Court correctly held that Plaintiffs' proposed amendment, like the allegations in the initial Complaint, failed to state a claim for breach of any actual term of the contract and thus, would be futile. (A-127).

SUMMARY OF ARGUMENT

In this case, the District Court correctly held that Plaintiffs' Complaint failed to state a claim for relief for breach of contract, breach of the covenant of good faith and fair dealing, and unjust enrichment. The Complaint incorrectly alleged that XOOM had breached the Electricity Service Agreement because XOOM's price was higher than Plaintiffs' "Market Supply Rate," which Plaintiffs manufactured for the purpose of litigation. The language of the Agreement, however, provided that XOOM's rate would be based on XOOM's "actual or estimated supply costs, including, but not limited to prior period adjustments, inventory, and balancing costs." (A-29). Plaintiffs did not allege anywhere that XOOM's prices were not consistent with ***XOOM's actual or estimated*** supply

costs. Plaintiffs' allegations, accepted as true, failed to allege a breach of any actual term of the agreement. Therefore, the District Court correctly held that the Complaint failed to state a claim for relief under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

The District Court did not abuse its discretion when it correctly denied Plaintiffs' motion to alter or amend the complaint or for relief from judgment under Rules 59 and 60. Despite Plaintiffs' failure to request leave to amend at the motion to dismiss stage, the District Court properly considered the allegations contained in Plaintiffs' proposed amendment, and found that the amendment would be futile. Specifically, it found that Plaintiffs' allegations adding that XOOM was a "market participant" in the New York Independent System Operator's Engery Market and comparing XOOM's prices to a competitor's prices did not change the outcome of the Court's decision because XOOM's agreement did not promise to charge "wholesale" or "market rate prices." Plaintiffs' references to XOOM's website and marketing materials accessed five-years after Plaintiffs terminated their agreement with XOOM were likewise irrelevant and unavailing. And Plaintiffs' allegations regarding how *Plaintiffs'* Market Supply Rate was calculated, that bore no relationship to the ***non-exhaustive*** list of factors XOOM promised to base its price upon in the Agreement, did not overcome dismissal of the Complaint.

Accordingly, the District Court correctly denied Plaintiffs' motion and held that amendment of the complaint would be futile.

Finally, the District Court did not abuse its discretion in denying Plaintiffs' second motion for reconsideration. Plaintiffs' motion simply reiterated their flawed arguments that XOOM breached the Agreement by failing to charge prices lower than Plaintiffs' own "Market Supply Rate," and expressed dissatisfaction with the District Court's September 21, 2018 and November 2, 2018 rulings. Plaintiffs' arguments were wholly without merit, and failed to satisfy the criteria for "extraordinary relief" afforded through reconsideration. Accordingly, the District Court's Order on this motion should likewise be affirmed.

I. STANDARD OF REVIEW

In this appeal, the standard of review of a district court's dismissal of Plaintiffs' Complaint pursuant to Rule 12(b)(6) is *de novo*. *See Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 403 (2d Cir. 2014). This Court reviews the District Court's denial of Plaintiffs' motion to alter or amend the judgment under Rule 59 or for relief from judgment under Rule 60 and Plaintiffs' motion for reconsideration for abuse of discretion. *See In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113, 120 (2d Cir. 2010); *Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2008). Applying these standards to the District Court's rulings in this case, it is evident that Plaintiffs' appellate arguments lack merit and the judgment of the

District Court dismissing Plaintiffs' Complaint with prejudice, as well as the orders denying Plaintiffs' postjudgment motions, should be affirmed.

II. THE DISTRICT COURT CORRECTLY GRANTED XOOM'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT BECAUSE IT FAILED TO ALLEGE A BREACH OF ANY ACTUAL TERM OF THE ELECTRICITY SALES AGREEMENT

The District Court correctly dismissed Plaintiffs' Complaint for failure to state a claim because the Electricity Sales Agreement expressly authorized XOOM to charge variable prices to Plaintiffs, and Plaintiffs failed to allege any conduct that violates the plain language of the Agreement. Accordingly, the District Court's September 21, 2018 Opinion and Order should be affirmed.

A. The Allegations Contained In Plaintiffs' Complaint Failed To State A Claim For Breach Of Contract That Was Plausible On Its Face Under The Electricity Sales Agreement

The Electricity Sales Agreement, which governs the terms and conditions of Plaintiffs' receipt of electricity supply from XOOM, contains a choice of law provision specifying that North Carolina law applies to the Agreement. (A-31, Choice of Laws). This Court has held that agreements containing an express choice of law provision will be enforced absent proof of fraud or violation of public policy. *See, e.g.*, *Hartford Fire Ins. Co. v. Orient Overseas Containers Lines (UK) Ltd.*, 230 F.3d 549, 556 (2d Cir. 2000). In this appeal, neither party disputes the application of North Carolina law to the Agreement.

To state a claim for breach of contract under North Carolina law, a plaintiff must establish (1) the existence of a valid contract and (2) breach of the terms of that contract. *Crosby v. City of Gastonia*, 635 F.3d 634, 645 (4th Cir. 2011). "Interpreting a contract requires the court to examine the language of the contract itself for indications of the parties' intent at the moment of execution." *State v. Phillip Morris USA Inc.*, 685 S.E.2d 85 (N.C. 2009). "It is the general law of contracts that the purport of a written instrument is to be gathered from its four corners, and the four corners are to be ascertained from the language used in the instrument." *Carolina Power & Light Co. v. Bowman*, 51 S.E.2d 191, 199 (N.C. 1949). "Where the terms of the contract are not ambiguous, the express language of the contract controls in determining its meaning and not what either party thought the agreement to be." *Crockett v. First Fed. Sav. & Loan Ass'n*, 224 S.E.2d 580, 588 (N.C. 1976).

In this case, the District Court below correctly held that Plaintiffs' Complaint failed to state a claim for breach of contract under North Carolina law. At its core, Plaintiffs' Complaint alleged that XOOM breached the Electricity Sales Agreement by charging energy rates that were not based on ***Plaintiffs'*** own interpretations of "Market Supply Costs," and therefore XOOM's rate was "not set in accordance with XOOM's customer contract." (A-20, at ¶¶ 48-49). Plaintiffs' cause of action against XOOM, however, was based entirely upon fiction and

manufactured numbers that find no basis in the terms of the contract. The Agreement explicitly advised Plaintiffs that they would be charged a "variable" price and authorized XOOM to charge such variable prices on a monthly basis, plus taxes and fees, if applicable. (A-29). Importantly, on the first page, in the first box of the Residential Disclosure Statement table, the Agreement provides:

> Your rate for energy purchases will be a variable rate, per kWh, that may change on a monthly basis, plus taxes and fees, if applicable. Your monthly variable rate is based on **XOOM's actual and estimated supply costs which may include but not be limited to prior period adjustments, inventory and balancing costs**.

(A-29, Residential Disclosure Statement: XOOM SimpleFlex Variable Price Product) (emphasis added). Furthermore, the last box in the Disclosure Statement Table states: "**Guaranteed Savings:** There are no guaranteed savings in this Agreement at this time." (A-29, Residential Disclosure Statement, Guaranteed Savings) (emphasis in original).

XOOM's agreement did not state that Plaintiffs' variable rate would be based on Plaintiffs' manufactured "Market Supply Rate" that was created for this lawsuit and that included an unknown "margin to cover retailer fixed costs . . . ." (A-20 at ¶ 48). Nor did the Agreement state that Plaintiffs' rate would be based on the "wholesale" cost of electricity or "market-related factors." Plaintiffs attempted to read terms into the Electricity Sales Agreement which simply do not exist, and which cannot form the basis of a breach of contract claim against XOOM. *See,*

e.g., *Hodgin v. Brighton*, 674 S.E.2d 444, 446 (N.C. Ct. App. 2009) (noting that when "the language of a contract is plain an unambiguous, the construction of the agreement is a matter of law; and the court may not ignore or delete any of its provisions, nor insert words into it," but must construe the contract as written). Rather, the Agreement expressly provides that the rate will be variable, that it may change on a monthly basis, and that it is "**based on XOOM's actual and estimated supply costs which may include but not be limited to prior period adjustments, inventory and balancing costs**." (A-29) (emphasis added).

Accordingly, Plaintiffs' Complaint failed to state a claim for breach of any actual term of the Electricity Sales Agreement.

B. Case Law From The Second Circuit And Courts In Other Circuits Confirms That The District Court Correctly Dismissed Plaintiffs' Complaint Pursuant To Rule 12(b)(6)

United States District Courts in the Second Circuit and in other Circuits across the country have consistently dismissed breach of contract and quasi-contractual claims against energy service providers under similar circumstances.

Notably, in *Hamlen v. Gateway Energy Services Corporation*, No. 16 CV 3526 (VB), 2017 WL 892399, at *3 (S.D.N.Y. Mar. 6, 2017) the District Court for the Southern District of New York dismissed the plaintiff's breach of contract claim with prejudice based on similar conclusory allegations against the defendant natural gas provider. In *Hamlen*, the plaintiff claimed that the defendant breached

the contract because it "failed to set its variable rates based on factors disclosed in the contract, in particular, defendant's cost for natural gas." *Id.* at *3. The court held that the plaintiff presented "only conclusory allegations" that the defendant failed to base its rates on the defendant's costs for natural gas and that the plaintiff's only "non-conclusory allegation is that defendant charged more than competitors or the wholesale rate." *Id.* at *4. The court held that this allegation was insufficient to state a claim for relief under the contract and the pleading standards of Rule 12(b)(6). *Id.*

The court further explained that the plaintiff's misguided allegations were fatally flawed as a matter of law. *Id.* It reasoned that "plaintiff conflates wholesale rates with defendant's natural gas costs," and concluded that:

> plaintiff's allegations demonstrate why wholesale prices do not necessarily equate or determine defendant's costs. As plaintiff states, defendant could buy natural gas wholesale, either in advance or on the spot market, produce its own supply, or contract from other brokers. Moreover, retailers often seek to offset market volatility through futures contracts, which could also impact defendant's costs. Plaintiff does not plead how defendant filled its supply needs. Thus, plaintiff improperly equates wholesale rates with defendant's natural gas cost.

Id. at *4 (emphasis added). Furthermore, the court noted that the parties agreed that "defendant was to evaluate a non-exhaustive list of factors, including its own cost of natural gas, in determining the rate to charge plaintiff," and that the plaintiff

failed to provide any factual support for the allegation that the rate charged was not based on these factors. *Id.* For these reasons, the court held that:

> Plaintiff's non-conclusory allegations do not plausibly suggest defendant failed to evaluate its natural gas costs and market conditions in setting the price it charged. **That defendant's rates do not track wholesale or competitors' rates is not sufficient to allege a breach of the contract. The contract expressly granted defendant discretion to set rates based on many other factors, and allegations regarding these factors are not present in the complaint**.

Id. at *4 (emphasis added). Accordingly, the court dismissed the plaintiff's breach of contract claim on the defendant's motion pursuant to Rule 12(b)(6).

Similarly, in *Daniyan v. Viridian Energy LLC*, No. CIV.A. GLR-14-2715, 2015 WL 4031752, at *3 (D. Md. June 30, 2015), the United States District Court for the District of Maryland dismissed the plaintiff's breach of contract and consumer fraud claims against the defendant energy company. There, the plaintiff alleged that the defendant induced customers to switch their energy supplier to the defendant with misleading statements and promises of lower rates, and failed to inform him that his rates could increase. *Id.* at *2. The court noted that the terms and conditions of the parties' agreement was governed by the defendant's electricity sales agreement. *Id.* The court then explained that "[t]he Agreement further states that the price will vary on a month-to-month basis and, after the first month of service, the prices may fluctuate each month." *Id.* at *3. After

interpreting the "plain meaning" of the contract, the court held that the plaintiff failed to allege that defendant breached a contractual term of the agreement and granted the defendant's motion to dismiss the plaintiff's breach of contract claim. *Id.*; *see also Windley v. Starion Energy, Inc.*, No. 14CV9053, 2016 WL 197503, at *3 (S.D.N.Y. Jan. 8, 2016) (dismissing plaintiffs' breach of contract and consumer fraud claims against defendant energy company because contract authorized company to charge variable rates and contract expressly indicated that defendant "cannot guarantee savings" under the agreement).

Recently, in *Richards v. Direct Energy Servs., LLC*, No. 17-1003-CV, 2019 WL 418014, at *1 (2d Cir. Feb. 4, 2019), this Court affirmed the dismissal of a plaintiff's putative class action complaint against an ESCO for breach of contract, breach of the covenant of good faith and fair dealing, and consumer fraud. In *Richards*, the plaintiff entered into an energy services contract with the defendant for a fixed electricity price for 12-months, after which the rate switched to a variable price if the plan was not canceled. *Id.* at *1. The contract provided that the variable price would be set on a month-to-month basis, according to the defendant's discretion, and "would reflect 'business and market conditions.'" *Id.* The plaintiff filed a lawsuit alleging that, after the fixed rate term expired, the defendant's variable price was higher than the wholesale "Standard Service Rate," for electricity in Connecticut. *Id.* at *3. The plaintiff further alleged that the

defendant's conduct constituted a breach of the covenant of good faith and fair dealing and a violation of Connecticut's consumer fraud statute. *Id.* The district court dismissed certain of the plaintiff's claims at the motion to dismiss phase, and then dismissed the remaining bad faith and consumer fraud claims on summary judgment. *Id.* at *4.

On appeal, this Court affirmed the district court's judgment dismissing the plaintiff's claims. *Id.* at *5. First, the court noted that the defendant did not breach the terms of the agreement in failing to charge prices consistent with the Standard Service Rate, and highlighted that courts across the country have dismissed similar contract claims against ESCOs at the pleadings stage. *Id.* at *6 (citing *Orange v. Starion Energy PA, Inc.*, No. CV 15-773, 2016 WL 1043618, at *4 (E.D. Pa. Mar. 16, 2016), *aff'd*, 711 F. App'x 681 (3d Cir. 2017); *Windley*, 2016 WL 197503, at *2; *Zahn v. N. Am. Power & Gas, LLC*, No. 14 C 8370, 2015 WL 2455125, at *4 (N.D. Ill. May 22, 2015), *rev'd and vacated in part on other grounds*, 847 F.3d 875 (7th Cir. 2017); *Urbino v. Ambit Energy Holdings, LLC*, No. Civ. 14-5184, 2015 WL 4510201, at *4–5 (D.N.J. July 24, 2015); *Faistl v. Energy Plus Holdings, LLC*, No. Civ. 12-2879, 2012 WL 3835815, at *5–6 (D.N.J. Sept. 4, 2012)). Importantly, the Second Circuit held that the plaintiff could not establish that the defendant's rates were not within its discretion and were not reflective of "business and market conditions." *Id.*

The court aptly reasoned that "[i]f we were to hold private electricity suppliers liable for departing from the Standard Service Rates, we would in effect make those [regulatory] rates binding on private electricity suppliers . . . Yet the entire point of electricity deregulation was to allow the market, rather than [the regulatory authority], to determine rates." *Id.* at *7. The court found that the plaintiff's "near-frivolous contract claim provides no basis on which a court is authorized to overrule this policy choice." *Id.* at *6. The court then affirmed the dismissal of the plaintiff's fraud claims, generally finding that the defendant did not engage in unfair practices or fraud because the defendant's conduct was authorized by the agreement and did not come close to rising to the level of unfair business practices as defined by the statute. *Id.* at *9-11.

Here, as in *Hamlen*, *Daniyan*, *Windley*, and *Richards*, the allegations in Plaintiffs' Complaint fail to state a claim for breach of contract against XOOM that is plausible on its face. Plaintiffs' allegations that XOOM's rates do not track Plaintiffs' own manufactured "Market Supply Rates" are irrelevant under the Electricity Sales Agreement and fail to provide any legitimate support for their breach of contract claim. *See Hamlen*, 2017 WL 892399, at *4. Similarly, Plaintiffs' unsupported, conclusory allegation that XOOM's rate was not in accordance with XOOM's customer contract or that "other cost factors cannot explain the drastic increases in XOOM's variable rate" was correctly rejected

under Twombly and Iqbal. Plaintiffs' attempts to read additional language into the contract that do not exist and to manufacture irrelevant "Market Supply Rates" in support of their improper and untenable claims against XOOM fail as a matter of law.

On appeal, Plaintiffs continue to push their misguided and legally invalid argument that because XOOM's prices were at times higher than Plaintiffs' manufactured "Market Supply Rate," the Complaint states a plausible claim. XOOM, however, never contracted to charge Plaintiffs their "Market Supply Rate." Plaintiffs have not pled anywhere in their Complaint how XOOM's prices were not based on XOOM's "actual or estimated supply costs which ***may include but not be limited to*** prior period adjustments, inventory and balancing costs." (A-29) (emphasis added). Instead, Plaintiffs created their own vague and ambiguous rate that bears no relation to **XOOM's** actual or estimated supply costs, and then state in conclusory fashion that Plaintiffs' Market Supply Rate is the price they should have been charged in the Summer of 2013. (A-19 to A-20). Plaintiffs' attempts to manufacture a cause of action, however, were correctly rejected by the District Court.

Tellingly, Plaintiffs continue to ignore the actual language of the Agreement between these parties when looking for cases to support their indefensible claims. Plaintiffs rely only on a string cite, contained in a footnote, to other cases in which

courts apparently denied motions to dismiss under starkly different circumstances. Plaintiffs' string citation includes no meaningful discussion of the pertinent facts of those cases, nor the specific language at issue in the contracts. (*See* Plaintiffs-Appellant's Br. at 21, n.3). This absence is glaring, as these cases all involve contractual provisions, legal theories, and factual allegations that are factually and legally distinguishable from the issues at bar.

In the cases Plaintiffs reference, unlike here, the defendants promised to charge rates based on "wholesale" or "market" prices and/or promised savings or competitive pricing with respect to other utility companies in the area. *See, e.g.*, *Edwards v. N. Am. Power & Gas, LLC*, 120 F. Supp. 3d 132 (D. Conn. 2015) (finding that the plaintiffs stated a claim for breach of contract where defendant represented that the variable rate would be based on the "***wholesale market rate***" and defendants allegedly charged up to four times the market rate); *Oladapo v. Smart One Energy, LLC*, No. 14 CV 7117-LTS, 2016 WL 344976, at *1 (S.D.N.Y. Jan. 27, 2016) (defendant promised the plaintiffs they would "save up to 10% on their energy expenses," rates would remain "competitive" with market rates, and would be determined by the defendant "in response to changing gas ***market conditions***") (emphasis added).

Plaintiffs' incorrect reliance on *Basile v. Stream Energy Pa., LLC*, No. 1:15-CV-01518, 2016 WL 4611443 (M.D. Pa. Sept. 6, 2016) is particularly illustrative

of this point. In *Basile*, the defendant's motion to dismiss was denied because the contract required the defendant to base its rates "upon the fluctuation of **wholesale natural gas prices or other inputs to wholesale electric prices**." *Id.* at *1, *4 (emphasis added). XOOM's Agreement, however, does not state anywhere that the price charged to Plaintiffs is based on wholesale market prices. Nor did XOOM promise that Plaintiffs' price would be competitive with wholesale market prices. In fact, the Agreement explicitly provided that "[t]here are no guaranteed savings in this Agreement at this time." (A-29). This distinction is critical and is the reason why Plaintiffs' claims in this case fail, but have been permitted by courts in other cases against ESCOs. Plaintiffs are trying to transpose allegations from other complaints and contract provisions from other agreements that do not exist here.

Thus, it is evident that case law from this Court and other Circuit Courts across the country confirm that Plaintiffs' Complaint was properly dismissed under these circumstances for failure to state a claim for relief in accordance with Rule 12(b)(6).

C. The District Court Correctly Dismissed Plaintiffs' Complaint For Failure To State A Claim Pursuant To Rule 12(B)(6)

The District Court properly considered and rejected Plaintiffs' allegations and arguments in its comprehensive written opinion entered on September 21, 2018. Importantly, the Court correctly found that, unlike the cases relied upon by

Plaintiffs that directly referenced the "wholesale market," "wholesale prices," or "market-related circumstances," XOOM's agreement with Plaintiffs did not contain any reference to such terms, and the agreement makes XOOM's rate-setting decisions an "internal activity." (A-47 to A-48). As such, the District Court accurately found that there was no basis to compare XOOM's rates to other utility company rates or a "Market Supply Rate," based on a wholesale rate of electricity. (A-48) Specifically, the Court reasoned:

> [P]laintiffs' agreement with XOOM does not incorporate any references to external rates or market prices. The agreement references a handful of factors that ***may*** help determine XOOM's 'actual or estimated supply costs,' but it provides customers with no clear formula for the calculation of its costs. By referencing XOOM's individual costs—as opposed to the circumstances of the broader market or the experiences of other, comparable ESCOs—the agreement makes XOOM's rate setting decisions an internal activity. Customers—at least those without any background in the electricity market or the numerous factors that may determine the costs of an individual electricity provider—would have no basis for predicting XOOM's actual or estimated costs. As a result customers have no mechanism for comparing their actual rates to the costs of the utility, since the agreement provides them with limited information about the factors used to determine XOOM's costs.

(A-48). The Court further held that Plaintiffs' allegations fail because they conflate XOOM's internal costs with "complicated costs that appear nowhere on the face of the agreement," and that XOOM's agreement "does not plausibly provide plaintiffs with a reasonable expectation that XOOM's costs are equivalent

to the wholesale market rate or any of the variables that plaintiffs include in their calculations." (A-50). The District Court's decision was wholly consistent with the principles of *Iqbal* and *Twombly*, as well as case law from this Court and other Circuit Courts in the United States, and should be affirmed.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING PLAINTIFFS' COMPLAINT WITHOUT GRANTING PLAINTIFFS AN AMENDMENT THAT WAS NEVER REQUESTED AND WITHOUT GRANTING PLAINTIFFS LEAVE TO AMEND *SUA SPONTE*

Plaintiffs' argument that the District Court erred in dismissing Plaintiffs' complaint with prejudice, without granting them permission to file an amended complaint that was never requested, is entirely without merit. In addition, Plaintiffs' argument on this issue is rendered moot by the District Court's November 2, 2018 Order, which considered and rejected Plaintiffs' proposed amended complaint as futile.

This Court has consistently described the contention that "the District Court abused its discretion in not permitting an amendment that was never requested" as "frivolous." *See Horoshko v. Citibank, N.A.*, 373 F.3d 248, 249-50 (2d Cir. 2004); *see also Hill v. DLJ Mortg. Capital, Inc.*, 689 F. App'x 97, 99 (2d Cir. 2017); *Williams v. Citigroup Inc.*, 659 F.3d 208, 212 (2d Cir. 2011). Additionally, it is well-settled that a district court does not abuse its discretion in dismissing a complaint with prejudice when any amendment to the Complaint proposed by the

plaintiff would be futile. *Betts v. Shearman*, 751 F.3d 78, 86 (2d Cir. 2014); *Lucente v. Int'l Bus. Machines Corp.*, 310 F.3d 243, 258 (2d Cir. 2002).

In this case, Plaintiffs did not amend their Complaint after XOOM served its motion to dismiss, though they could have as a matter of right under Federal Rule of Civil Procedure 15. Instead, Plaintiffs strategically chose to oppose XOOM's motion and assert that Plaintiffs' claims were adequately pled because XOOM's rates were higher than Plaintiffs' "Market Supply Rate." Plaintiffs also made a tactical decision not to argue that, if the District Court was inclined to dismiss, the Court should permit Plaintiffs to file an amended complaint. (A-111). Thus, in granting XOOM's motion to dismiss, the Court did not err in declining to grant Plaintiffs leave to amend the complaint *sua sponte*, as such relief was never requested. *See, e.g.*, *Hill*, 689 F. App'x at 99.

Plaintiffs' reliance on *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 164 (2d Cir. 2015) and *Palmer v. Fannie Mae*, No. 17-2867, 2018 WL 5830504, at *2 (2d Cir. Nov. 7, 2018) is misplaced. In both of those actions, the plaintiffs requested permission to file an amended complaint before the court ruled on the motions to dismiss, which were denied without consideration of their merits. *See, e.g.*, *Lorely*, 797 F.3d at 169 (noting that "[w]hile vigorously opposing the motion, Plaintiffs also requested leave, in the alternative, to amend the complaint," and that "Plaintiffs' counsel twice sought to be heard on the issue

and was twice denied a chance to respond."). Plaintiffs' reliance on a decision from the Sixth Circuit, *Burkeen v. A.R.E. Accessories, LLC*, No. 17-6437, 2018 WL 6620183, at *3 (6th Cir. Dec. 17, 2018), is also misplaced. Unlike here, in *Burkeen* the district court did not address the substance of the Plaintiffs' proposed amended complaint contained in its Rule 59 motion or indicate whether the amendment would be futile.

Notwithstanding that Plaintiffs did not ask for such relief, Plaintiffs' argument that the District Court erred in dismissing Plaintiffs' Complaint without considering whether an amendment by Plaintiffs would be futile is mooted by the District Court's decision on Plaintiffs' motion to alter or amend the judgment or for relief from judgment. (A-107 to A-115). In its November 2, 2018 Opinion, the District Court specifically considered Plaintiffs' proposed amended complaint and the allegations contained therein, and correctly found that the amendment would be futile. (A-112 to A-115). Stated otherwise, even if the District Court erred in its decision not to permit Plaintiffs leave to replead *sua sponte* – an untenable finding on this record – any error would be harmless. Accordingly, Plaintiffs' argument on this point is meritless.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFFS' MOTION TO ALTER OR AMEND ITS JUDGMENT OR FOR RELIEF FROM JUDGMENT AND THE COURT CORRECTLY CONSIDERED AND REJECTED PLAINTIFFS' PROPOSED AMENDED COMPLAINT AS FUTILE

Plaintiffs' next argument, that the District Court erred in denying their motion to alter or amend the judgment under Rule 59, or for relief from judgment under Rule 60, fails as a matter of law. The District Court first correctly concluded that Plaintiffs had not satisfied the requirements to alter or amend the judgment or to obtain relief from judgment under Rules 59 or 60. The District Court then properly reviewed the allegations contained in Plaintiffs' proposed amended complaint and correctly concluded that they did not state a claim for breach of the Electricity Sales Agreement. Accordingly, the Court did not abuse its discretion in denying Plaintiffs' postjudgment motion for relief under Rules 59 and 60 because Plaintiffs' proposed amendment was futile. *Id.*

A. Plaintiffs' Proposed Amendments Failed To State A Claim For Relief For Breach Of Contract Under The Agreement

It is evident from a liberal reading of Plaintiffs' proposed amended complaint that it was premised upon the same, fatally flawed theories and allegations contained in Plaintiffs' initial complaint, and therefore likewise failed to state a claim for relief under Rule 12(b)(6).

Plaintiffs' proposed amended complaint merely perpetuates their flawed argument that because XOOM's variable price charged to Plaintiffs was at times

higher than a "wholesale" or "market rate" for electricity, XOOM breached its contract with Plaintiffs. (*See* A-83, at ¶ 57). Yet Plaintiffs' allegations are disconnected from the ***actual language*** of their contract with XOOM. Accordingly, the District Court correctly held that Plaintiffs' allegations failed to correct Plaintiffs' fundamental failure: "that the contractual language allowing XOOM to set its prices in accordance with its 'actual and estimated supply costs' does not require that XOOM set its prices in accordance with any of the market-related factors identified by plaintiffs—regardless of new allegations about XOOM's electricity purchasing arrangements." (A-113).

First, Plaintiffs proposed amendment included an allegation that XOOM is a "market participant" in the New York Independent System Operator's ("NYISO") Energy Market and offered a comparison of XOOM's prices with that of another utility company, Con Edison, which is wholly irrelevant under the terms of XOOM's contract. (A-84, ¶¶ 60-61). It bears noting, however, that even Con Edison, Plaintiffs' model utility company that purchases electricity on the wholesale market, charged prices to customers that did not rise and fall consistently with Plaintiffs' manufactured "Market Supply Rate." For example, between August/September 2013 and September/October 2013, Plaintiffs' purported "Market Supply Rate" ***decreased,*** whereas Con Edison's price ***increased***. (*Compare* A-82, at ¶ 54 *with* A-84, at ¶ 61; *see also* Plaintiffs-Appellants' Br. at

32-33). In addition, XOOM did not promise to base its price on "market prices," or "competitors' rates" and therefore, Plaintiffs' attempt to compare XOOM's prices with Con Edison is irrelevant.

Furthermore, Plaintiffs cannot and do not allege that simply because XOOM is a "market participant" in the NYISO Energy Market that the prices XOOM charged Plaintiffs were **not** based on "XOOM's actual or estimated supply costs, which may include but not be limited to prior period adjustments, inventory and balancing costs." (A-29). This is Plaintiffs' fundamental failure, which requires dismissal of their claims. Plaintiffs implicitly concede this failure, but ask this Court to ***read into the contract*** their argument that "XOOM's contractual promise to base its rates on ***XOOM's*** supply costs has the exact same ***legal meaning*** as a contract that ties rates to the wholesale market rate." (*See* Plaintiffs-Appellants' Br. at 45). It does not. Plaintiffs' argument would turn the fundamental principles of contract interpretation and plain language consideration on their head.

Second, Plaintiffs' proposed amended complaint included citations to recent advertising on XOOM's website, but failed to allege that Plaintiffs ever saw or read that material. (A-79 to A-80, ¶¶ 48-52). Nor could they have, because the advertising was taken from XOOM's website on ***October 19, 2018***, when Plaintiffs' counsel drafted the proposed amended complaint—almost five years after Plaintiffs terminated their agreement with XOOM. (A-79 to A-80, ¶¶ 48-52,

nn. 22-25). In any event, this material is irrelevant pursuant to the explicit language in the Agreement. Specifically, the warranty provision contained in XOOM's agreement provided that "[t]his Agreement, including applicable attachments, constitutes the entire Agreement between you and XOOM Energy. XOOM Energy makes no representations or warranties other than those expressly set forth in this Agreement, and XOOM Energy expressly disclaims all other warranties, express or implied, including merchantability and fitness for a particular purpose." (A-30, Warranty). Thus, these allegations again fail to demonstrate that XOOM breached any term of the parties' agreement and fail to state a claim for relief under Rule 12(b)(6).

Third, Plaintiffs attached a spreadsheet purporting to show how Plaintiffs calculated ***their own*** "Market Supply Rate." (A-103). This spreadsheet, however, is based on factors that are not referenced in XOOM's agreement, *i.e.* load-weighted Zone J day ahead prices, ancillary services costs, capacity costs, renewable portfolio standard (RPS) costs, and various charges and taxes. (*Compare* A-103, *with* A-29). Indeed, XOOM's agreement says nothing about the "wholesale rate" of electricity, Plaintiffs' "Market Supply Cost" nor any of the factors that Plaintiffs used to calculate their "Market Supply Cost." Thus, Plaintiffs' inclusion of a chart that breaks down these factors that ***are not***

referenced in XOOM's agreement does not support a claim for breach of contract or impact the Court's decision to dismiss Plaintiffs' Complaint with prejudice.

Fourth, Plaintiffs' removal of references to a consumer's "reasonable expectations" from the Complaint does not impact the District Court's ruling nor does it avoid dismissal of the Plaintiffs' claims. The Court was already required to construe the complaint liberally, accept Plaintiffs' factual allegations as true, and draw all reasonable inferences in the plaintiffs' favor. *Lundy v. Catholic Health Sys. of Long Island Inc.*, 711 F.3d 106, 113 (2d Cir. 2013). Furthermore, regardless of a reasonable consumer's expectations or whether the consumer actually read the terms of the sales agreement, Plaintiffs have not alleged that XOOM breached any term under the plain language of the contract, which is required under North Carolina law. *See, e.g.*, *Salvaggio v. New Breed Transfer Corp.*, 564 S.E.2d 641, 689 (N.C. Ct. App. 2002).

B. The District Court Correctly Reviewed And Considered Plaintiffs' Proposed Amended Complaint Before Denying Plaintiffs' Motion To Alter Or Amend The Judgment Or For Relief From Judgment

Plaintiffs' arguments that the District Court abused its discretion in denying Plaintiffs' motion to alter or amend the judgment or for relief from judgment are based on their fundamental misinterpretation of the liberal amendment rule and this Court's holding in *Williams v. Citigroup Inc.*, 659 F.3d 208 (2d Cir. 2011), and therefore, are without merit.

Plaintiffs continue to repeat their mantra that "leave to amend should be freely given," without providing appropriate context and consideration of Rule 15. In actuality, Rule 15 provides that courts "should freely give leave," to amend a complaint "when justice so requires." *See* Fed. R. Civ. P. 15(a)(2). Importantly, this Court has held that "[w]here, however, a party does not seek leave to file an amended complaint until after judgment is entered, Rule 15's liberality must be tempered by considerations of finality." *Williams*, 659 F.3d at 213. This Court has further explained that, "[t]he standards we have developed for evaluating postjudgment motions generally place significant emphasis on the 'value of finality and repose.'" *Id.* at 213 (citing *In re Frigitemp Corp.*, 781 F.2d 324, 327 (2d Cir. 1986)). In addition, this Court has found that when a party "has had an opportunity to assert the amendment earlier, but has waited until after judgment before requesting leave, a court may exercise its discretion [to grant leave to amend] more exactingly." *State Trading Corp. of India, Ltd. v. Assuranceforeningen Skuld*, 921 F.2d 409, 418 (2d Cir. 1990).

In considering these principles, this Court has indicated that "it might be appropriate in a proper case to take into account the nature of the proposed amendment in deciding whether to vacate the previously entered judgment." *Ruotolo*, 514 F.3d at 191. Nevertheless, it is well-settled that a district court need not vacate the judgment nor grant leave to amend the complaint where the

proposed amendment would be futile. *See Williams*, 659 F.3d at 214; *see also Kim v. Kimm*, 884 F.3d 98, 105–06 (2d Cir. 2018) (affirming district court's denial of the Plaintiffs' request for leave to amend the complaint because the proposed amendments would have no impact on the basis for the district court's dismissal and such amendment would be futile); *see also Ellis v. Chao*, 336 F.3d 114, 127 (2d Cir. 2003) ("[I]t is well established that leave to amend a complaint need not be granted when amendment would be futile.").

Consistent with this Court's binding precedent, the District Court in this case properly considered and rejected all of the arguments raised in Plaintiffs' motion to alter or amend or for relief from judgment, and also evaluated the additional allegations in Plaintiffs' proposed amended complaint. *See Williams*, 659 F.3d at 213-14. In *Williams*, this Court reviewed a District Court's orders dismissing the plaintiff's complaint with prejudice and denying her motion for reconsideration seeking leave to amend her complaint pursuant to Rules 59 and 60, in part, because the plaintiff did not explain why she should be granted leave to replead when she had failed to request an opportunity to replead in the first instance. *Id.* at 211-14. The court in *Williams* vacated the district's court's denial of the plaintiff's motion for reconsideration for the sole reason that the district court had failed to consider the plaintiff's proposed amendment before denying her leave to amend. *Id.* Nevertheless, this Court emphasized that "[i]t is well established that 'leave to

amend need not be granted . . . where the proposed amendment would be futile'" and remanded the matter so that the district court could address whether the plaintiff's proposed amendment would be futile. *Id.* at 215 (quoting *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 18 (2d Cir. 1997) (additional quotations and citations omitted)).

Here, by contrast, this Court explicitly referenced *Williams* and carefully considered Plaintiffs' proposed amended complaint before correctly denying Plaintiffs' request to replead. Specifically, the District Court noted in its Opinion:

> Mindful of the Second Circuit's observation that "it might be appropriate in a proper case to take into account the nature of the proposed amendment in deciding whether to vacate the previously entered judgment," *Williams*, 659 F.3d at 213 (quoting *Ruotolo*, 514 F.3d at 191), I begin by analyzing whether plaintiffs' motion meets the standards for reconsideration, and then address the proposed amended complaint, before concluding that plaintiffs' brief fails to demonstrate that they are entitled to relief.

(A-109). As noted below, after determining that Plaintiffs' proposed amended complaint was futile, the District Court properly denied Plaintiffs' request for leave to amend. (A-113 to A-115).

The District Court's decision was fully consistent with this Court's precedent, and, as set forth below, was supported by the facts and law of the case. Accordingly, the District Court's November 2, 2018 decision should be affirmed.

C. The District Court Correctly Held That Plaintiffs' Proposed Amendment Was Futile And The Court Was Well Within Its Discretion When It Denied Plaintiffs' Postjudgment Motion

In this case, the District Court correctly concluded that Plaintiffs' proposed amended complaint failed to state a claim for breach of contract and did nothing to overcome the dismissal of Plaintiffs' claims. Specifically, the Court found that none of Plaintiffs' proposed amendments address the fundamental principle that "the contractual language allowing XOOM to set its prices in accordance with its 'actual and estimated supply costs' does not require that XOOM set its prices in accordance with any of the market-related factors identified by plaintiffs—*regardless* of new allegations about XOOM's electricity purchasing arrangements." (A-113). In addition, the Court correctly held that while Plaintiffs' inclusion of some of their "Market Supply Cost calculations would provide additional context for their allegations, this information still demonstrates that the factors the plaintiffs included in their calculation *do not* appear on the face of the contract." (A-114).

Finally, the Court noted that Plaintiffs' transparent attempts to "remove all references to the expectations of a reasonable consumer" does nothing to cure the dismissal of their claims. (A-115). The Court correctly reasoned that "[r]egardless of the expectations of a 'reasonable consumer'—and regardless of whether or not a consumer actually reads the terms of the electricity sales agreement—plaintiffs can

plead a breach of contract only if their proposed interpretation of the contract is reasonable," and that "the expectations and understanding of a consumer—based on the plain language of the contract—is always relevant to the court's analysis of a contract's terms." (A-115) (citing *Salvaggio v. New Breed Transfer Corp.*, 564 S.E.2d 641, 689 (N.C. Ct. App. 2002)).

Thus, the District Court denied Plaintiffs' motion and found that an amendment would be futile because "plaintiffs' proposed amendments would not alter [the] conclusion that the contract does not require defendants to set their prices in accordance with market-related factors or wholesale rates—as calculated in Plaintiffs' Market Supply Cost." (A-115). The District Court's decision under these circumstances was not an abuse of discretion and should be affirmed. *See Kim*, 884 F.3d at 105–06; *Ellis*, 336 F.3d at 127.

Plaintiffs' appellate arguments represent a fundamental misunderstanding of the federal court pleading standards and principles of contract interpretation. Specifically, Plaintiffs continue to argue incorrectly that the factors that Plaintiffs identified in their proposed amended complaint based on the "wholesale rate," or "market rate" of electricity "are XOOM's supply costs," but they are not. Plaintiffs' allegations also do not take into account "prior period adjustments" or the other ***non-exhaustive*** elements of XOOM's prices. (A-29). Critically, Plaintiffs also do not allege that their factors are in any way related to XOOM's

"estimated" supply costs as provided in the Electricity Sales Agreement. (*See* A-29).

In short, Plaintiffs continue to blatantly ignore the fact that XOOM's contract says nothing about the "wholesale" rate of electricity, the "market rate," or any of the factors that Plaintiffs use to calculate their "Market Supply Cost." It cannot be overstated that XOOM's agreement does not require XOOM to set its prices in accordance with any of Plaintiffs' alleged factors and therefore, Plaintiffs cannot state a claim for breach of contract that is plausible on its face. *See, e.g.*, *Hamlen*, 2017 WL 892399, at *4 (dismissing complaint because the fact that the defendant's rates did not track wholesale or competitor rates was insufficient to state a claim and the contract granted defendant discretion to set rates based on many other factors not included in the complaint); *see also Brown v. Agway Energy Servs., LLC*, No. 19-321, 2018 WL 4362490, at *2 (W.D. Pa. Sept. 13, 2018) (noting that "[s]o long as the contractual price structure incorporates some factor beyond market factors," comparison of the ESCO's rate to wholesale or local utility's rates in insufficient to state a claim for breach of contract).

Accordingly, under these circumstances, it was not error for the Court to conclude that Plaintiffs had failed to satisfy the heightened standards entitling them to relief under Rule 59 and 60. Plaintiffs' argument that they were not required to demonstrate why the District Court's Order should be set aside and that Rule 59

and 60 are merely a "procedural vehicle," for requesting leave to amend the Complaint is flat wrong. This Court has explained that "[u]nless there is a valid basis to vacate the previously entered judgment, it would be contradictory to entertain a motion to amend the complaint" and that "to hold otherwise would enable the liberal amendment policy of Rule 15(a) to be employed in a way that is contrary to the philosophy favoring finality of judgments and the expeditious termination of litigation." *Nat'l Petrochem. Co. of Iran v. M/T Stolt Sheaf*, 930 F.2d 240, 245 (2d Cir. 1991); *see also Williams*, 659 F.3d at 213. Here, the District Court correctly employed and followed this Court's precedent and the principles underlying Rules 15, 59, and 60. Accordingly, its decision should be affirmed.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFFS' SECOND MOTION FOR RECONSIDERATION BASED ON THE SAME ARGUMENTS AND ALLEGATIONS RAISED IN ITS MOTION UNDER RULES 59 AND 60

Finally, Plaintiffs incorrectly argue on appeal that the District Court somehow abused its discretion in denying their *second* motion for reconsideration. This argument is likewise meritless. The District Court correctly held that Plaintiffs failed to demonstrate any extraordinary circumstances that would warrant reconsideration, as Plaintiffs' arguments merely reflected a dissatisfaction with the Court's decision and reiterated arguments previously brought before the Court.

The standard for granting a motion for reconsideration is "strict," and the motion "will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transport, Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). A motion for reconsideration is "not a proper tool to repackage and relitigate arguments and issues already considered by the court in deciding the original motion." *Id.* Nor is it a proper time to raise new arguments and issues. *United States v. Gross*, No. 98 CR 0159 SJ, 2002 WL 32096592, at *4 (E.D.N.Y. Dec. 5, 2002). This Court has held that a motion for reconsideration is "a mechanism for 'extraordinary judicial relief' invoked only if the moving party demonstrates 'exceptional circumstances.'" *Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2008) (citing *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1142 (2d Cir. 1994)). Reconsideration is disfavored and should be "used sparingly." *De Curtis v. Ferrandina*, 529 F. App'x. 85, 86 (2d Cir. 2013).

In this case, contrary to Plaintiffs' assertion, the District Court did not "overlook" Plaintiffs' fundamentally flawed argument that XOOM's prices are not based on Plaintiffs' calculation of XOOM's supply costs. Indeed, the District Court specifically considered that argument and correctly found that Plaintiffs' new allegations did not demonstrate that XOOM breached the Electricity Sales

Agreement. (A-125). Specifically, the Court held that "[t]he agreement does not commit XOOM to set prices based on external factors like 'market rates' and plaintiffs' calculated 'Market Supply Cost' includes criteria that do not appear on the fact of the agreement between the parties." (A-125). The Court explained that:

> XOOM's promise to set prices in accordance with its 'actual and estimated supply costs' allows XOOM to consider its own criteria—based on cost projections and financial models that reflect internal data specific to XOOM—when setting its electricity rates. Regardless of the method by which XOOM purchases electricity, the electricity sales agreement reveals that XOOM's costs include a number of factors that are *not* exhaustively disclosed in the contract, and the agreement authorizes XOOM to use its discretion over time to set prices that are responsive to those costs.

(A-125 to A-126). The Court reasoned that Plaintiffs' amendment and "Market Supply Rate," did not account for factors specifically referenced in the agreement, such as "prior period adjustments," and the fact that XOOM's prices did not rise and fall in tandem with wholesale electricity costs does not demonstrate that XOOM's prices were not based on its "actual or estimated" supply costs. (A-127). Moreover, the Court correctly noted that

> even if plaintiffs' allegations did demonstrate that XOOM was not adequately taking its "actual" supply costs into account when setting prices, plaintiffs have not sufficiently addressed defendants' contractual right to set prices based on its "estimated" supply costs—an even broader category of price setting criteria that gives defendants additional discretion to consult its own internal data before setting prices.

(A-127). In short, Plaintiffs' proposed amendment, like the allegations in the initial Complaint, failed to state a claim for breach of any actual term of the contract and thus, would be futile. (A-127).

Furthermore, the District Court properly distinguished *Gonzales v. Agway Energy Servs., LLC*, No. 518 Civ. 235 (MAD)(ATB), 2018 WL 5118509 (N.D.N.Y. Oct. 22, 2018), which is factually different from this action and does not constitute *controlling* authority. Most importantly, *Gonzales* is distinguishable for the same reason that Plaintiffs' reliance on certain other cases involving ESCOs was misplaced: unlike here, the contracts at issue in those other cases expressly represented that the ESCOs would base their prices on "wholesale" or "market-based" factors.

In *Gonzales*, the plaintiff filed a complaint against the defendant alleging misleading pricing practices in connection with the defendant's soliciting plaintiff to switch energy service providers and promising to charge plaintiffs a variable rate based on market factors. *Id.* at *1-2. Specifically, the agreement indicated that "the variable rate 'shall each month reflect the cost of electricity acquired by Agway from all sources . . . related transmission and distribution charges ***and other market-related factors***," plus applicable taxes, fees and assessments. *Id.* at *1 (emphasis added). The Court concluded that, because the plaintiff had alleged that the defendant failed to charge "competitive market rates" based on the factors

set forth in the agreement, the complaint survived dismissal under those circumstances. *Id.* at *4.

Here, the District Court correctly found that XOOM's Agreement does not contain any reference to the "wholesale market," "wholesale prices," "competitive market rates," or "market-related circumstances," and therefore, Plaintiffs' reliance on *Gonzales* is misplaced. Moreover, *Gonzales* is not controlling authority and, therefore, it could not justify reconsideration of this Court's ruling, even if it were factually on point, which it is not. It is well-settled that although reconsideration may be appropriate when there has been an intervening change in controlling law, non-binding authority from other District Courts "'does not constitute a point of law or fact that mandates reconsideration.'" *Bonn-Wittingham v. Project O.H.R. (Office for Homecare Referral), Inc.*, No. 16-CV-541 (ARR) (JO), 2017 WL 2178426, at *1 (E.D.N.Y. May 17, 2017) (quoting *Analytical Surveys, Inc. v. Tonga Partners, L.P*, No. 06 Civ. 2692(KMW)(RE), 2009 WL 1514310, at *3 n.9 (S.D.N.Y. May 29, 2009)).

Thus, in their second motion for reconsideration Plaintiffs again failed to demonstrate that they were entitled to the extraordinary relief provided by Rule 60(b) and the District Court was within its discretion in denying Plaintiffs' motion. Its decision, therefore, should be affirmed.

CONCLUSION

For the reasons set forth above, Defendants-Appellees XOOM Energy New York, LLC and XOOM Energy, LLC respectfully request that this Court affirm the judgment of the District Court dismissing Plaintiffs' Complaint with prejudice, and affirm the Orders of the District Court denying Plaintiffs' motion to alter or amend judgment or for relief from judgment and denying Plaintiffs' second motion for reconsideration.

Respectfully submitted,
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David R. Kott

Dated: February 22, 2019

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Fed. R. App. P. 32, I hereby certify as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,039 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: February 22, 2019

Respectfully submitted,

s/ David R. Kott
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