

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

PATRICIA VITALE and VINCENT VITALE, on  
behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

U.S. GAS & ELECTRIC, INC., ENERGY  
SERVICES PROVIDERS, INC. and JOHN DOE  
CORPORATIONS #1-25,

Defendants.

Case No. 2:14-cv-4464 (KM)(MAH)

Hon. Kevin McNulty, U.S.D.J.

~~PROPOSED~~ ORDER GRANTING PRELIMINARY  
APPROVAL TO CLASS ACTION SETTLEMENT

On February 10, 2017, Plaintiffs Patricia Vitale and Vincent Vitale, husband and wife (together, "Plaintiffs"), on behalf of themselves and the Settlement Class, and Defendants U.S. Gas & Electric, Inc., Energy Services Providers, Inc., and their subsidiaries (collectively, "USGE" or "Defendants," and together with Plaintiffs, the "Parties") executed a proposed Settlement Agreement (the "Settlement Agreement"). Pursuant to the Settlement Agreement, Plaintiffs moved for entry of an order granting preliminary approval to the settlement (the "Settlement") provided for in the Settlement Agreement. Having reviewed the Settlement Agreement and considered the submissions in support of preliminary approval of the Settlement, the Court now finds, concludes, and orders as follows:

**I. CERTIFICATION OF A MULTI-STATE SETTLEMENT CLASS<sup>1</sup>**

The Settlement Agreement provides for a multi-state class settlement of the claims that

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<sup>1</sup> With respect to gas or electric supply service plans, the multi-state settlement class includes the States of New Jersey, Connecticut, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Ohio and the District of Columbia. With respect to gas supply service plans only, the multi-state settlement class also includes the State of Pennsylvania.

are the subject of this litigation.

A. The Court has considered: the (1) allegations, information, arguments, and authorities provided by the Parties in connection with pleadings previously filed in this case; (2) information, arguments, and authorities provided by Plaintiffs in their brief in support of their motion for entry of an order granting preliminary approval of the Settlement; (3) the terms of the Settlement Agreement, including, but not limited to, the definition of the Settlement Class and the benefits to be provided to the Settlement Class; and (4) the Settlement's elimination of any potential manageability issue, and individualized issues of fact and law that could have had a bearing on the certification of a multi-state class for trial in this case. Based on those considerations, the Court hereby finds as follows:

1. Defendants are third-party providers of gas and electric supply services to residents and companies throughout the States of New Jersey, Connecticut, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Ohio, the District of Columbia, and Pennsylvania. Defendants' customers comprise these residents and companies. The number of Defendants' customers satisfies the numerosity requirement of Rule 23 of the Federal Rules of Civil Procedure.

2. There are questions of law and fact common to all members of the Settlement Class based on Defendants' marketing, sales, and rates in connection with the provision of gas and electric supply services. Such questions include, but are not necessarily limited to, the following:

a. Whether the automated voice language and/or standardized scripts used in Defendants' telephonic interactions with Plaintiffs and members of the Settlement Class contained misrepresentations, concealments, and/or omissions of

material facts concerning the rates Defendants charged for supplying gas and electric service compared to local utility companies;

b. Whether Defendants' "Welcome Packages" and/or terms and conditions provided to Plaintiffs and members of the Settlement Class contained misrepresentations, concealments, and/or omissions of material facts concerning the rates Defendants charged for supplying gas and electric service compared to local utility companies;

c. Whether Defendants engaged in fraudulent practices by inducing Plaintiffs and members of the Settlement Class to switch gas and/or electric suppliers;

d. Whether Defendants' alleged acts in inducing Plaintiffs and members of the Settlement Class to switch gas and/or electric suppliers violated the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 *et seq.* ("NJCFA");

e. Whether, by allegedly violating the NJCFA, Defendants violated clearly established rights of Plaintiffs and members of the Settlement Class, or the responsibilities of Defendants, in violation of the New Jersey Truth-in-Consumer Contract, Warranty and Notice Act, N.J.S.A. 56:12-14 *et seq.* ("TCCWNA");

f. Whether Plaintiffs and members of the Settlement Class are entitled to damages, restitution, injunctive and/or monetary relief, and the amount and nature of same; and

g. Whether Plaintiffs and members of the Settlement Class are entitled to reimbursement of the amounts charged by Defendants in excess of what would have been charged had Plaintiffs and members of the Settlement

Class not switched their gas and/or electric supplier to Defendants, as well as any fees incurred in connection with switching to Defendants.

3. Plaintiffs' claims are typical of the claims of the Settlement Class.

Plaintiffs are members of the Settlement Class and allege that they have been damaged by the same conduct of Defendants that they allege has damaged other members of the Settlement Class. Plaintiffs' claims are not in conflict with or antagonistic to the claims of the Settlement Class as a whole. The claims of Plaintiffs and members of the Settlement Class are based upon corresponding theories.

4. The Settlement Class is ascertainable. All of the members of the Settlement Class were Defendants' customers, who can readily be identified from Defendants' records.

5. Plaintiffs are adequate class representatives who can fairly, fully, and adequately protect the interests of the Settlement Class. Class Counsel too are adequate, as they are experienced in prosecuting complex class action litigation. Plaintiffs and their counsel have no interests that conflict with, or are adverse to, the interests of the Settlement Class.

6. The common questions of law and fact identified above predominate over any questions affecting only individual members for settlement purposes.

7. A multi-state class action for settlement purposes is superior to other available methods for the fair and efficient adjudication of this controversy.

B. Pursuant to Federal Rule of Procedure 23(b)(3), the Court hereby preliminarily certifies the following Settlement Class for settlement purposes only:

Each person or entity in the States of New Jersey, Connecticut, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Ohio, and the District of Columbia, who,

from January 1, 2008 to February 10, 2017, entered into a gas or electric service supply plan with Defendants or either of them.

Each person or entity in the State of Pennsylvania who, from January 1, 2008 to February 10, 2017, entered into a gas service supply plan with Defendants or either of them.

Excluded from the Settlement Class are all judges to whom this Action is assigned, and the staff of those judges, the officers, directors and counsel of record of Defendants, and all employees of Defendants, any putative Settlement Class Members who properly and timely exclude themselves by filing a request for exclusion in accordance with the requirements set forth in this Order, and any putative class members who have already had adjudicated in legal proceedings other than this Action the same or similar claims as those alleged in this Action.

C. Patricia Vitale and Vincent Vitale are appointed as the representatives of the Settlement Class, and the law firms of Lite DePalma Greenberg, LLC and Poulos LoPiccolo P.C. are appointed as Class Counsel for the Settlement Class.

D. If, for any reason, the Settlement Agreement should fail to become effective, Defendants' stipulation to certification of the Settlement Class, or to any other class or subclass, shall be null and void, and the Parties shall return to their respective positions in the Action as those positions existed on October 10, 2016, when the Parties reached an agreement-in-principle to settle. Nothing stated in the Settlement Agreement shall be deemed an admission or waiver of any kind by any of the Parties or used as evidence against, or over the objection of, any of the Parties for any purpose in the Action.

## **II. PRELIMINARY APPROVAL OF THE TERMS OF THE SETTLEMENT**

Defendants have at all times disputed, and continue to dispute, Plaintiffs' factual allegations in the Action and to deny any liability for any of the claims that have or could have been alleged by Plaintiffs or other members of the Settlement Class.

A. The Settlement requires Defendants to provide specified benefits to each member of the Settlement Class, without the need for any member of the Settlement Class to submit a

claim. Defendants shall pay the sum of \$1,825,000.00 into an interest-bearing account (“the Settlement Fund Account”). Following the Court’s entry of a Final Approval Order, the Settlement Administrator shall transmit checks from the Settlement Fund Account to each Settlement Class Member in an amount, for each Settlement Class Member, equal to the Settlement Fund plus any accrued interest, divided by the number of Settlement Class Members.

B. On a preliminary basis, therefore, taking into account: (1) the value and certainty of the benefits to be provided by the Settlement to the Settlement Class; (2) the defenses asserted by Defendants, as to both litigation class certification and the merits; (3) the risks to the members of the Settlement Class that Defendants would successfully defend against class certification and/or against the merits of the claims arising out of the facts and legal theories asserted in this Action, whether litigated by members of the Settlement Class themselves or on their behalf in a class action; and (4) the length of time that would be required for members of the Settlement Class, or any group of members of the Settlement Class, to obtain a final judgment through one or more trials and appeals, the Settlement appears fair, reasonable, and adequate. Moreover, the Parties have reached the Settlement after vigorous motion practice and extensive, contentious, and arms-length negotiations facilitated by a mediator (Hon. Joel M. Rosen, U.S.M.J. (Ret.)), and the Settlement is not in any way the product of collusion. For all these reasons, the Settlement falls within the appropriate range of possible approval and does not appear in any way to be the product of collusion.

C. Accordingly, the Settlement Agreement and corresponding Settlement are hereby preliminarily approved.

D. The Court hereby adopts and incorporates the terms of the Settlement Agreement for the purposes of this Preliminary Approval Order, including the Definitions set forth in the Settlement Agreement.

**III. APPROVAL OF THE SUMMARY NOTICE AND THE SETTLEMENT NOTICE AND THE PLAN FOR DISTRIBUTING THE NOTICES**

As provided for in the Settlement Agreement, the Parties have submitted a proposed Summary Notice, a copy of which is attached to this Order as Exhibit 1; and a proposed Settlement Notice, a copy of which is attached to this Order as Exhibit 2. Having reviewed each, the Court finds and concludes as follows:

A. Distribution of the Summary Notice and the Settlement Notice, in substantially the forms attached hereto, through the methodology and plan described in the Settlement Agreement is the only notice required, and such notice satisfies the requirements of due process, Rule 23 of the Federal Rules of Civil Procedure, the Class Action Fairness Act of 2005, 28 U.S.C. § 1715, and any other applicable laws, and constitutes the best notice practicable under the circumstances and shall constitute due and sufficient notice to all persons entitled thereto.

B. The Summary Notice and the Settlement Notice fairly, accurately, and reasonably inform members of the Settlement Class of: (1) appropriate information about the nature of this litigation and the essential terms of the Settlement Agreement; (2) appropriate information about how to obtain additional information regarding this matter and the Settlement Agreement; and (3) appropriate information about how to object to or exclude themselves from the Settlement, if they wish to do so. The Summary Notice and the Settlement Notice also fairly and adequately inform members of the Settlement Class that if they do not comply with the specified procedures and the deadline for objections, they will lose any opportunity to have any objection considered



at the Fairness Hearing or to otherwise contest approval of the Settlement or appeal from any order or judgment entered by the Court in connection with the Settlement.

Accordingly, the Court hereby orders as follows:

1. The form and content of the proposed Summary Notice and Settlement Notice are hereby approved. The proposed Notice Plan is hereby approved and notice shall be given to the Settlement Class as provided by the notice methodology described in the Settlement Agreement and the Notice Plan.
2. Promptly following the entry of this Order, the Parties shall prepare final versions of the Summary Notice and the Settlement Notice, and incorporate into each of them the Fairness Hearing date and the deadlines set forth in section IV of this Order.
3. Within fourteen (14) days after the entry of this Order, Defendants, through the Settlement Administrator appointed hereby, shall cause the Settlement Notice to be posted on the Settlement Website, [www.usgesettlement.com](http://www.usgesettlement.com).
4. Within twenty-one (21) days after the entry of this Order, the Settlement Administrator shall disseminate to every member of the Settlement Class a copy of the Summary Notice. The Settlement Administrator will disseminate the Summary Notice by email to those Settlement Class Members for whom Defendants have an email address and by first-class United States Mail to all other Settlement Class Members. Before doing so, the Settlement Administrator will obtain or cause to be obtained address updates using a National Change of Address database and use any updated addresses when mailing. If any Summary Notice is returned bearing a forwarding address for a member of the Settlement Class, the Settlement Administrator shall make one attempt to mail the Settlement Notice to that forwarding address.



5. This civil action was commenced after February 18, 2005. As a result, Defendants shall notify the appropriate Federal and State officials under the Class Action Fairness Act of 2005, 28 U.S.C. § 1715. Defendants' Counsel shall file with the Court proof of compliance with the Class Action Fairness Act of 2005, 28 U.S.C. § 1715.

6. No later than seven (7) days before the Fairness Hearing, Defendants shall file with this Court a declaration of compliance with paragraphs 2, 3, 4, and 5 above.

7. Epiq Class Action & Claims Solutions, Inc. is hereby approved as the Settlement Administrator, whose reasonable costs in administering the Settlement and notice thereof are to be paid by Defendants.

8. The Settlement Administrator shall issue notice and administer the Settlement subject to the jurisdiction of the Court.

9. The Settlement Administrator shall perform the following functions in accordance with the Settlement Agreement, this Preliminary Approval Order, and subsequent orders that may be entered by this Court in this case:

a. As described above, disseminate the Summary Notice to members of the Settlement Class by email or by first-class United States Mail;

b. Before disseminating the Summary Notice, establish the Settlement Website, which will include the Settlement Notice;

c. Before disseminating the Summary Notice, set up and thereafter operate a toll-free automated interactive voice response system through which Settlement Class Members can access settlement information and facilitate requests for the Settlement Notice and other settlement information;

- d. Send via first-class United States Mail or email notice packets or other settlement information to all those who may request via the toll-free number or mail;
- e. Before disseminating the Summary Notice, establish a postal address to which Settlement Class Members can request to be excluded from the Settlement Class;
- f. Carry out the Notice Plan;
- g. Process requests for exclusion from the Settlement in accordance with section 9 of the Settlement Agreement; and
- h. Promptly provide to Class Counsel and Defendants' Counsel copies of the Requests for Exclusion and a list of the names of all persons who submitted Requests for Exclusion. Class Counsel and Defendants shall jointly report in writing to the Court, no later than seven (7) days before the Fairness Hearing, the names and states of residence of all such persons.

#### **IV. PROCEDURES FOR FINAL APPROVAL OF THE SETTLEMENT**

##### **A. Fairness Hearing**

The Court hereby schedules a Fairness Hearing at 10 : 00 a.m. on July 18<sup>th</sup>, 2017, which date is approximately (and no less than) seventy-five (75) days after the entry of this Order, to determine whether the certification of the Settlement Class, the designation of Plaintiffs as class representatives, the appointment of Class Counsel, the Settlement Agreement, and the Settlement should receive final approval. At that time, the Court also will consider Class Counsel's application for an award of attorneys' fees and reimbursement

of costs they incurred prosecuting the Action, as well as awards to be paid to Plaintiffs, all in accordance with the terms of the Settlement Agreement (the “Application”).

**B. Deadline for Requests for Exclusion from the Settlement Class**

Settlement Class Members shall be bound by all determinations and judgments in the Action, whether favorable or unfavorable, unless such persons request exclusion from the Settlement Class in a timely and proper manner, as hereinafter provided. Members of the Settlement Class who wish to be excluded from the Settlement Class must mail their requests for exclusion in written form to the Settlement Administrator by first-class United States Mail, postmarked by the United States Postal Service no later than thirty (30) days after the issuance of the Summary Notice. Any request for exclusion submitted in any other manner shall be deemed to have been submitted when actually received by the Settlement Administrator. The request must: (i) be personally signed by the Settlement Class Member; (ii) clearly express the Settlement Class Member’s desire to be excluded (or to “opt out”) from the Settlement Class in *Patricia Vitale and Vincent Vitale, on behalf of themselves and all others similarly situated, v. US Gas & Electric, Inc., Energy Services Providers, Inc., and John Doe Corporations #1-25, Case No. 2:14-cv-4464 (KM)(MAH)*; and (iii) include the Settlement Class Member’s name, address, telephone number, electronic mail address, if any, account number(s) with Defendants or any of them, and, if represented by counsel, counsel’s name, address, telephone number, and electronic mail address. The request for exclusion shall not be effective unless it provides the required information and is made within the time stated above, or the exclusion is otherwise accepted by the Court.

**C. Deadline for Filing Objections and Requests to Appear**

All objections to certification of the Settlement Class, the designation of Plaintiffs as class representatives, the appointment of Class Counsel, the Settlement, the Settlement Agreement, or Class Counsel's Application, shall be made in writing and, no later than thirty (30) days after the date of issuance of the Summary Notice, filed with this Court and mailed to Defendants' Counsel and to Class Counsel listed below, by first-class United States Mail, at the following addresses:

Clerk of the Court  
U.S. District Court for the District of New Jersey  
Martin Luther King Building & U.S. Courthouse  
50 Walnut Street  
Newark, NJ 07101

For Defendants:

Stephen M. Orlofsky  
BLANK ROME LLP  
301 Carnegie Center, 3<sup>rd</sup> Floor  
Princeton, NJ 08540

For the Settlement Class:

Bruce D. Greenberg  
LITE DEPALMA GREENBERG LLC  
570 Broad Street, Suite 1201  
Newark, NJ 07102

Any written objection must include: (i) the objecting Settlement Class Member's name, address, telephone number, electronic mail address, if any, account number(s) with Defendants or any of them, and, if represented by counsel, counsel's name, address, telephone number, and electronic mail address ; (ii) the full case name and number (*Patricia Vitale and Vincent Vitale, on behalf of themselves and all others similarly situated, v. US Gas & Electric, Inc., Energy Services Providers, Inc., and John Doe Corporations #1-25, Case No. 2:14-cv-4464 (KM)(MAH)*); (iii) a statement that the objecting Settlement Class Member is a Settlement Class Member; (iv) a statement of each objection asserted; (v) a detailed description of the facts underlying each objection; (vi) a detailed description of the legal authorities supporting each objection; (vii) a statement of whether the objecting Settlement Class Member intends to appear

and speak at the Fairness Hearing; and (viii) the signature of the Objecting Class Member, personally signed by the objecting Settlement Class Member and not by any representative or counsel. In addition, if applicable, all objections shall include: (i) the number of times in which the objecting Settlement Class Member, the objecting Settlement Class Member's counsel (if any), or the objecting Settlement Class Member's counsel's law firm (if any) has objected to a class action settlement within the five (5) years preceding the date that the objecting Settlement Class Member files the objection and the caption of each case in which such objection was made; and (ii) a statement disclosing any consideration that the objecting Settlement Class Member, the objecting Settlement Class Member's counsel (if any), or the objecting Settlement Class Member's counsel's law firm (if any) has received in connection with the resolution or dismissal of an objection to a class action settlement within the five (5) years preceding the date that the objecting Settlement Class Member files the objection. If the objecting Settlement Class Member or the objecting Settlement Class Member's counsel has *not* objected to any other class action settlement in any court in the United States in the previous five (5) years, the objection must affirmatively so state. Any papers not filed and served in the prescribed manner and time will not be considered at the Fairness Hearing, and all objections not made in the prescribed manner and time shall be deemed waived.

The filing of an objection allows Class Counsel or Defendants' Counsel to take the deposition of the objecting Settlement Class Member consistent with the Federal Rules of Civil Procedure at an agreed-upon location, and/or to seek any documentary evidence or other tangible things that are relevant to the objection. Failure by an objecting Settlement Class Member to make himself or herself available for a deposition or otherwise comply with expedited discovery requests may result in the Court striking the objection and otherwise denying the objecting

Settlement Class Member the opportunity to make an objection or be further heard. The Court may tax the costs of any such discovery to the objecting Settlement Class Member or the objecting Settlement Class Member's counsel should the Court determine that the objection is frivolous or is made for an improper purpose.

All persons wishing to appear at the Fairness Hearing, either in person or by counsel, for the purpose of objecting to any aspect of the certification of the Settlement Class, the designation of Plaintiffs as representatives of the Settlement Class, the appointment of Class Counsel, the Settlement, the Settlement Agreement, or Class Counsel's Application, must file with the Court and serve, on Defendants' Counsel and on Class Counsel, no later than twenty (20) days before the date of the Fairness Hearing, a notice of their intention to appear setting forth the basis of their objections and summarizing the nature and source of any evidence they intend to present at the Fairness Hearing.

Any memorandum or other material the Parties wish to submit in response to any objections to the certification of the Settlement Class, the designation of Plaintiffs as representatives of the Settlement Class, the appointment of Class Counsel, the Settlement, the Settlement Agreement, or Class Counsel's Application, or otherwise in support of the Settlement Class, the Settlement, the Settlement Agreement, or Class Counsel's Application, shall be made in writing and, no later than ten (10) days before the Fairness Hearing, filed with this Court and served on each other and any objectors.

**D. Deadline for Class Counsel to File Papers in Support of Final Approval of Settlement and Fee Application**

No later than twenty-one (21) days before the deadlines for Requests for Exclusion and for Filing Objections and Requests to Appear, Class Counsel shall file with this Court, and serve on Defendants, Class Counsel's Application, pursuant to the Settlement Agreement, their papers

in support of final approval of the Settlement and their Application for an award of attorneys' fees and reimbursement of costs incurred in the Action and for awards to Plaintiffs.

**V. STAY OF PROCEEDINGS**

Pending final determination of whether the Settlement should be approved, Plaintiffs, all other Settlement Class Members, and each of them, and anyone who acts or purports to act on their behalf, shall not institute, commence or prosecute any action that asserts Released Claims against any Releasee. Pending the Fairness Hearing, the Court stays all proceedings in the Action, other than those proceedings necessary to carry out or enforce the terms and conditions of the Settlement Agreement.

IT IS SO ORDERED.

Dated: April 24, 2017

  
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Kevin McNulty, U.S.D.J.