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**In the  
United States Court of Appeals  
For the Second Circuit**

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August Term 2018

No. 18-3138

SUSANNA MIRKIN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY  
SITUATED 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.*

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Appeal from the United States District Court  
for the Eastern District of New York  
No. 18-cv-2949, Allyne R. Ross, District Judge, Presiding.  
(Argued June 11, 2019; Decided July 26, 2019)





1 with traditional utilities. These ESCOs operate as commodity brokers or  
2 middlemen. They do not generate or deliver electricity; they simply buy  
3 electricity from utility companies that generate it and resell it to consumers.  
4 Utility companies then ultimately deliver the electricity to consumers. The  
5 Mirkins allege that the business practices of ESCOs have come under intense  
6 scrutiny from regulators as a consequence of questionable business practices.  
7 According to the Complaint, in December 2016, following a flood of consumer  
8 complaints and negative media reports, the New York State Public Service  
9 Commission (“PSC”) permanently prohibited ESCOs from serving low-income  
10 customers. Compl. ¶ 36.

11 The Complaint cites to the PSC’s March 2018 conclusions that “ESCO  
12 customers have become the victims of a failed market structure that results in  
13 customers being fooled by advertising and marketing tricks into paying  
14 substantially more for commodity service than [if] they had remained full utility  
15 customers, yet thinking they are getting a better deal.” *Id.* ¶ 37. The PSC  
16 explained that the primary problem with ESCOs is “the overcharging of  
17 customers for [a] commodity due to the lack of transparency . . . on ESCO prices  
18 and products,” which “allows ESCOs to charge customers practically whatever

1 they want.” *Id.* The PSC also concluded that “ESCOs take advantage of the mass  
2 market customers’ lack of knowledge and understanding of, among other issues,  
3 the electric and gas commodity markets, commodity pricing, . . . contract  
4 terms . . . and in particular, the ESCOs’ use of teaser rates and ‘market based rate’  
5 mechanisms that customers are charged after the teaser rate expires.” *Id.*

6 The parties do not dispute that XOOM, which supplies residential  
7 electricity to thousands of New York households, operates like a typical ESCO  
8 and markets itself as such. Oral Arg. R. at 13:59–14:10 (conceding that XOOM  
9 operates essentially as a commodity broker or middleman); *see also* PAC ¶¶ 48–49  
10 (quoting *What is Energy Deregulation?*, XOOM Energy, [https://xoomenergy.com/e](https://xoomenergy.com/en/what-is-deregulation)  
11 [n/what-is-deregulation](https://xoomenergy.com/en/what-is-deregulation) (last visited July 23, 2019) (explaining XOOM’s  
12 middleman role and confirming that it does not generate or deliver electricity)  
13 [hereinafter “XOOM Website”]; *Frequently Asked Questions*, XOOM Energy,  
14 <https://xoomenergy.com/en/faq> (last visited July 23, 2019) (“A variable rate plan  
15 allows you to purchase gas at *market-based prices* that change from month to  
16 month.” (emphasis added))). The Mirkins allege that, like other ESCOs, XOOM  
17 attracts customers with low introductory rates. Upon the expiration of these  
18 rates, customers are then charged variable rates.

1           In March 2013, the Mirkins entered into a customer agreement (the  
2           “Agreement”) with XOOM. The Agreement set forth the basis upon which rates  
3           would be determined as follows:

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

9           App’x at 29 (emphasis added). The Mirkins remained customers of XOOM for  
10          six months before discontinuing the arrangement because of their dissatisfaction  
11          with the rates they were charged after the expiration of the teaser rate.

12          The Mirkins sued XOOM for breaching the Agreement, alleging that  
13          XOOM did not base its rates on its supply costs. With the help of an energy  
14          expert, the Mirkins calculated the market cost for supplying wholesale energy  
15          (the “Market Supply Cost”) based on publicly available data provided by the  
16          New York Independent System Operator (“NYISO”), accounting for ancillary  
17          services costs, capacity costs, renewable portfolio standard costs, and various  
18          charges related to the NYISO. The Mirkins’ calculations, set forth in their  
19          Complaint, are as follows:

	Period	XOOM Rate	Market Supply Cost	Difference in %
1				
2	5/10/2013 - 6/11/2013	9.39 (teaser)	11.03	-14.87%
3	6/11/2013 - 7/11/2013	12.50	11.89	5.13%
4	7/11/2013 - 8/9/2013	15.05	12.36	21.76%
5	8/9/2013 - 9/10/2013	15.55	10.1	53.96%
6	9/10/2013 - 10/8/2013	14.79	10.12	46.15%
7	10/8/2013 - 11/7/2013	15.57	9.82	58.55%

8 Compl. ¶ 47. The Mirkins allege that, according to their calculations, XOOM's  
 9 rates substantially exceeded the Market Supply Cost and continued to rise even  
 10 when the Market Supply Cost went down.

11 XOOM moved to dismiss the Complaint for failure to state a claim under  
 12 Rule 12(b)(6). The District Court granted the motion, reasoning that the  
 13 Agreement's reference to actual or estimated supply costs "makes XOOM's  
 14 rate-setting decisions an internal activity." *Mirkin v. XOOM Energy, LLC*, 342 F.  
 15 Supp. 3d 320, 328 (E.D.N.Y. 2018). In other words, according to the District  
 16 Court, the Agreement allows XOOM to set rates at its discretion because  
 17 "[c]ustomers—at least those without any background in the electricity market or  
 18 the numerous factors that may determine the costs of an individual electricity  
 19 provider—would have no basis for predicting XOOM's actual or estimated  
 20 costs." *Id.* This conclusion disregarded plausible allegations in the Complaint.



1           The District Court dismissed the Complaint because it concluded that the  
2 Agreement did “not incorporate any references to external rates or market  
3 prices” and therefore “provides customers with no clear formula for the  
4 calculation of its costs.” *XOOM*, 342 F. Supp. 3d at 328. Thus, according to the  
5 District Court, there is no way the Mirkins could successfully state a claim  
6 without detailed information on the internal costs and rate-setting processes to  
7 which only XOOM is privy.

8           In holding the Complaint insufficient and the motion to file the PAC futile,  
9 the District Court failed to accept as true plausible allegations in the Complaint  
10 and the PAC. As an initial matter, XOOM concedes that it operates as a  
11 commodity broker or middleman and does not generate or deliver electricity.  
12 Oral Arg. R. at 13:59–14:10. Rather, it purchases energy “from wholesale  
13 markets” and resells that energy to its customers. PAC ¶ 48 (quoting XOOM  
14 Website). Consistent with this concession, the Mirkins plausibly allege that  
15 “[t]he cost of wholesale energy is the primary component of the non-overhead  
16 costs XOOM incurs.” Compl. ¶ 51. We must therefore draw the reasonable  
17 inference from the Complaint and the PAC that XOOM’s actual or estimated  
18 supply costs should track the Market Supply Cost.

1           The Mirkins have alleged, with the support of the expert calculations  
2 included in the Complaint and the PAC, that XOOM’s rates showed significant  
3 upward deviations from the Market Supply Cost and continued to rise even  
4 when that cost fell. These allegations are sufficient to state a claim for breach of  
5 contract, as XOOM promised to base its rates on its supply costs and the Mirkins’  
6 allegations and calculations plausibly allege that this did not occur. Notably,  
7 XOOM failed, in its briefs and at oral argument, to cast doubt on the plausibility  
8 of these allegations simply by pointing to a single factor that could cause such  
9 substantial deviations from the Market Supply Cost in just a few months.

10           The District Court also suggested that the Mirkins “fabricated” their  
11 calculations. *XOOM*, 342 F. Supp. 3d at 329. We see no support for this assertion  
12 in the Complaint or the PAC. On the contrary, in approximating the Market  
13 Supply Cost, the Mirkins relied on publicly available NYISO data, which is  
14 mandated by state and federal regulations and updated frequently to account for  
15 changes across time and location. PAC ¶ 53; Appellant’s Br. at 30, 34. At the  
16 pleading stage, relying on this source of information is sufficient to set forth a  
17 plausible allegation of breach of contract.

1           For similar reasons, the District Court erred in denying the Mirkins leave  
2 to amend their Complaint. Notwithstanding the fact that the Complaint was  
3 sufficient to state a claim for breach of contract, the PAC should have allayed any  
4 concerns the District Court had about the plausibility of the Mirkins' allegations.  
5 First, the Mirkins specifically alleged in the PAC that "the wholesale cost of  
6 energy makes up over 90% of [XOOM's] supply costs." PAC ¶ 4. Second, the  
7 Mirkins alleged that "XOOM purchases its energy either directly from the  
8 [NYISO] or pursuant to an agreement[] that ties XOOM's supply costs to prices  
9 in the NYISO wholesale market." *Id.* ¶ 47. Indeed, the Mirkins alleged that  
10 XOOM was listed on NYISO's Annual Report as a "market participant" during  
11 the year in which it supplied the Mirkins with electricity. *Id.* Third, the Mirkins  
12 attached their expert's calculations and explained, in detail, the variables used to  
13 determine the Market Supply Cost. *Id.* ¶ 53; App'x at 103. Relatedly, they  
14 alleged that "all components of the wholesale cost of electricity are objectively  
15 determinable and mandated by regulation." PAC ¶ 53. Finally, the Mirkins  
16 presented a new data table demonstrating that XOOM's rates deviated from the  
17 rates charged by Con Edison,<sup>2</sup> the leading New York City electric utility

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<sup>2</sup> Because utility companies like Con Edison participate on the wholesale energy market, their rates are another reflection of the Market Supply Cost. PAC ¶ 60.

1 company, by up to sixty percent, and continued to rise even when Con Edison's  
2 rates fell. *Id.* ¶ 61. We conclude that, like the Complaint, the PAC plausibly  
3 stated a claim for breach of contract.<sup>3</sup>

4 The Mirkins sought to present their PAC by moving to alter or amend the  
5 judgment under Rule 59(e) or alternatively to secure relief from the judgment  
6 under Rule 60(b). In *Williams v. Citigroup Inc.*, we reversed a district court's  
7 denial of Rule 59(e) and Rule 60(b) motions made by a plaintiff who, like the  
8 Mirkins, sought to amend its dismissed complaint. 659 F.3d 208, 214 (2d Cir.  
9 2011). The District Court, we concluded, had "overemphasized considerations of  
10 finality at the expense of the liberal amendment policy embodied in the Federal  
11 Rules of Civil Procedure." *Id.* at 210. We noted that the Supreme Court's leading  
12 decision allowing amendment of a complaint, *Foman v. Davis*, 371 U.S. 178 (1962),  
13 also involved a post-judgment motion. *See Williams*, 659 F.3d at 214. Here, too,

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<sup>3</sup> Our decision in *Richards v. Direct Energy Services, LLC*, 915 F.3d 88 (2d Cir. 2019), does not compel a different result. There, we were asked to determine the import of the following contractual provision in an agreement between an ESCO, Direct Energy Services, LLC, and a consumer: "After the Initial Term and during the Renewal Period, the rate for electricity will be variable each month at Direct Energy's discretion. The rate may be higher or lower each month based upon business and market conditions." *Id.* at 94. The consumer sued, principally alleging "that Direct Energy breached its contract . . . by not pegging its variable rate to Direct Energy's procurement costs." *Id.* at 92; *see also id.* at 100. Our Court concluded that the breach of contract theory could not stand.

While the consumer-plaintiff's breach of contract theory in *Richards* was identical, or at least nearly identical, to the one the Mirkins now advance, the relevant contractual provisions are critically different. The Agreement required XOOM to base its variable rates on its supply costs. In contrast, the contract in *Richards*, by its plain terms, imposed no such requirement; the relevant provision there made no mention of procurement costs. In light of this crucial difference, *Richards* does not control the outcome of this appeal.

1 we conclude that the District Court should have accepted the PAC,  
2 notwithstanding its presentation after judgment was entered. We therefore  
3 reverse the judgment to the extent that it denied the motions under Rules 59(e)  
4 and 60(b), direct that the plaintiffs may file their PAC, and affirm dismissal of  
5 their claims for breach of the implied covenant of good faith and fair dealing and  
6 for unjust enrichment, which have not been pursued on appeal.

### 7 CONCLUSION

8 For the reasons set forth, we **AFFIRM** in part, **REVERSE** in part, and  
9 **REMAND** with direction to permit the Mirkins to proceed on their PAC.