No. 400837/10

To be argued by:
STEVEN C. WU

Supreme Court, New York County

Supreme Court of the State of New York
Appellate Division – First Department

PEOPLE OF THE STATE OF NEW YORK, by ANDREW M. CUOMO,
Attorney General of the State of New York,

Petitioner-Appellant,

-against-

TEMPUR-PEDIC INTERNATIONAL, INC.,

Respondent-Respondent.

BRIEF FOR APPELLANT

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PRELIMINARY STATEMENT

For nearly forty years until the 1970s, resale price-fixing was authorized under New York's Fair Trade Act. The Legislature repealed the Act in 1975 based on comprehensive evidence that resale price-fixing harmed consumers by forcing them to pay artificially inflated prices for retail goods. When the Legislature repealed the Fair Trade Act, it did not leave price-fixing agreements under the general regulation of state antitrust law alone. Instead, the Legislature enacted a specific and independent statute, General Business Law ("GBL") § 369-a, to protect consumers by eliminating price-fixing schemes. GBL § 369-a declares resale price-fixing "prohibited" and provides that any contractual agreement purporting to restrict resale discounting is categorically unenforceable, without exception and without requiring any further evidentiary showing.

In 2010, the Attorney General brought this enforcement action against respondent Tempur-Pedic International, Inc., a manufacturer of mattress and pillow products. The Attorney General's petition alleges that Tempur-Pedic and its retail partners entered into an unlawful and fraudulent anti-discounting scheme, effectuated through a contractual

agreement, which requires retailers to sell Tempur-Pedic's products at inflated, anticompetitive prices dictated by Tempur-Pedic. The petition seeks injunctive and other relief pursuant to Executive Law § 63(12) for Tempur-Pedic's violation of GBL § 369-a and other fraudulent conduct, including an order barring Tempur-Pedic from enforcing any restraint on resale discounting.

Although Tempur-Pedic *admits* that it imposes and enforces a no-discount policy and threatens retailers with termination if they sell Tempur-Pedic's products at lower prices than other stores, Tempur-Pedic sought pre-trial dismissal of the Attorney General's petition on two grounds. First, Tempur-Pedic argued that GBL § 369-a was not a consumer-protection statute, subject to public enforcement, but instead enacted only a contractual defense to be invoked by parties in private lawsuits to enforce price-fixing agreements. Second, Tempur-Pedic claimed that the Attorney General had submitted insufficient evidence to prove the existence of a price-fixing contract and other fraudulent conduct.

Supreme Court, New York County (Lobis, J.) agreed with Tempur-Pedic's arguments and dismissed the petition. This Court should

reverse. Interpreting GBL § 369-a as enacting only a private defense in breach-of-contract suits makes no sense in light of the Legislature's stated mission to protect consumers and broadly eradicate resale price-fixing. Under Tempur-Pedic's interpretation, so long as the co-conspirators to a price-fixing scheme refrain from suing each other in court, as they are likely to do, GBL § 369-a would have *no independent effect*. The language, purpose, and legislative history of the statute all refute that absurd result, which would delegate protection of consumers to the very parties whose price-fixing behavior the Legislature meant to prohibit.

Second, while Tempur-Pedic may factually dispute the petition's allegations, it is not entitled to pre-trial dismissal on a C.P.L.R. 3211 motion because of the alleged absence of proof. The petition here seeks to vindicate the State's public policy against price-fixing and to prevent further consumer harm, and the Attorney General is entitled to have his claims—and evidence—tested at trial.

ISSUES PRESENTED

1. Does GBL § 369-a enact only a private contractual defense?

2. Should the Attorney General's petition be dismissed because Tempur-Pedic disputes the factual allegation that it entered into a price-fixing contract with retailers?

3. Should the Attorney General's petition be dismissed because Tempur-Pedic denies that retailers and consumers were deceived into believing the Tempur-Pedic's price restraints were legally enforceable?

Supreme Court answered all three questions in the affirmative and dismissed the Attorney General's petition.

STATEMENT OF THE CASE

A. Regulation of Resale Price Restraints

Resale price-fixing (also known as vertical price-fixing or resale price maintenance) has long been prohibited as inherently anticompetitive and *per se* illegal, unless specifically authorized by statute. *See 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 341 (1987). In 1931, Congress enacted the Miller-Tydings Fair Trade Act, which, until its repeal in 1975, permitted States to enact state-specific "fair trade laws" authorizing manufacturers to dictate the minimum price at which

their products could be resold. Between 1931 and 1975, thirty-six States, including New York, did so. New York's Fair Trade Act specifically "authorize[d] vertical pricefixing arrangements between a producer . . . and a vendee" for branded or trademarked goods. *Port Chester Wine & Liquor Shop, Inc. v. Miller Bros. Fruiterers, Inc.*, 253 A.D. 188, 189 (2d Dep't 1938).

Consumers in States that permitted resale price-fixing paid significantly higher prices for retail goods than consumers in States that barred the practice. Studies by the United States Department of Justice, for example, concluded that retail prices in "fair trade" states that permitted resale price-fixing were 19% to 37.4% higher than prices in "free trade" states that prohibited resale price-fixing. *See Quality Stabilization: Hearings Before a Subcomm. of the Senate Comm. on Commerce*, 88th Cong. 6 (1963) (statement of Lee Loevinger, Assistant Attorney General, Antitrust Division, Department of Justice); Thomas R. Overstreet, *Resale Price Maintenance: Economic Theories and Empirical Evidence* 113 (FTC 1983).

1. Enactment of GBL § 369-a

Based on the wide body of evidence demonstrating significant harm to consumers from resale price-fixing, New York repealed its Fair Trade Act in 1975. *See* ch. 65, 1975 McKinney's N.Y. Laws, 91. But the bill did more than simply repeal the prior provisions of the Fair Trade Act, leaving resale price-fixing to general regulation under federal and state antitrust laws.

Instead, to protect consumers, the Legislature further enacted a specific statute governing resale price-fixing under New York law. The repeal bill implemented this consumer-protection goal by replacing a prior version of GBL § 369-a, which implemented the former Fair Trade Act, with an entirely new section whose purpose was to "eliminat[e] [the] legal basis for price-maintenance agreements" and to prohibit resale price-fixing under New York law. Governor's Program Bill Mem. 2 (1975), *reprinted in* Bill Jacket for ch. 65 (1975). Titled "Price-fixing *prohibited*," the new GBL § 369-a specified that "any contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer

shall not be enforceable or actionable at law." GBL § 369-a (1975) (emphasis added).

By withdrawing statutory authorization for resale price-fixing, and by explicitly barring enforcement of any contractual agreement purporting to restrain resale discounting—whether by action at law or otherwise—the Legislature, the executive branch, and other supporters of the bill all understood that the new version of GBL § 369-a would affirmatively prohibit and make resale price-fixing illegal. Thus, in the debates over the bill, legislators explained that minimum-price policies would be "illegal if we passed this bill." Assembly Debates 2068, 2112 (1975) (Bill No. A3916); *see also id.* at 2117 (explaining that, under the new version of § 369-a, price-fixing "is illegal between a manufacturer and retailer. It is just illegal, period.").

Likewise, Governor Carey urged passage of the bill "[t]o restore full competition to the marketplace and to *insure* that consumers are not victimized by price-fixing schemes." Governor Hugh L. Carey, "Proposing the Creation of a Division of Consumer Affairs" (Mar. 17, 1975) (emphasis added), *reprinted in Public Papers of Governor Hugh L. Carey* 72, 77 (1982). And in his program memorandum, Governor Carey

emphasized the need for "more effective enforcement of laws *against* price-fixing." Governor's Program Bill Mem. 2, *supra* (emphasis added). Executive agencies commenting on the bill also understood the repeal of the Fair Trade Act and the enactment of GBL § 369-a as affirmatively prohibiting price-fixing agreements under New York law. *See* Budget Report on Bills 1 (Apr. 23, 1975) (noting that bill would "*prohibit* manufacturers or wholesalers from setting minimum resale prices for their products") (emphasis added), *reprinted in* Bill Jacket, *supra*; Dep't of Commerce Memorandum (Apr. 28, 1975) (observing that "[t]his consumer-oriented bill would make *illegal* the fixing of the reselling price . . . by the vendor or producer") (emphasis added), *reprinted in* Bill Jacket, *supra*.

Other key supporters of the repeal bill also recognized that the bill would enact a new state statute, affirmatively prohibiting resale price-fixing. Then-Attorney General Louis J. Lefkowitz, for example, criticized the language of GBL § 369-a as too narrow because it "appears to prohibit *only* minimum price-fixing and not maximum-price fixing" and urged an amendment "to clarify the price-fixing prohibition"

to include maximum-price fixing as well. Louis J. Lefkowitz, Mem. for the Governor 2 (Apr. 29, 1975), *reprinted in* Bill Jacket, *supra*.

2. Federal Antitrust Law

When New York's Fair Trade Act was repealed and the current version of GBL § 369-a enacted, resale price-fixing was also *per se* illegal under federal antitrust law. *See Dr. Miles Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 384-85 (1911), *overruled by Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007). Thus, although the Attorney General routinely prosecuted cases involving minimum-price policies, there was no need to distinguish between federal and state law or to rely on New York's separate, specific prohibition against price-fixing. *See, e.g., New York v. Salton, Inc.*, 265 F. Supp. 2d 310 (S.D.N.Y. 2003); *New York v. Reebok Int'l, Ltd*, 903 F. Supp. 532 (S.D.N.Y. 1995), *aff'd*, 96 F.3d 44 (2d Cir. 1996); *New York v. Keds Corp.*, No. 93 Civ. 6708, 1994 WL 97201 (S.D.N.Y. Mar. 21, 1994).

In 2007, however, a closely divided Supreme Court reversed almost a century of federal precedent and held that resale price-fixing agreements were not *per se* illegal under the federal Sherman Antitrust Act. *See Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S.

877, 882 (2007). Although recognizing that minimum-price policies may have many anticompetitive effects and that "unlawful price fixing . . . is an ever-present temptation," *id.* at 892-94, the majority relied on economic literature and studies to reject the longstanding rule of *per se* illegality. The five justices in the majority felt free to do so—despite the admittedly "limited" empirical evidence suggesting any pro-competitive benefits to resale price-fixing, *id.* at 894—because the Sherman Act was a unique "common-law statute" under which Congress had delegated to the federal courts the task of developing statutory requirements. *Id.* at 899.

Leegin was decided solely as a matter of federal law. Federal interpretations of the Sherman Act do not preempt state antitrust or consumer-protection statutes—like GBL § 369-a—that are broader or more protective in "deterring anticompetitive conduct and ensuring compensation for victims of that conduct." *California v. ARC Am. Corp.*, 490 U.S. 93, 102 (1989).

B. Tempur-Pedic's Price-Fixing Scheme

Tempur-Pedic is the leading manufacturer of mattresses and pillows made from visco-elastic memory foam. It sells its products both

through its own website and through authorized retail partners, such as mattress specialty stores, furniture stores, and department stores. Tempur-Pedic's sales in the United States exceed $350 million annually. (R. 26, 236.)

Tempur-Pedic acknowledges that it has implemented a "suggested retail price" policy for many years under which retailers must adhere to the minimum sale prices set by Tempur-Pedic (R. 58). Tempur-Pedic has openly announced that it will terminate retailers and refuse to ship its products to any retailers that attempt to sell its products at a lower, discounted price (R. 236-237). In 2007, after receiving a complaint from a consumer who had been informed by a number of stores that Tempur-Pedic dictates mattress sale prices and does not allow any discounts, the Attorney General began investigating Tempur-Pedic's "suggested retail price" policy (R. 52).

In 2010, the Attorney General filed a petition under Executive Law § 63(12), seeking to enjoin Tempur-Pedic from prohibiting discounting of its products, to obtain restitution for consumers injured by Tempur-Pedic's anti-discounting policy, and to compel Tempur-Pedic to disgorge profits earned through its successful maintenance of

artificially high retail prices. The petition alleges that Tempur-Pedic and its authorized retailers entered into a resale price-fixing scheme—in violation of GBL § 369-a—which injured consumers by ensuring that Tempur-Pedic product are sold at "virtually uniform, high prices" in New York (R. 25-26).

The petition and accompanying evidence submitted by the Attorney General support the following allegations. Temper-Pedic enters into a written agreement with *every authorized retailer* that expressly prohibits the advertising or offering of a number of discounts, including rebates, coupons, and certain money-back offers on Tempur-Pedic products. To carry Tempur-Pedic products, retailers must agree to follow the guidelines set out in this agreement—which is known as the "Retail Partner Obligations & Advertising Policies" ("Retail Partner Agreement")—and acknowledge in writing that failure to follow Tempur-Pedic's anti-discounting guidelines "could result in termination" of the retailer's account (R. 95). A "cover letter" attached to the 2007 Retail Partner Agreement further emphasized Tempur-Pedic's anti-discounting policy and reiterated Tempur-Pedic's intention to cease doing business with any retailer that charged less than the

"suggested" retail prices (R. 112). After the Attorney General commenced its investigation, Tempur-Pedic amended its Retail Partner Agreement in 2009 to add a disclaimer purportedly specifying that its "guidelines relate to advertising [of discounts] only" (R. 98).

Retailers and sales representatives uniformly confirm that agreeing and adhering to Tempur-Pedic's "suggested retail price" policy is a necessary condition of doing business with Tempur-Pedic. Tempur-Pedic actively polices retailers to ensure adherence to its minimum-price mandates and to guard against unauthorized discounting by retailers. Email communications between Tempur-Pedic and approved retailers reveal Tempur-Pedic executives cajoling, threatening, and terminating retailers that offered discounts on Tempur-Pedic products in violation of the minimum-price policy (R. 146-176). For example, Tempur-Pedic contacted Raymour & Flanigan to complain about allegations that Raymour's staff was selling Tempur-Pedic products at a discount (R. 39-40). Tempur-Pedic similarly contacted representatives of Rotman's Furniture and Macy's complaining about violations of the "SRP policy" and the "corporate policy pertaining to discounts" and

urging both retailers to "stop" their discounting practices—warning that "[t]here is no wiggle room on this point" (R. 38-39, 146-149).

When these warnings failed to coerce retailers into compliance with its minimum-price policy, Tempur-Pedic carried through with its threats and terminated retailers for discounting its products. Sometimes the terminations were at the behest of other retailers who sought to avoid price competition by compelling Tempur-Pedic to cut off competitors that failed to comply with the Retail Partner Agreement (R. 42, 163-64 (terminating Dave Hayes Appliance Center based on complaint from Sleepy's)). Many other retailers also supported the price-fixing scheme by monitoring and reporting on their competitors' discounting of Tempur-Pedic products and by urging Tempur-Pedic to vigorously enforce its no-discounting policy against price-cutting competitors (R. 27).

Tempur-Pedic's price-fixing efforts were successful. In sharp contrast to the varied price distribution one would expect to see under competitive retail conditions, Tempur-Pedic products are sold throughout New York at uniformly high—and virtually identical—prices without any competitive discounting. During the Attorney

General's investigation, major mattress retailers confirmed that they consistently adhered to Tempur-Pedic's minimum-pricing requirements despite *preferring* to price Tempur-Pedic products based on competitive market demand (R. 119, 123, 135-136, 143-145). And mattress retailers verified that they refrained from discounting Tempur-Pedic items because of the enforced pricing policy, despite regularly offering discounts on other mattress brands (R. 115-145).

C. Procedural Background

The Attorney General's petition asserts Executive Law § 63(12) claims for violations of GBL § 369-a and for repeated fraudulent conduct (R. 28-29). Based on the petition and accompanying evidence submitted by affidavit, the Attorney General sought summary relief enjoining Tempur-Pedic from engaging in continued price-fixing (R.22-23). Tempur-Pedic opposed the State's application for injunctive relief pursuant to C.P.L.R. 404(a) and further moved to dismiss the State's petition under C.P.L.R. 3211(a)(3) and 3211(a)(7), contending that the petition failed as a matter of law (R. 249).

Supreme Court, New York County (Lobis, J.) granted Tempur-Pedic's motion and dismissed the Attorney General's petition in its

entirety (R. 8-21). Supreme Court's decision rested on three grounds. First, the court found that the Attorney General "failed to allege an illegal act," under Executive Law § 63(12) because GBL § 369-a simply makes contracts for resale price-fixing "unenforceable . . . but not illegal" (R. 13). Ignoring the statute's heading, which specifically declares "[p]rice-fixing prohibited," and making no attempt to reconcile its reading with the statute's purpose, the court interpreted GBL § 369-a—not as a consumer-protection measure—but instead as enacting a private contractual defense available only if manufacturers such as Tempur-Pedic attempt to enforce a price-fixing agreement in court.

Second, without denying that the Attorney General has authority under Executive Law § 63(12)—even under a restrictive private-defense reading of GBL § 369-a—to enjoin Tempur-Pedic from repeatedly and persistently "imposing unenforceable contract provisions" as part of its conduct of business, Supreme Court concluded that the Attorney General "ha[d] not sufficiently demonstrated the existence of a contract" to sustain § 63(12) relief (R. 16, 21).

Because the court found no New York case law directly on point, it turned instead to federal antitrust law governing "trade restraints and

price fixing" (R. 16). Under those federal standards, the court concluded that the Attorney General had failed to submit sufficient "evidence" to prove the existence of a price-fixing agreement (R. 21). Although the petition alleged that Tempur-Pedic's Retail Partner Agreement, particularly when considered with the cover letter on pricing policy, constituted an agreement between Tempur-Pedic and its authorized retailers to fix prices and prohibit discounting (R. 26-27), the court credited Tempur-Pedic's self-serving denial of any agreement with retailers, and faulted the Attorney General for not submitting documentary proof to definitively establish that a contractual agreement had been formed (R. 21).

Finally, Supreme Court likewise dismissed the petition's § 63(12) claim for fraudulent conduct, which alleged that Tempur-Pedic misled retailers and consumers into believing that its no-discount policy was enforceable when, by Tempur-Pedic's own admission, retailers have the right to discount by law. Once again, although ruling on a motion to dismiss the pleadings, the court dismissed the State's fraud claim because the Attorney General had not "submitted" affirmative evidence to prove that retailers or consumers were misled or deceived (R. 21).

ARGUMENT

Executive Law § 63(12) authorizes the Attorney General to enjoin and remedy "repeated" or "persistent fraud or illegality" in a party's conduct or transaction of business. Here, Tempur-Pedic engaged in unlawful and fraudulent practices, warranting § 63(12) relief, by entering into a contractual agreement with retailers to set minimum resale prices, and by misleading retailers and the public into believing that its pricing and discount restrictions were legally enforceable. GBL § 369-a expressly prohibits such price-fixing and deems any contract provision purporting to restrict resale discounting unenforceable under New York law. Accordingly, the Attorney General has properly alleged that Tempur-Pedic engaged in illegal and fraudulent practices under Executive Law § 63(12), and Supreme Court erred in concluding otherwise.

POINT I

GENERAL BUSINESS LAW § 369-a PROHIBITS RETAIL PRICE-FIXING

A. The Language, History, and Purpose of GBL § 369-a Confirm that the Legislature Prohibited Price-Fixing Agreements.

The Attorney General's petition seeks to enforce GBL § 369-a, as the statute was intended, as an independent state-law provision specifically protecting consumers from resale price-fixing. Supreme Court, at Tempur-Pedic's urging, impermissibly interpreted GBL § 369-a as protecting only the *private parties* to a price-fixing agreement—an interpretation that cannot be sustained in light of the statute's wording, history, and purpose.

Supreme Court reasoned that, because GBL § 369-a does not specifically use the term "illegal" in its body, the statute must be construed as enacting, not a prohibition on resale price-fixing, but rather a private defense to a suit brought by a manufacturer against a retailer in court to enforce a price-fixing agreement (R. 13). But not all such suits would be barred under this reading: as Tempur-Pedic argued below, because the statute provides that price-fixing contracts shall not be "enforceable *or actionable at law*," GBL § 369-a permits enforcement

of such contracts *in equity*, allowing manufacturers to obtain court orders requiring specific performance of price-fixing contracts. Mem. of Law in Support of Respondent's Motion to Dismiss at 9 n.9 (emphasis in original).

This narrow and illogical reading of GBL § 369-a—as enacting merely a damages defense in private litigation to enforce price-fixing agreements—is not compelled by the statute's failure to use the term "illegal" or by its use of the term "actionable at law." The law does not generally distinguish between contractual illegality and unenforceability, the technical distinction that drives Tempur-Pedic's contorted statutory construction. *See, e.g.*, *Lloyd Capital Corp. v. Pat Henchar, Inc.*, 80 N.Y.2d 124, 127 (1992) ("Illegal contracts are, as a general rule, unenforceable."). And here, whatever the validity of a potential distinction in other contexts, the language of GBL § 369-a affirmatively rejects any distinction between illegality and unenforceability with respect to resale price-fixing agreements.

When the Legislature repealed New York's Fair Trade Act in 1975, it replaced the prior version of GBL § 369-a, whose heading read, "Price-fixing of certain commodities *permitted*," ch. 195, § 3, 1940 N.Y.

Laws 750, 755, with a new section whose heading the Legislature deliberately and specifically drafted to state, "Price fixing *prohibited*," ch. 65, 1975 McKinney's N.Y. Laws, 91. The ordinary meaning of "prohibit" is "[t]o forbid by law": *i.e.*, to make illegal. *Black's Law Dictionary* 1331 (9th ed. 2009). Thus, in amending GBL § 369-a, the Legislature expressly disclaimed any intent to draw a technical distinction between contractual enforceability and illegality. Instead, the statute's heading affirmatively proclaims the statute's intended function and operation. *See Carl Wagner and Sons v. Appendagez, Inc.*, 485 F. Supp. 762, 772 (S.D.N.Y. 1980) (holding that vendor "could not legally implement" a price-fixing policy under GBL § 369-a and granting damages to retailer plaintiffs).

Contrary to Supreme Court's decision (R.13), the heading of the statute is not irrelevant. *See Broderick v. Weinsier*, 253 A.D. 213, 219 (1st Dep't 1938) (headings are "not to be disregarded in the interpretation of the statute"). Here, GBL § 369-a's heading was specifically drafted and enacted by the Legislature and is therefore part of the statute itself and defines the statute's scope and legal effect. *See, e.g.*, Statutes § 123(b), 1 McKinney's Cons. Laws of N.Y. at 248-50

(1971) ("Where the heading of a . . . section of an act is inserted by the Legislature as a part of the . . . statute, it limits and defines its effect, and is construed accordingly."); *People v. Molyneux*, 40 N.Y. 113, 119 (1869) (headings enacted by the Legislature "are parts of the statute," defining the statute's effect).

Moreover, the straightforward, plain-meaning interpretation of GBL § 369-a—as *prohibiting* price-fixing, just as the Legislature specified—is overwhelmingly confirmed by the statute's legislative history. When the Legislature repealed New York's Fair Trade Act, it could have defaulted to the general antitrust law and permitted price-fixing agreements to be regulated by antitrust requirements alone. But the Legislature did not do so. Instead, it separately and specifically addressed the consumer harms caused by resale price-fixing by enacting an independent, free-standing prohibition to protect consumers and "*eliminate* [the] legal basis for price-maintenance agreements" under state law. Governor's Program Bill Mem., *supra*, at 2 (emphasis added).

Legislators and executive officials advocated in favor of enacting the new version of GBL § 369-a precisely because they believed the statute would "outlaw" price-fixing and make price-fixing "illegal." The

new language inserted by the Legislature in the heading and body of GBL § 369-a were understood and welcomed as enacting an affirmative prohibition on price-fixing agreements. See *supra* at 6-8. Indeed, the Attorney General argued that the statutory "price-fixing prohibition" did not go far enough because it "prohibited only minimum price-fixing and not maximum price-fixing." Lefkowitz, Mem., supra, at 2.

Thus, in direct conflict with Supreme Court's restrictive private-defense interpretation, the legislative history overwhelmingly confirms that the new version of GBL § 369-a was enacted to *protect consumers*, not to regulate private litigation between the parties to a price-fixing agreement. *See* Dep't of Commerce, Mem., *supra* (noting that "[t]his *consumer-oriented* bill would make illegal the fixing of the reselling price . . . by the vendor or producer") (emphasis added). Supreme Court's reading of GBL § 369-a, by contrast, would leave the Legislature's *public goal* of consumer protection entirely in the hands of the *private parties* who enter into resale price-fixing agreements.

But that makes no sense. As Tempur-Pedic acknowledged below, a narrow private-defense reading of GBL § 369-a would provide for no "public enforcement mechanism" at all. Mem. of Law in Support of

Respondent's Motion to Dismiss at 9. And it would not even provide for *private* enforcement in cases where the price-fixing scheme is successful. For example, if a manufacturer successfully coerces retailers into complying with price restrictions without filing a breach-of-contract action, GBL § 369-a will have no legal effect. Likewise, if retailers are willing participants in the price-fixing scheme, profiting from the sale of goods at artificially high prices, GBL § 369-a would similarly fail to "lower consumer prices," Budget Report on Bills, *supra*, at 2, or prevent a price-fixing scheme from "rip[ping] off the consumer," Assembly Debates at 2107. *See id.* at 2081 (price-fixing "lock[s] in the profit of the retailer"), 2130 ("the retailer . . . is always pushing the fair-traded item because it guarantees him a markup which is unconscionable"); *see also Leegin*, 551 U.S. at 893-94 (identifying circumstances in which a retailer may be a willing participant in a vertical price-fixing scheme).

Supreme Court's private-defense interpretation of GBL § 369-a is not only inconsistent with statutory purpose; it deprives the statute of its core consumer-protection function. Whereas the Legislature intended "the *elimination* of this monopolistic practice," Lefkowitz,

Mem., *supra*, at 1 (emphasis added), and sought to "allow *all* salable commodities to sell at competitive market prices, free from artificial or contractual restrictions," Dep't of Commerce, Mem., *supra* (emphasis added), under Supreme Court's reading GBL § 369-a would be wholly ineffective against broad swathes of price-fixing that harm consumers most. That result directly contradicts the intended statutory goal of ensuring "*more effective* enforcement of laws against price-fixing" by state and local officials, not less. Governor's Program Bill Mem., *supra*, at 2.

Nothing in the language of GBL § 369-a compels Supreme Court's backwards interpretation of the statute, which transforms GBL § 369-a from a consumer-protection law to a statutory delegation of enforcement authority to the *very parties* whose price-fixing agreements the Legislature sought to eradicate and prevent—leaving the statute without effect, so long as the parties to a price-fixing agreement do not seek damages in court. Because the lower court's construction has no support in the language, purpose, or legislative history of GBL § 369-a, this Court should reverse the judgment below.

B. Federal Law Does Not Control Because New York Enacted a Specific Statute Barring Retail Price-Fixing.

Tempur-Pedic also argued below that GBL § 369-a should be read in light of the Supreme Court's decision in *Leegin*, which rejected a rule of *per se* illegality for resale price-fixing agreements under the federal Sherman Act. *See* Mem. of Law in Support of Respondent's Motion to Dismiss at 15. In *Leegin*, the majority refused to interpret Congress's repeal of the federal fair trade law, the Miller-Tydings Act, as ratifying a federal rule of *per se* illegality for resale price-fixing agreements. 551 U.S. at 904-05. But the legislative history of the federal repeal materially differs from GBL § 369-a, refuting Tempur-Pedic's narrow interpretation of state law.

When Congress repealed the Miller-Tydings Act, it did not enact a separate statute regulating resale price-fixing. *See* Consumer Goods Pricing Act, Pub. L. No. 94-145, 89 Stat. 801 (Dec. 12, 1975). In the absence of such a federal statute, these restraints fell "within the ambit of § 1 of the Sherman Act," to be governed by general, preexisting federal antitrust law. *Leegin*, 551 U.S. at 905. But New York followed a different path. The New York Legislature not only repealed New

York's Fair Trade Act; it also enacted the affirmative prohibition of GBL § 369-a, "codifying the rule of *per se* illegality for vertical price restraints"—precisely what Congress declined to do under federal law. *Id.*

Thus, far from mandating a restrictive reading of GBL § 369-a, *Leegin* supports the Attorney General's enforcement action here. Like Congress, the New York Legislature could have simply repealed existing fair trade statutes and returned resale price-fixing to regulation under general antitrust law. But the Legislature went a step further in the interest of protecting consumers. Rather than leaving resale price-fixing to general antitrust enforcement, the Legislature enacted a separate and independent statute comprehensively prohibiting resale price-fixing agreements—without exception and without qualification. That legislative choice must be given effect.

While *Leegin* was based on policy concerns about theoretical procompetitive benefits to resale price-fixing in certain cases, the Court acknowledged that price-fixing has the known and undisputed effect of raising consumer prices. *Leegin*, 551 U.S. at 892-94; *see also id.* at 910-12 (Breyer, J., dissenting). State and federal antitrust and consumer-

protection policies "do not move in lockstep." *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 335 (1988). And neither the lower court, nor Tempur-Pedic, claimed that it would be unreasonable for New York to adopt a more consumer-protective statute—favoring lower consumer prices over the marketing and branding benefits that resale price-fixing might theoretically provide to manufacturers and retailers.

In enacting GBL § 369-a, the Legislature considered and rejected the same arguments raised in *Leegin*—that resale price-fixing might potentially be procompetitive. *See, e.g.*, Assembly Debates at 2081-83, 2088-90, 2094-95. And the statute, even under Tempur-Pedic's narrow private-defense reading, explicitly rejects the rule-of-reason approach *Leegin* adopted for federal Sherman Act purposes. GBL § 369-a would deem *all* resale price-fixing contracts unenforceable, whether a valid procompetitive justification is claimed or not. Thus, the statute reflects—and enacts—a definitive legislative policy judgment against resale price-fixing, as contrary to consumer protection, that has no counterpart under federal law.

Here, "State policy, differences in statutory language, [and] legislative history," *Anheuser-Busch, Inc.*, 71 N.Y.2d at 335, all

support a different result than *Leegin*. Regardless of how federal courts interpret the Sherman Act, the New York Legislature's decision to specifically prohibit resale price-fixing under GBL § 369-a is controlling for state law purposes.

POINT II

THE PETITION SUFFICIENTLY ALLEGES A RESALE PRICE-FIXING CONTRACT UNDER GBL § 369-a

Section 369-a prohibits "[a]ny contract provision that purports" to fix resale prices. Looking to federal case law narrowly defining "concerted action" under the federal Sherman Act, Supreme Court concluded that the Attorney General had "not sufficiently demonstrated the existence of a contract" between Tempur-Pedic and its retail partners to fix prices (R. 16). But that holding is flawed for two fundamental reasons.

First, GBL § 369-a does not require a showing of "concerted action" or incorporate federal antitrust law, and there is no basis for engrafting "difficult to apply" federal standards, *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 762 (1984), onto the separate language of § 369-a. Second, and more importantly, the petition alleges that

Tempur-Pedic imposed and enforced contractual provisions barring retailer discounting. The Attorney General also submitted additional evidence supporting the existence of both a price-fixing agreement and concerted action by Tempur-Pedic and its authorized retailers. The petition's allegations and attached evidence adequately plead both a "contract provision" under GBL § 369-a and concerted action under independent federal standards.

By faulting the Attorney General for not submitting dispositive proof of an illegal price-fixing agreement, Supreme Court misapplied the motion-to-dismiss standard under C.P.L.R. 3211. The existence of factual disputes may warrant denial of the Attorney General's request for summary relief, s*ee* C.P.L.R. 410, but they do not authorize pretrial *dismissal* of the State's petition.

A. The Petition's Allegations and Supporting Evidence Establish Both a Contract under State Law and Concerted Action under More Stringent Federal Standards.

Under federal law, a plaintiff bringing a resale price-fixing claim must allege facts "exclud[ing] the possibility of independent action" by the manufacturer and free acquiescence by retailers to a manufacturer's

unilateral price demands. *Monsanto Co.*, 465 U.S. at 768. This federal pleading standard is "often . . . difficult to apply in practice." *Id.* at 762. GBL § 369-a does not adopt federal antitrust requirements—instead, it prohibits "any contract provision" requiring minimum resale prices. New York law defines the term "contract" broadly, and Supreme Court identified no reason to reject that broad definition in this case.

Under New York law, a contract is formed whenever parties reach a "basic agreement, however manifested," *Kleinschmidt Div. of SCM Corp. v Futuronics Corp.*, 41 N.Y.2d 972, 973 (1977), including by the parties' course of dealing or other conduct confirming the existence of a meeting of the minds. *See, e.g.,* UCC § 2-204(a) ("A contract for sale of goods may be made in *any manner* sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." (emphasis added)); UCC § 2-208(1)-(2) ("the meaning of the agreement" may be determined from "any course of performance . . . as well as any course of dealing and usage of trade"); *Otis Elevator Co. v. George A. Fuller Co.*, 172 A.D.2d 732, 733 (2d Dep't 1991) (inferring existence of contract from course of dealing).

Here, the petition adequately alleges that Tempur-Pedic and retailers entered into a "basic agreement" under which Tempur-Pedic enforced, and retailers agreed to abide by, Tempur-Pedic's "suggested retail price" policy. Every retailer that sells Tempur-Pedic products is required to sign Tempur-Pedic's "Retail Partner Agreement." The Agreement specifically prohibits a broad range of price discounts, including "[r]ebates, in-store credits or coupons"; offers to pay sales tax; and discounts for consumers trading in their old bedding (R. 98, 107). And in a cover letter signed by Tempur-Pedic's president and sent to all retailers, Tempur-Pedic expressly reminded retailers that it will terminate its relationship with "any retailer who chooses to charge retail prices which are different than our suggested retail prices." (R. 112; *see also* R. 113). Before supplying products to a retailer, Tempur-Pedic would first confirm that the retailer "understood and *would adhere* to [its] pricing policy" (R. 154 (emphasis added)).

Both Tempur-Pedic and its retail partners complied with and jointly enforced this agreement to set minimum resale prices (R. 36-38). Two of New York's largest mattress retailers, Raymour & Flanigan and Sleepy's, told the Attorney General that they conform to Tempur-Pedic's

pricing policy (R. 119, 122, 130-131, 135-137, 143-145). Moreover, when investigators posed as customers shopping for Tempur-Pedic products, they were uniformly advised by sales staff at various mattress and furniture stores that the stores—*like all other retailers*—adhered to Tempur-Pedic's no-discounting policy (R. 45-51).

When retailers attempted to sell Tempur-Pedic products at lower prices, Tempur-Pedic moved swiftly to "correct" these deviations, ordering retailer "trouble makers" (R. 156) to "stop this practice" (R. 148) and "exclude Tempur-Pedic" from any discounting offers (R. 152; *see also* R. 57-58, 79-80). Retailers also independently enforced the price-fixing agreement. Retailers regularly reported any discounts or price reductions offered by competing stores to Tempur-Pedic, usually with demands that Tempur-Pedic enforce and uphold its minimum-price policy against violating price-cutters (R. 41-44, 62, 84-85, 123, 134, 143, 155, 168-174). In response to retailer complaints, Tempur-Pedic on at least two occasions upheld its side of the bargain and terminated retailers that, Tempur-Pedic concluded, had offered its products for sale at a discount (R. 42).

These allegations and supporting evidence are more than sufficient to plead the existence of a price-fixing contract in violation of GBL § 369-a. They are also sufficient to establish concerted action even if the more stringent federal standard applied. Tempur-Pedic did not just unilaterally "announc[e] a policy of terminating dealers who sell below suggested retail prices." *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1163 (7th Cir. 1987). Rather, Tempur-Pedic and its retailers regularly communicated about Tempur-Pedic's no-discounting policy and cooperated in enforcing minimum prices on *all* retailers carrying Tempur-Pedic products. Such communications and evidence of cooperation adequately support the allegation that Tempur-Pedic and its retailer partners agreed on "the rules of the game," *Monsanto*, 465 U.S. at 766 (quotation marks omitted), and that Tempur-Pedic was not engaged in *unilateral* activity.

Tempur-Pedic also actively monitored and enforced its minimum-price policy. On several occasions, Tempur-Pedic confronted discounting retailers and successfully induced them to restore Tempur-Pedic's higher dictated prices (R. 38-40). The Supreme Court in *Monsanto* found evidence of this kind "plainly . . . relevant and persuasive" in

showing concerted action through "a meeting of . . . minds." 465 U.S. at 765. Tempur-Pedic also threatened retailers who violated its minimum-price policy and carried out its threats by terminating discounting retailers, retaliatory behavior sufficient to support an allegation of concerted action under federal requirements. *See Isaksen*, 825 F.2d at 1162-63.

B. The Existence of Factual Disputes or the Need for Additional Proof Does Not Authorize Pretrial Dismissal of the Petition.

Supreme Court questioned the Attorney General's ability to prove the petition's allegation of a contract to fix prices (R. 18-21). But neither factual disputes, nor doubts about the Attorney General's ability to prevail at trial, are grounds for a threshold dismissal of the petition under C.P.L.R. 3211. *See Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994) (in deciding a motion under C.P.L.R. 3211, the court must accept all alleged facts as true and accord the plaintiff the benefit of every possible favorable inference); *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005) (explaining that "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss"); *People ex rel. Cuomo v. Coventry*

First LLC, 13 N.Y.3d 108, 115 (2009) (applying same dismissal standards to suit by the Attorney General).

Supreme Court rejected the Attorney General's allegation that Tempur-Pedic had terminated retailers that failed to adhere its pricing policy because there was "no documentation annexed to the petition to support [the] allegation" of retailer termination (R.19). But the Attorney General specifically identified the terminated retailers by name, and further submitted e-mails indicating that Tempur-Pedic had "agreed" to terminate a store for violating its minimum-price policy after a competing retailer complained to Tempur-Pedic about the store's discounting practices (R. 163). The Attorney General had no obligation to present *any* documentary proof to avoid pretrial dismissal under C.P.L.R. 3211, and Supreme Court erred in dismissing and discounting the supporting evidence that the Attorney General nonetheless provided. S*ee Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977) (complaint evaluated "from its four corners," and "evidentiary material" cannot be dismissed unless "no significant dispute exists" that allegation supported by that evidence "is not a fact at all").

Likewise, the petition alleges that "Tempur-Pedic's Retail Partner Agreement has contractual provisions that prohibit and restrain discounting" (R. 27). Tempur-Pedic admits that the Retail Partner Agreement is a contract between itself and retailers (R. 19). Supreme Court concluded that the petition "falls short of pleading all the elements required to show a violation of General Business Law § 369-a" because the Attorney General had not submitted definitive "*evidence* that a contract to adhere to suggested minimum resale prices or [to] prohibit discounting exists" (R. 21, emphasis added).

Again, Tempur-Pedic moved to dismiss, not for summary judgment, and at the pleading stage, no evidentiary showing is required. Supreme Court accepted and adopted Tempur-Pedic's argument that its Retail Partner Agreement applies only to the *advertising* of discounts (R. 20). But by its own terms, the Agreement also prohibits "in-store" discounts by retailers (R. 107). In addition, the Agreement was provided with a cover letter setting forth Tempur-Pedic's retail pricing policy, which was also part of the agreement between Tempur-Pedic and its retail partners. Supreme Court rejected the claim that the two documents formed a single contract because the

court viewed the Attorney General's "submissions" as insufficient to support the "claim that the documents [were] provided together" to retailers and presented as one agreement (R. 20). But on a C.P.L.R. 3211 motion, the court was required to credit the State's allegations—particularly when the record contains extensive evidence based on Tempur-Pedic's own conduct and statements that Tempur-Pedic did in fact prohibit the actual *offering* of discounts, not just their *advertising*, and that retailers universally understood Tempur-Pedic as in fact barring discounted sales. See *supra* at 10-14.

Here, although Supreme Court may have identified contested issues of fact, and areas where additional proof may be necessary before judgment may be entered in the State's favor, these concerns do not authorize outright dismissal of the petition under C.P.L.R. 3211. The petition and supporting evidence adequately allege the existence of a price-fixing agreement prohibited by GBL § 369-a. The State's claims, if factually disputed, should be tested by Tempur-Pedic at trial or on a motion for summary judgment.

POINT III

THE PETITION SUFFICIENTLY ALLEGES A § 63(12) CLAIM FOR FRAUDULENT CONDUCT

For the same reason, dismissal of the petition's § 63(12) claim for fraudulent conduct was improper (R. 15-16). Regardless of the actual wording and scope of Tempur-Pedic's Retail Partner Agreement, Tempur-Pedic's conduct and communications with retailers were fraudulent and deceptive by misleading retailers into believing that Tempur-Pedic could "compel obedience to" its pricing restraints. *Black's Law Dictionary* 608 (9th ed. 2009) (defining "enforce"). Consumers were also deceived when they were repeatedly told by retailers' sales staff that the retailers could not discount Tempur-Pedic products because of a mandatory policy imposed by Tempur-Pedic (R. 178-234). Supreme Court dismissed the § 63(12) fraud claim solely because "no evidence" was submitted to prove that retailers and consumers were misled (R. 16). Further proof may be required at trial, but no such proof is not required to survive a pretrial motion to dismiss.

CONCLUSION

Supreme Court's order dismissing the Attorney General's petition should be reversed.

Dated: New York, NY
January 30, 2012

Respectfully submitted,

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK, by Andrew M. Cuomo, Attorney General of the State of New York,

Petitioner-Appellant,

New York County
Index No. 400837/10

-against-

TEMPUR-PEDIC INTERNATIONAL, INC.,

Respondent-Respondent.

STATEMENT PURSUANT TO C.P.L.R. 5531

1. The index number of the case below is 400837/10.

2. The full names of the original parties are as they appear above.

3. This action was commenced in Supreme Court, New York County.

4. The action was commenced by the filing of a verified petition on or about March 29, 2010. Respondent filed a verified answer on or about May 12, 2010.

5. The proceeding seeks injunctive relief, restitution, disgorgement, and costs against respondent Tempur-Pedic under Executive Law § 63(12) and General Business Law § 369-a for Tempur-Pedic's retail price-fixing scheme.

6. This appeal is from a Decision, Order, and Judgment entered January 14, 2011, by Supreme Court, New York County (Lobis, J.).

7. The method of appeal being used is the reproduced full record.