

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

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

Petitioner, :

**NEW YORK
COUNTY CLERK'S OFFICE**

MAR 29 2010

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-against-

TEMPUR-PEDIC INTERNATIONAL, INC.
Respondent.
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**VERIFIED PETITION
Index No. _____**

The People of the State of New York, by their attorney, Andrew Cuomo, Attorney General of the State of New York, respectfully alleges upon information and belief that:

INTRODUCTION

1. Petitioner brings this summary proceeding (a) to enjoin respondent from engaging in the unlawful practice of prohibiting the discounting of its products by resellers; (b) to order restitution to consumers harmed by these practices and disgorgement; (c) to recover costs as authorized by statute, and (d) such other relief as requested herein.

JURISDICTION AND PARTIES

2. Petitioner is Andrew Cuomo, Attorney General of the State of New York, acting on behalf of the people of the State of New York.

3. Petitioner brings this summary proceeding pursuant to his authority under Executive Law § 63(12) ("section 63(12)") to enjoin and remedy respondent's violations of section 63(12) and New York General Business Law § 369-a ("section 369-a").

4. Section 369-a provides that a vendor or producer cannot set the minimum price at which its product can be resold and thereby ensures that a reseller gets to discount the goods it

sells. Section 63(12) empowers the Attorney General to seek injunctive relief, restitution, disgorgement, and costs when any business entity has engaged in or otherwise demonstrated repeated fraudulent or illegal acts in the transaction of business, such as violations of section 369-a. Finally, CPLR § 8303 entitles the Attorney General to costs, when it prevails on its claims.

5. At all times relevant, respondent Tempur-Pedic International, Inc. (“Tempur-Pedic”) conducted business in the State of New York under the name Tempur-Pedic.

TEMPUR-PEDIC’S REPEATED AND PERSISTENT PATTERN OF ILLEGAL RESALE PRICE FIXING

6. Tempur-Pedic is a limited liability company having its principal place of business at 1713 Jaggie Fox Way, Lexington, KY 40511.

7. Tempur-Pedic is the leading manufacturer of premium mattresses and pillows (“Tempur-Pedic products”), made from visco-elastic memory foam. In New York State, Tempur-Pedic products are widely distributed at retail through mattress specialty stores, furniture stores, and department stores.

8. Tempur-Pedic products are sold to consumers directly by Tempur-Pedic, through its website, and by retailers authorized by Tempur-Pedic to resell its products. Tempur-Pedic’s global net sales in 2009 totaled \$831,156,000.

Tempur-Pedic’s Contract Provisions Prohibit Discounting

9. Tempur-Pedic products are sold at virtually uniform, high prices by all New York retailers of Tempur-Pedic products. These uniformly high retail prices result from Tempur-Pedic’s unlawful and fraudulent contractual prohibition of discounting.

10. Tempur-Pedic's Retail Partner Agreement has contractual provisions that prohibit and restrain discounting contrary to New York law. Among the ways to discount that Tempur-Pedic deems "unacceptable" in the Retail Partner Agreement are:

- Free gifts with purchase or "purchase with purchase" offers (retail value **over \$100**) with the sale of Tempur-Pedic products
- No Sales Tax or any phrasing such as "We Pay Sales Tax"
- Gift cards, rebates, coupons or other "in-store credits" that can or can not be applied to Tempur-Pedic products at a Retail Partner location as a cash equivalent
- Offering money back for the return of the consumer's old bedding with a new purchase, i.e. "Trade-in Sale"
- Free foundation

11. Moreover, beginning in 2002 through a series of letters to all accounts from its president, Tempur-Pedic has explicitly stated that it will not do business with any retailer that charges retail prices that differ from the prices set by Tempur-Pedic.

12. Retailers that sell Tempur-Pedic mattresses have accepted the contractual requirement that discounting is not permitted by Tempur-Pedic, and comply with that requirement in violation of law.

13. Tempur-Pedic enforces the contractual provisions that prohibit discounting.

14. Retailers assist Tempur-Pedic's enforcement of the contractual provision against discounting by monitoring the prices of their competitors and reporting to Tempur-Pedic any pricing below the retail price set by Tempur-Pedic. Tempur-Pedic uses this information to further enforce the contractual prohibition against discounting.

Tempur-Pedic's Contractual Provisions Against Discounting Harm Retailers, Consumers, and the Public Interest

15. Absent Tempur-Pedic's prohibition against discounting, New York retailers would set prices for Tempur-Pedic products according to the competitive conditions of a free market.

16. New York consumers pay more for Tempur-Pedic products because of Tempur-Pedic's unlawful anti-discounting practices.

**FIRST CAUSE OF ACTION
PURSUANT TO EXECUTIVE LAW
SECTION 63(12) – ILLEGALITY**

17. Petitioner repeats, realleges, and incorporates paragraphs one through seventeen contained herein.

18. Titled "Price-fixing prohibited," section 369-a states "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 at law."

19. By engaging in the acts and practices described above, respondent has engaged in prohibited price fixing in violation of section 369-a.

20. Respondent's violations of section 369-a constitute repeated and persistent illegal conduct in violation of section 63(12).

21. Section 63(12) authorizes the Attorney General to seek injunctive relief, restitution, and disgorgement whenever any person shall engage in repeated illegal acts or otherwise demonstrate persistent illegality in the carrying on, conducting, or transacting of business.

**SECOND CAUSE OF ACTION
PURSUANT TO EXECUTIVE LAW
SECTION 63(12) – FRAUD**

22. Petitioner repeats, realleges, and incorporates paragraphs one through twenty-two contained herein.

23. Section 63(12) authorizes the Attorney General to seek injunctive relief, restitution, and disgorgement whenever any person shall engage in repeated fraudulent or otherwise demonstrate persistent fraud in the carrying on, conducting, or transacting of business.

24. By the acts and practices described in this Petition, respondent has engaged in repeated and persistent fraud in violation of Section 63(12).

WHEREFORE, petitioner requests that this court grant relief pursuant to section 63(12) and section 369-a, against respondent by issuing an Order and Judgment as follows:

1. Determining that respondent has violated section 63(12) and section 369-a;
2. Enjoining respondent from seeking or enforcing any restraint against discounting;
3. Enjoining respondent from securing or attempting to secure any commitment or assurance, including by contract, from any retailer concerning the resale price at which the retailer may advertise, promote, offer for sale, or sell any product;
4. Enjoining respondent from requiring that any retailer fix, raise, peg, maintain or stabilize the prices at which Tempur-Pedic products are advertised, promoted, offered for sale, or sold to consumers;
5. Enjoining respondent from requiring, coercing, or otherwise pressuring any retailer to maintain, adopt, or adhere to any resale price;
6. Directing respondent to pay restitution to all consumers who purchased Tempur-Pedic products in New York while respondent prohibited discounting of those products;
7. Directing respondent to disgorge all profits received by Tempur-Pedic due to its anti-discounting practices;
8. Awarding petitioner the costs and disbursements of this action, including additional costs pursuant to CPLR § 8303(a)(6); and

9. Granting petitioner such other and further relief as this Court finds just and proper.

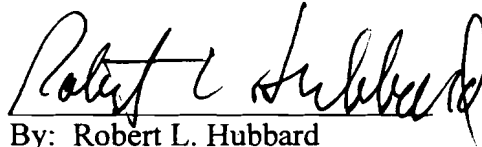
Dated: New York, New York
March 29, 2010

Yours truly,

ANDREW M. CUOMO
Attorney General of the State of New York

Maria T. Vullo, Executive Deputy Attorney General for
Economic Justice

Michael Berlin, Deputy Attorney General for Economic
Justice



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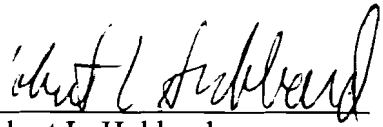
VERIFICATION

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

ROBERT L. HUBBARD, being duly sworn, deposes and says:

I am the Director of Litigation in the Antitrust Bureau of the office of Andrew Cuomo, Attorney General of the State of New York. I am duly authorized to make this verification.

I have read the foregoing Petition and know the contents. To my knowledge, the Petition is true, except as to matters stated to be alleged on information and belief, and as to those matters I believe them to be true.


Robert L. Hubbard