

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

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

Petitioner, :

NOTICE OF
VERIFIED PETITION

-against-

FILED

Index No.

TEMPUR-PEDIC INTERNATIONAL, INC. MAR 29 2010

10400837

Respondent COUNTY CLERKS OFFICE
NEW YORK

PLEASE TAKE NOTICE that upon the verified petition dated March 29, 2010, and the affirmation of Assistant Attorney General Linda Gargiulo dated March 24, 2010, with accompanying exhibits, petitioner will move at the Submissions Part, Room 130, of this Court at 60 Centre Street, New York, New York, on the ^{19th} day of April, 2010, at 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order and judgment pursuant to Executive Law § 63(12) and General Business Law § 369-a:

1. permanently enjoining respondent, its employees, agents, successors, heirs and assigns, directly or indirectly, from engaging in the fraudulent or illegal practices specified in the verified petition;
2. permanently enjoining respondent from directly or indirectly destroying or disposing of any records pertaining to this proceeding;
3. directing respondent to pay restitution to any injured New York consumers to be identified by the Attorney General;

4. directing respondent to disgorge profits to the State of New York for the fraudulent or illegal business practices identified in this proceeding;
5. awarding petitioner costs against the respondent pursuant to CPLR § 8303(a)(6);
6. directing respondent to notify petitioner promptly of any change of address; and
7. granting petitioner such other and further relief as this Court finds just and proper.

This proceeding charges respondent with engaging in fraudulent and unlawful acts and practices in violation of General Business Law § 369-a and Executive Law § 63(12).

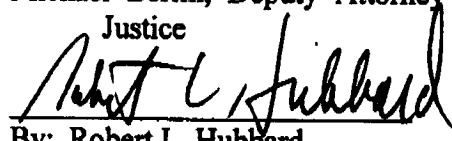
PLEASE TAKE FURTHER NOTICE that, in accordance with CPLR § 403(b), respondent's answer and supporting affidavits, if any, shall be served at least seven (7) days before the return date of this petition.

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



By: Robert L. Hubbard
Director of Litigation, Antitrust Bureau
Attorney for Petitioner
120 Broadway, 26th Floor
New York, New York 10271
(212) 416-8267 (voice)
(212) 416-6015 (telecopy)
Robert.Hubbard@ag.ny.gov (email)

Of Counsel:

Linda Gargiulo, Assistant Attorney General

Sarah Hubbard, Assistant Attorney General

Saami Zain, Assistant Attorney General

Sir:
Please take notice that the within is a true copy of
duly filed and entered in the office of the Clerk of County, on the
day of , 2010

Yours, etc.,
ANDREW M. CUOMO,
Attorney General,

Attorney For
Office and P. O. Address
120 Broadway, New York, NY 10271
To
Attorney for
, Esq.

Sir:
Please take notice that the within will be presented for
settlement and signature herein to the Hon. one of the Judges of
the within named Court, at in the Borough of City of
New York, on the day of 200 , atM.

Dated, N.Y. , 200
Yours, etc.,
ANDREW M. CUOMO,
Attorney General,

Attorney For
Office and P. O. Address
120 Broadway, New York, NY 10271
To
Attorney for
, Esq.

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

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

-against-

TEMPUR-PEDIC INTERNATIONAL, INC.
Defendants.

NOTICE OF VERIFIED PETITION

ANDREW M. CUOMO,
Attorney General
Attorney for Plaintiff

Office and P. O. Address
120 Broadway, New York, NY 10271
Tel. 212-416-8474

Personal service of a copy of

within.....day of
is admitted this.....day of
..... 2010

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

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

Petitioner,

-against-

TEMPUR-PEDIC INTERNATIONAL, INC.
Respondent.
-----X

FILED 10400837
MAR 29 2010
VERIFIED PETITION
COUNTY CLERK'S OFFICE
NEW YORK

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.

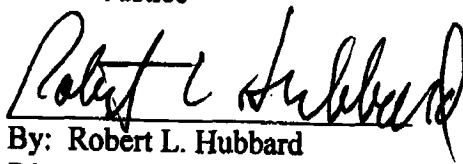
Dated: New York, New York
March 29, 2010

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



By: Robert L. Hubbard
Director of Litigation, Antitrust Bureau
Attorney for Petitioner
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Of Counsel:

Linda Gargiulo, Assistant Attorney General
Sarah Hubbard, Assistant Attorney General
Saami Zain, Assistant Attorney General

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

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

Petitioner,

-against-

TEMPUR-PEDIC INTERNATIONAL, INC.,

Respondent.

INDEX NO. 400837/10

NOTICE OF MOTION TO
STRIKE, OR IN THE
ALTERNATIVE, FOR LEAVE TO
TAKE DISCOVERY

003

PLEASE TAKE NOTICE that Respondent, Tempur-Pedic, Inc. will move at the Submissions Part, Room 130, of this Court at 60 Centre Street, New York, New York, on June 4, 2010 at 9:30 a.m., or as soon thereafter as counsel can be heard, for an order striking portions of the Affirmation of Assistant Attorney General Linda Gargiulo dated March 24, 2010, or, in the alternative, granting Tempur-Pedic leave to take discovery of evidence submitted with the Attorney General's Verified Petition, pursuant to CPLR 408.

Dated: New York, New York.
May 12, 2010

BINGHAM McCUTCHEN LLP

By:



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Brandon L. Bigelow, admitted *pro hac vice*
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*Attorneys for Respondent
Tempur-Pedic International, Inc.*

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

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

Petitioner,

-against-

TEMPUR-PEDIC INTERNATIONAL, INC.,

Respondent.

INDEX NO. 400837/10


NOTICE OF MOTION TO
DISMISS

002

PLEASE TAKE NOTICE that Respondent, Tempur-Pedic, Inc. will move at the Submissions Part, Room 130, of this Court at 60 Centre Street, New York, New York, on June 4, 2010 at 9:30 a.m., or as soon thereafter as counsel can be heard, for an order and judgment dismissing, with prejudice, the Verified Petition filed by Petitioner, Andrew M. Cuomo, Attorney General of the State of New York, pursuant to CPLR 404(a), 3211(a)(3), and 3211(a)(7).

Dated: New York, New York.
May 12, 2010

BINGHAM McCUTCHEN LLP

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Tempur-Pedic International, Inc.*