SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEWYORK

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PEOPLE OF THE STATE OF NEW YORK, by ANDREW M. CUOMO, Attorney General of the State of New York,	:	**Index No.**
	:	**RJI No.**
Petitioner,	:	**Date filed:**
-against-	:	
TEMPUR-PEDIC INTERNATIONAL, INC.,	:	
Respondent.	:	

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MEMORANDUM OF LAW IN SUPPORT OF PETITION

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Petitioner, the People of the State of New York, by Andrew M. Cuomo, Attorney General of the State of New York, submits this Memorandum of Law in support of the summary grant of the relief sought in the Verified Petition pursuant to Executive Law § 63(12) ("section 63(12)") and General Business Law § 369-a ("section 369-a").

PRELIMINARY STATEMENT

Petitioner files this summary proceeding to enjoin respondent Tempur-Pedic International, Inc. ("Tempur-Pedic") from prohibiting its retailers from discounting its mattresses and to remedy by restitution to consumers and disgorgement what Tempur-Pedic has already done in violation of the law. Section 63(12) empowers the Attorney General to seek injunctive relief, restitution, disgorgement, and costs when any person or business entity has engaged in repeated or persistent fraudulent or illegal acts in the transaction of business. In turn, section 369-a, entitled "Price-fixing prohibited," prohibits a vendor or producer from restraining the resale of its product "at less than the price stipulated by the vendor or producer."

The facts of this case are not in dispute. Tempur-Pedic has admitted through interrogatory responses and testimony of its employees that, starting in April of 2002 and continuing through today, the retailers with which it contracts may only resell Tempur-Pedic mattresses at the retail prices set by Tempur-Pedic. Tempur-Pedic also admits that Tempur-Pedic regularly communicates this contractual requirement to its retailers in letters, emails, and phone calls and monitors its retailers to ensure compliance, despite section 369-a's prohibition of restraints on discounting.

Through these actions, Tempur-Pedic has successfully prevented the discount pricing of its mattresses, to the detriment of consumers. As the Office of the Attorney General ("OAG")'s investigation has demonstrated, retailers' sales prices for Tempur-Pedic mattresses were at the levels set by Tempur-Pedic; discounting did not occur.

The effect of this illegal and fraudulent action is clear. New York consumers are paying more for Tempur-Pedic mattresses than would result from competition. In taking those actions, Tempur-Pedic has patently violated section 369-a's prohibition on restraining discounting by resellers. Accordingly, Tempur-Pedic's violations of law should be enjoined and monetary relief should be ordered.

STATEMENT OF FACTS

The undisputed facts of this investigation are set forth in the supporting Affirmation of Assistant Attorney General Linda Gargiulo and the attached exhibits ("Gargiulo Aff.").

Tempur-Pedic is the leading manufacturer of premium mattresses and pillows ("Tempur-Pedic products"), made from visco-elastic memory foam. Tempur-Pedic products are sold in over 80 countries under the Tempur and Tempur-Pedic brand names.

In New York State, Tempur-Pedic products are widely distributed through mattress specialty stores, furniture stores, and department stores. 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.

A. Tempur-Pedic Prohibits Retailers From Discounting

Tempur-Pedic contractually restrains discounting in its "Retail Partner Obligations & Advertising Policies" ("Retail Partner Agreement").[1] Specifically, in the Retail Partner Agreement, under "Coupons, Rebates & Promotional Items," the following is deemed "**UNACCEPTABLE**" for a retailer to provide to consumers:

- 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

Retail Partner Agreement ¶ 4, Gargiulo Aff. Ex. 4.[2]

Moreover, beginning in 2002 through a series of letters to all accounts from its president Rick Anderson, Tempur-Pedic had explicitly stated that it will not do business with any retailer that charges retail prices that vary from Tempur-Pedic's "suggested retail price" ("SRP"). Gargiulo Aff. Exs. 2, 3 (Response to Interrogatories 5 & 15). Tempur-

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[1] Tempur-Pedic monitors and enforces this Retail Partner Agreement, and retailers comply and assist Tempur-Pedic to do so, regardless of whether the account has signed the acknowledgement page of the Retail Partner Agreement. Gargiulo Aff. ¶12.

[2] As contrasted to the 2007 Retail Partner Agreement, Gargiulo Aff. Ex. 4, the 2009 Retail Partner Agreement, Gargiulo Aff. Ex. 5, includes in this section the phrase that "[t]hese guidelines relate to advertising only."

Pedic informs its dealers that if it "discovers that an account has chosen to charge prices lower than Tempur-Pedic's suggested retail prices, and it is more than an isolated incident, promotional item, or a liquidation sale of discontinued Tempur-Pedic merchandise, [Tempur-Pedic] will cease doing business with that account." Gargiulo Aff. Ex. 6. Those retailers that sell Tempur-Pedic mattresses have accepted this contractual requirement.

Indeed, mattress retailers uniformly acknowledge that adhering and agreeing to Tempur-Pedic's so-called "suggested" retail prices is required to become and remain an account with Tempur-Pedic. *See* Affidavit of Michael Bookbinder dated July 9, 2009 ¶ 6, Gargiulo Aff. Ex. 12 ("Sleepy's understands that Tempur-Pedic makes charging SRPs a condition for being a Tempur-Pedic account and maintaining that status."); Affidavit of Patrick Judd dated July 7, 2009 ¶ 4, Gargiulo Aff. Ex. 18 ("Raymour understands that it must follow Tempur-Pedic's price policy as a condition of maintaining the Tempur-Pedic line of products."); Sleepy's Interrogatory Response No. 18, Gargiulo Aff. Ex. 11.

Tempur-Pedic's prohibition of discounting and the retailers' agreement to not discount extends uniformly and decisively to the sales floor. Gargiulo Aff. ¶¶ 45-66. Examples abound. Sales representatives at Sleepy's said "Tempur-Pedic is a price control company" and "the price is fixed." *Id.* ¶¶ 47, 49, 50. A 1-800 Mattress sales representative said "we cannot touch [Tempur-Pedic's] price." *Id.* ¶ 51. A Levitz representative referred to Tempur-Pedic pricing as "firm." *Id.* ¶ 54. A Raymour & Flanigan representative said "We're not supposed to do any discounting on [Tempur-Pedic products] . . . Tempur-Pedic is cracking down." *Id.* ¶ 55. A Mooradian's representative conveyed that Tempur-Pedic "might pull our license. . . . all stores can't

sell it below this price." *Id.* ¶ 62. That continues to be true. On March 2, 2010, sales representatives said "the price is fixed by" Tempur Pedic, "Tempur-Pedic has never discounted," and discounting "is not allowed." Affidavit of Arlene Leventhal dated March 3, 2010, ¶¶ 6-8, Gargiulo Aff. Ex. 42 and ¶ 68.

B. Tempur-Pedic Polices Retailers and Enforces Its Prohibition on Discounting

Tempur-Pedic actively polices its retailers to verify that discounts do not occur. In the instances it has discovered that a retailer chose to or was considering discounting a mattress, Tempur-Pedic has moved quickly to reconfirm the agreement that discounting not occur. *See generally* Gargiulo Aff. ¶¶ 22-31. For example, on November 30, 2007, Tempur-Pedic's Paul Cowie wrote Raymour & Flanigan's Patrick Judd, "[i]t has been brought to my attention that one of your sales associates sold a Tempur-Pedic Deluxe full set for $2,018.00. The price is $381.00 below our SRP of $2,399.00. Would you please investigate and let me know?" (Gargiulo Aff. Ex. 15). On July 3, 2008, Paul Cowie wrote Patrick Judd, "[t]his email is a follow up to the voicemail message that I left you this morning. It has been brought to my attention that on 3 occasions Raymour [Retail Sales Associates] have sold Tempur-Pedic products for less than SRP. . . . I would appreciate you following up on these matters." Gargiulo Aff. Ex.16 . On another occasion, upon learning of a 5% discount off the SRP being offered by Rotmans Furniture ("Rotmans"), Tempur-Pedic's Paul Cowie informed Lynn Glick of Rotmans that "it has been brought to my attention that Rotman's is selling Tempur-Pedic for 5% off in addition to 5% tax free. This is a violation of our SRP policy. Please stop this practice." Gargiulo Aff. Ex. 14. Rotmans stopped. The next morning, Lynn Glick told sales people to stop discounting Tempur-Pedic products and told Paul Cowie she had done so by

stating:

> Sorry for the confusion on the extra 5% off - the sales people were told that Tempur-Pedic were excluded from the promotion but not everyone understood. I left everyone a voice mail this morning so it will be very clear to them!

Id.

Similarly, store-wide discounts came under attack in an email dated May 10, 2007, from Tempur-Pedic's Thomas Rehwinkel to Macy's. "I need to reiterate our corporate policy pertaining to discounts. We don't sanction/support them. If you have a storewide discount we aren't part of it. If Macy's has a 10% discount for opening a new charge account we are not part of it." Rehwinkel further advised Macy's that its competitors were adhering to the prohibition on discounting and added that Macy's could "offer one free pillow or our Tempur-pedic 'teddy bear' but no additional discount. *There is no wiggle room on this point.*" Gargiulo Aff. Ex. 13 (emphasis added).

C. Tempur-Pedic Retailers Prevent Discounting by Competing Retailers

The agreement to prohibit discounting is monitored and enforced not only by Tempur-Pedic but also by mattress retailers themselves, who regularly monitor their competitors and report to Tempur-Pedic any pricing below SRP. *See generally* Gargiulo Aff. ¶¶ 32-43. One example of the regular communications between retailers and Tempur-Pedic to ensure that no discounting occurs is an email dated September 5, 2007 from retailer Raymour & Flanigan to Tempur-Pedic. In this email, Patrick Judd of Raymour & Flanigan advised Tempur-Pedic representatives Paul Cowie Jr. and Bob McCarthy that "discounting by our competitors has become a growing concern. As stated in our agreement there is no discounting, but we continue to have issues with specific examples of our competitors violating the policy. You have committed to us that this

would be taken care of." Tempur-Pedic's Paul Cowie responded to this email, stating "this situation has been addressed. We have assurances that it will end no later than Friday 9/7." Gargiulo Aff. Ex. 26. Likewise, by email dated February 16, 2007, Sleepy's Ira Fishman reported to Tempur-Pedic's Thomas Rehwinkel that pricing below the SRP by competitor Relax the Back "is a continuing problem." Within minutes of receiving this complaint from Sleepy's, Rehwinkel requested another Tempur-Pedic employee to remind Relax the Back of Tempur-Pedic's pricing policies. Gargiulo Aff. Ex. 25.

These communications between and among Tempur-Pedic and competing dealers to ensure that discounting does not occur are frequent and direct. What's more, New York retailers who do not agree by conduct to Tempur-Pedic's no discounting demand have been terminated as a result. By email dated October 29, 2007, Metro Mattress owner Dave Shiroff reported to Tempur-Pedic an instance of discounting by a competitor, Dave Hayes Appliance Center. Dave Shiroff wrote: "I have, in my possession, a copy of an ad that Dave Hayes Appliance Center in the Utica area ran last Friday. In it, they list their prices as the Classic Bed and the Queen mattress is listed for $1599 (1699.99 is your MAAP)." Tempur-Pedic's Joe Ginsburgh responded to Shiroff's email, stating "the correct SRP is $1,699 for the Classic set (as of September 12th) this will be addressed today with Dave Hayes. If you still have a copy of that ad I would like a copy." Gargiulo Aff. Ex. 23. One day later, Tempur-Pedic started the necessary paperwork and terminated Dave Hayes Appliance Center as a Tempur-Pedic customer. Gargiulo Aff. Ex. 24. Dream City was terminated for similar reasons. Gargiulo Aff. ¶ 35.

D. Tempur-Pedic's Restraints on Discounting Raise Prices For Consumers

During its investigation, the OAG reviewed the prices for Tempur-Pedic

mattresses at many retailers. The sale prices were identical. Virtually every retailer questioned admitted that the reason for the uniform prices was the store's fear that Tempur-Pedic would end its relationship if the retailer offered discounts on Tempur-Pedic products. Gargiulo Aff. ¶¶ 15-21. If not for Tempur-Pedic's restraint, retailers would set the prices of Tempur-Pedic products according to the competitive conditions of the free market. *See generally* Gargiulo Aff. ¶¶ 16, 18, 19. As expressed by one retailer, "[i]f not subject to SRP policy, Raymour would evaluate the pricing for Tempur-Pedic products as for other products, by market conditions and internal profitability criteria." Rosenbaum Affidavit ¶ 6, Gargiulo Aff. Ex. 9. That is, the retailers agreed to Tempur-Pedic's prohibition on discounting, by not discounting.

ARGUMENT

Tempur Pedic is violating Executive Law § 63(12) and General Business Law § 369-a. Under section 63(12), the Attorney General can stop and remedy fraudulent or illegal acts.[3] Section 369-a specifies the illegality at issue in this proceeding.[4] By engaging in the "price fixing" prohibited by section 369-a, Tempur-Pedic is engaged in repeated and persistent fraudulent and illegal conduct. Under section 63(12), Petitioner is

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[3] Executive Law § 63(12) provides:

> Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the state of New York, to the supreme court . . . for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts [and] directing restitution and damages.

[4] Section 369-a provides:

> 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

entitled to an order enjoining Tempur-Pedic's restraints on discounting and providing disgorgement and/or restitution for consumers injured by Tempur-Pedic's repeated violations of section 369-a.

I. SECTION 63(12) ENABLES THE ATTORNEY GENERAL TO ACHIEVE PROMPT AND COMPREHENSIVE RELIEF

A. The Attorney General Can Secure Prompt Relief Under Section 63(12)

Section 63(12) empowers the Attorney General to bring this special proceeding under CPLR Article 4 for permanent injunctive relief, restitution, and disgorgement whenever any person or business engages in repeated or persistent "fraud or illegality." A special proceeding is "plenary as an action, culminating in a judgment, but is brought on with the ease, speed and economy of a mere motion." David D. Siegel, N.Y. PRACTICE § 547, at 943 (4th ed. 2005). The legislative purpose for allowing a special proceeding under section 63(12) is to further the public interest by giving the Attorney General an expeditious means to enjoin fraudulent or illegal activity and obtain relief for its victims, including ex parte relief. *People v. B.C. Assocs., Inc.*, 22 Misc. 2d 43, 44-46 (Sup. Ct. N.Y. County 1959).

Article 4 of the CPLR requires that on the return date of a petition "[t]he court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised." C.P.L.R. § 409(b). The tests and standards applied to decide whether the petition, answer, and affidavits create triable issues of fact are the same as those applied on a motion for summary judgment pursuant to C.P.L.R. § 3212. *Lefkowitz v. McMillen*, 57 A.D.2d 979, 979 (3d Dep't), *appeal denied*, 42 N.Y.2d 807 (1977); *In re Javarone*, 49 A.D.2d 788, 788 (3d Dep't 1975); *State*

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producer shall not be enforceable at law.

v. Mgmt. Transition Res., Inc., 115 Misc. 2d 489, 492 (Sup. Ct. NY County 1982); *Port of New York Authority v. 62 Cortlandt St. Realty Co.*, 18 N.Y.2d 250, 255 (1966).

A special proceeding goes right to the merits. To oppose a section 63(12) special proceeding, respondent must present facts having probative value sufficient to demonstrate an unresolved material issue. *Id.* After a petitioner submits evidence establishing the claim, the burden shifts to respondent to come forward with evidence sufficient to raise triable issues of fact. As the Third Department has stated in a section 63(12) proceeding:

> [W]here, in a special proceeding as here, the petition and supporting papers contain sufficient allegations of fact to merit the relief requested and the respondents have raised no evidentiary showing, but only assert conclusory statements in a general denial, judgment without trial is proper.

State v. Daro Chartours, Inc., 72 A.D.2d 872, 872 (3d Dep't 1979) (quoting *Lefkowitz v. McMillen*, 57 A.D.2d 979, 979 (3d Dep't), *appeal denied*, 42 N.Y.2d 807 (1977)); *see State v. Telehublink Corp.*, 301 A.D.2d 1006, 1007-09 (3d Dep't 2003); *People v. Helena VIP Personal Introduction Servs., Inc.*, 199 A.D.2d 186, 186 (1st Dep't 1993); *Lefkowitz v. McMillen*, 57 A.D.2d at 979 ("The burden was on [respondent] to reveal his proofs and show that his defenses were real and capable of being established."); *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 258 (1970); *State v. Mgmt. Transition Res., Inc.*, 115 Misc.2d at 489).

Moreover, the evidence need not establish that the violations were knowing or marketwide. Nor is the Attorney General required to prove scienter under section 63(12). *Lefkowitz v. Bull Investment Group, Inc.*, 46 A.D.2d 25, 27 (3d Dep't. 1974), *appeal denied*, 35 N.Y.2d 647 (1975). "Repeated" under section 63(12) is conduct that affects more than one person. *People v. Empyre Inground Pools, Inc.*, 227 A.D.2d 731, 732 (3d

Dep't 1996); *People v. 21st Century Leisure Spa Int'l, Ltd.*, 153 Misc. 2d 938, 944 (Sup. Ct. N.Y. Co. 1991) (All the Attorney General is required to show is any number of "separate and distinct fraudulent or illegal acts which affected more than one individual.").[5] These standards are easily satisfied here.

B. Section 63(12) Special Proceedings Reach Any Fraudulent or Illegal Act

As noted above, repeated "illegality" or "fraud" is actionable under section 63(12). *Princess Prestige*, 42 N.Y.2d at 104; *Empyre Inground Pools, Inc.*, 227 A.D.2d at 732-733; *Lefkowitz v. E.F.G. Baby Prods. Inc.*, 40 A.D.2d 364, 366 (3d Dep't 1973); *State v. Scottish-Am. Ass'n, Inc.*, 52 A.D.2d 528 (1st Dep't 1976), *appeal dismissed*, 39 N.Y.2d 1057 (1976). Thus, the Attorney General has used section 63(12) to enforce a broad range of state, local, and federal laws and regulations. *E.g.*, *State v Princess Prestige*, 42 N.Y. 2d 104, 106 (1977) (Home Solicitation Act); *State v. Ford Motor Co.*, 136 A.D.2d 154 (3d Dep't 1988) (Lemon Law), *aff'd*, 74 N.Y. 495 (1989); *State v. Apple Health & Sports Clubs, Ltd.*, 206 A.D.2d 266, 267 (1st Dep't 1994) (health club law); *State v. Am. Motor Club*, 179 A.D.2d 277 (1st Dep't) (Insurance Law), *appeal dismissed*, 80 N.Y.2d 893 (1992); *State v. Midland Equities*, 117 Misc. 2d 203 (Sup. Ct. N.Y. County 1982) (Judiciary Law); *State v. Winter*, 121 A.D.2d 287 (1st Dep't 1986) (New York City Rent Stabilization Law and Code); *State v. Manhattan Transit Co.*, 58 A.D.2d 758 (1st Dep't 1977) (New York City pollution law); *State v. Scottish-Am. Ass'n*, 52

[5] Occasional illegal or fraudulent actions are enough for the Attorney General to prevail under section 63(12). *State v. Princess Prestige Co.*, 42 N.Y.2d 104 (1977) (16 illegal transactions out of 3,600 is sufficient); *People v. Dell, Inc.*, 2008 NY Slip Op 52026, at 8 (Sup. Ct. Albany Co. 2008) (conduct impacting less than 0.01% of the sales in New York is enough to "establish repeated improper conduct"). Indeed, with clear evidence of fraudulent or illegal conduct, the Attorney General need not wait for a consumer complaint or injury before bringing a proceeding under section 63(12). *State v. Mgmt.*

A.D.2d 528 (1st Dep't) (Civil Aeronautics Board regulations), *appeal dismissed*, 39 N.Y.2d 1057 (1976); *State v. Life Science Church*, 113 Misc. 2d 952 (Sup. Ct. N.Y. County 1982) (I.R.C. § 501 tax exemption), *appeal dismissed*, 93 A.D.2d 774 (1st Dep't), *appeal dismissed*, 60 N.Y.2d 643 (1983), *cert. denied*, 469 U.S. 822 (1984); *State v. Abortion Info. Agency, Inc.*, 69 Misc. 2d 825 (Sup. Ct. N.Y. County) (Education Law §§ 6514, 6501), *aff'd*, 37 A.D.2d 142 (1st Dep't 1971), *aff'd*, 30 N.Y.2d 779 (1972).

Similarly, section 63(12) defines "fraud" broadly to include "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual clauses." This statutory definition for the Attorney General is broader than the common law definition of fraud, which includes "all deceitful practices contrary to the plain rules of common honesty . . . [and] should therefore be given a wide meaning, so as to include all acts . . . which do by their tendency to deceive or mislead the purchasing public." *People v. Federated Radio Corp.* 244 N.Y. 33, 38-39 (1926). *Accord Bull Inv.*, 46 A.D.2d at 27.

C. Section 63(12) Permits Permanent Injunctive Relief

When the evidence supports the relief requested and no triable issues of fact are present, courts routinely grant permanent injunctive relief in cases brought pursuant to section 63(12). The Court's remedial powers under section 63(12) are extremely broad. *See State v Princess Prestige Co.*, 42 N.Y.2d at 108; *State v. Mgmt. Transition Res., Inc.*, 115 Misc. 2d at 489; *State v. Daro Chartours, Inc.*, 72 A.D.2d at 872; *State v. Scottish Am. Assoc.*, 52 A.D.2d at 528-29; *State v. Midland Equities of New York, Inc.*, 117 Misc. 2d 203, 206 (Sup. Ct. N.Y. County 1982); *State v. Hotel Waldorf-Astoria Corp.*, 67 Misc. 2d 90, 91

Transition Res., 115 Misc. 2d at 489.

(Sup. Ct. N.Y. County 1971).

D. Section 63(12) Permits Restitution for Consumers and Disgorgement

In addition to injunctive relief, courts under section 63(12) can "direct[] restitution and damages" to all New Yorkers, known and unknown, who have been injured by the illegal and/or fraudulent conduct. New York courts routinely have ordered restitution to remedy illegal and fraudulent conduct. *State v. Ford Motor Co.*, 74 N.Y.2d 495 (1989) ($100 per consumer restitution ordered when respondents charged consumers a $100 deductible for repairs when Lemon Law required a warranty "at no charge"); *State v. Princess Prestige Co.*, 42 N.Y.2d at 104 (restitution allowing consumers to cancel and get a refund when Personal Property Law required a "cooling off" period and the right to cancel); *State v. Scottish-Am. Ass'n*, 52 A.D.2d at 528 ($100,000 performance bond to support restitution to those who paid for but did not receive charter airline flights); *State v. Midland Equities of N.Y.*, 117 Misc. 2d at 208(refund of fees paid for unauthorized practice of law and improper solicitation of legal business); *State v. Mgmt. Transition Resources*,115 Misc.2d at 492 (refund of fees paid to unlicensed employment agency); *State v. Hotel Waldorf-Astoria Corp.*, 67 Misc. 2d at 92 (refund for all unexplained charges when General Business Law required a statement of the charges and that charges be only for services rendered).

Moreover, pursuant to section 63(12), courts have broad equitable powers to fashion appropriate remedial relief without individualized hearings. Thus, pursuant to section 63(12), courts customarily order restitution to all victims of fraud or illegality even where those victims are not identified at the time of the order. *See, e.g., State v. General Electric Co.*, 302 A.D.2d 314, 316 (1st Dep't 2003); *State v. Telehublink Corp.*, 301 A.D.2d at 1007; *State v. Scottish-Am. Ass'n*, 52 A.D.2d at 529; *State v. Midland Equities of New York, Inc.*,

117 Misc.2d at 208; *State v. Mgmt. Transition Resources*, 115 Misc.2d at 492; *State v. Hotel Waldorf-Astoria*, 67 Misc. 2d at 92; *State v. Bevis Indus. Inc.*, 63 Misc.2d at 1092.

Further, the statutory grant of authority under section 63(12) to issue an injunction carries the full range of equitable remedies, including the power to compel disgorgement. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398-99 (1946) ("readily apparent" that once a trial court's equitable jurisdiction is invoked, "a decree compelling one to disgorge profits, rent, or property acquired in violation of the statute" is proper). The Court of Appeals has expressly endorsed the availability of a disgorgement remedy under section 63(12). *People v. Applied Card Systems, Inc.*, 11 N.Y.3d 105, 125-26 (2008).

II. SECTION 369-a PROHIBITS TEMPUR-PEDIC FROM PROHIBITING DISCOUNTING ON ITS PRODUCTS

A. By Its Terms, Section 369-a Prohibits the Restraints on Discounting Demonstrated in This Case

Section 369-a of the General Business Law provides that a "vendor or producer" cannot prohibit a reseller from discounting. Titled "Price-fixing prohibited," section 369-a states in full:

> 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.

Section 369-a ensures that a reseller is free to sell the goods at less than the price set by the vendor or producer and prohibits contract provisions that prevent a retailer from discounting – such as those involved in this summary proceeding. Under New York law, a vendor cannot insist that resellers use the prices specified by the vendor or otherwise restrain the reseller's right to discount the resale price. *See Carl Wagner & Sons v. Appendagez, Inc.*, 485 F. Supp. 762, 764 (S.D.N.Y. 1980). The prohibition

extends broadly to any "commodity" that is "any subject of commerce." General Bus. Law § 369-c.

The legislative intent of section 369-a is clear. When enacted, section 369-a reversed New York's "Fair Trade Law," which gave a vendor or producer the ability to set the resale price for its products. L. 1935, ch. 976. That prior New York law provided that resale at a "vendor stipulated" price would not be deemed a violation of New York law, creating a way for businesses to do what otherwise would have violated state and federal antitrust laws.[6]

On May 8, 1975, Governor Hugh Carey signed legislation ending New York's Fair Trade Law. L. 1975, c. 65. Significantly, this legislation went beyond mere repeal to direct, in what was codified as section 369-a, that prohibitions on discounting could not be imposed by contract. The Governor stated that the goal of the legislation was to "restore full competition to the marketplace and to insure that consumers are not victimized by price-fixing schemes." Public Papers of Hugh L. Carey 77 (1982). The Department of Commerce wrote that the "bill would make illegal the fixing of the reselling price of commodities by the vendor or producer. . . . This bill seeks to promote lower consumer prices by prohibiting manufacturers or wholesalers from setting

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[6] Culminating in the 1970's, state Fair Trade Laws were identified as causing inflation, by causing higher consumer prices. Studies showed that consumer prices in states with Fair Trade Laws were significantly higher than those in so-called "Free Trade" states, in which resellers set the resale price. *E.g.*, Report of the House Committee on the Judiciary, H.R. Rep. No. 94-341, 94th Cong., 1st Sess. 3 (1975); 121 Cong. Rec. S20872-73 (daily ed. Dec. 2, 1975) (remarks of Sen. Brooke); 120 Cong. Rec. S20362 (daily ed. Dec. 3, 1974) (remarks of Sen. Brooke). Because of those higher prices, Governor Nelson Rockefeller called on the Legislature to repeal New York's "[s]o-called Fair Trade laws," which the Governor said "are an affront to the American system of free enterprise." Public Papers of Nelson A. Rockefeller 32 (1973).

minimum resale prices for their products." Bill Jacket for L. 1975, ch. 65 at 11 (Department of Commerce Mem. dated April 28, 1975).

In sum, by repealing the Fair Trade Law and enacting section 369-a, the New York Legislature sought to eliminate the higher prices that result from prohibitions on discounting. The legislative intent was directly stated in the title of the statute: "Price Fixing Prohibited."

To date, one court has applied section 369-a to restraints on discounting.[7] In *Carl Wagner & Sons v. Appendagez, Inc.*, 485 F. Supp. 762 (S.D.N.Y. 1980), Appendagez (the manufacturer) sought to require Carl Wagner & Sons to resell Appendagez's products at the price stipulated by Appendagez. The court held that purchase orders and attendant circumstances established a contract between the parties, *id.* at 769-72, and that Appendagez could not prohibit discounting as a term of that contract. Having found that "Appendagez refused to fill plaintiffs' orders because plaintiffs refused to agree that they would sell the 'Faded Glory' line at keystone prices [the resale price set by Appendagez]," the court held for Carl Wagner on the ground that Appendagez "could not legally implement that policy in view of section 369-a." *Id.* at 772.

By its terms, section 369-a applies to "[a]ny contract provision" in which a vendor restrains the vendee from discounting. The UCC broadly defines "contract" and provides that a contract is formed and its terms established by evidence of agreement, including conduct, the parties' course of dealings, the usage in trade, or otherwise. UCC § 2-204 ("A contract for the sale of goods may be made in any manner sufficient to show

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[7] In *WorldHomeCenter.com v. L.D. Kichler Co.*, 2009 U.S. Dist. LEXIS 28123 (E.D.N.Y. 2009), the court granted judgment on the pleadings, rejecting a claim under section 369-a because the plaintiff there did not allege a contract with the defendant.

agreement, including by conduct by both parties which recognizes the existence of such a contract."); *see* UCC § 1-205 (defining the meaning and application of course of dealing and usage of trade); UCC § 2-208 (applying course of performance, course of dealing, and usage of trade in interpreting contract provisions). As phrased by the Court of Appeals:

> The basic philosophy of the sales article of the Uniform Commercial Code is simple. Practical business people cannot be expected to govern their actions with reference to nice legal formalisms. Thus, when there is basic agreement, however manifested and whether or not the precise moment of agreement may be determined, failure to articulate that agreement in the precise language of a lawyer, with every difficulty and contingency considered and resolved, will not prevent the formation of a contract.

Kleinschmidt Division of SCM Corp. v. Futuronics Corp., 41 N.Y.2d 972, 973 (1977).

B. Tempur-Pedic is violating Sections 63(12) and 369-a

Thus, by securing its retailers' adherence to a prohibition on discounting, Tempur-Pedic is violating section 63(12) and section 369-a, which requires that Tempur-Pedic not restrain the right of its retailers to discount Tempur-Pedic's products. The undisputed evidence shows that Tempur-Pedic's contract with its retailers contains provisions by which Tempur-Pedic restrains the price at which its products can be resold. The Retail Partner Agreement expressly prohibits retailers from discounting Tempur-Pedic products through rebates, in-store credits or coupons, offering free gifts with a purchase, or offering money back for the customer's old bedding. Gargiulo Aff. Ex. 4 & 5.[8]

[8] As contrasted with the 2007 Retail Partner Agreement, Gargiulo Aff. Ex. 4, the 2009 Retail Partner Agreement, Gargiulo Aff. Ex. 5, includes in the section on coupons, rebates, and promotional items the phrase that "[t]hese guidelines relate to advertising only." Because advertising is an offer to sell, restraining the advertising of discounts is itself a restraint on discounting that violates section 369-a. Moreover, to avoid deception, the Retail Partner Agreement does not and should clearly state that discounting is permissible.

Tempur-Pedic, with the active assistance of various accounts, actively monitors and enforces these prohibitions. Gargiulo Aff. ¶12. These efforts have the effect that Tempur-Pedic seeks. From the highest levels of management, Gargiulo Aff. ¶¶ 16, 21, to the sales representatives on the floor, Gargiulo Aff. ¶¶ 45-65, retailers know that adhering to Tempur-Pedic's "suggested" resale prices is a condition of maintaining the Tempur-Pedic account and accordingly agree to Tempur-Pedic's so-called "suggestions."

The agreement to avoid discounting is also decisively evidenced by the conduct of the retailers. Discounting does not occur because Tempur Pedic prohibits discounting and the retailers expressly adhere to that prohibition. The Attorney General's investigation was unable to find a retailer willing to discount Tempur-Pedic mattresses. Gargiulo Aff. ¶ 45. Recent inquiries confirm that conclusion. Affidavit of Arlene Leventhal dated March 3, 2010, Gargiulo Aff. Ex. 42 and ¶¶ 67-68. Tempur-Pedic's prohibition of discounting was uniformly conveyed by sales representatives. *See supra* pages 4-5. And Tempur-Pedic retailers enhance the contract's effectiveness by reporting to Tempur-Pedic when retail competitors are discounting. *See supra* pages 6-7. Tempur-Pedic uses this information to ensure that discounting does not occur, even occasionally acknowledging the competitor retailers' assistance. Tempur-Pedic admits that it prevents discounting. Retailers admit they would price to reflect market conditions if not for that prohibition and the evidence outlined in the Gargiulo Affirmation illustrates that would mean discounting for consumers because retailers would compete on price to sell more mattresses. Gargiulo Aff. ¶¶ 6-11, 15-21. New York consumers thus pay more for Tempur-Pedic products because of Tempur-Pedic's illegal resale price fixing.

Moreover, since 2002, Tempur-Pedic has persistently communicated to its retail accounts that Tempur-Pedic will terminate its relationship with anyone who discounts its mattresses. Tempur-Pedic states unequivocally in a cover letter from its president to all of its retail accounts that "[i]f we discover that an account has chosen to charge prices lower than our suggested retail prices . . . we will cease doing business with that account." Gargiulo Aff. ¶ 14 & Exh. 6. To ensure that discounting does not occur, Tempur-Pedic monitors and polices resale pricing. *E.g.*, Gargiulo Aff. Exs. 21, 26, 29, 30, 31, 33, 37. The result is that retailers are well aware that they will lose their account with Tempur-Pedic if they charge consumers less than the resale price set by Tempur-Pedic. *See, e.g.,* Gargiulo Aff. ¶ 44 ("Virtually every retailer visited said . . . they would lose the Tempur-Pedic line of products if they offered discounts."). And in response, the retailers agree to not discount. These contractual terms violate section 369-a.

III. INJUNCTIVE RELIEF, RESTITUTION, AND DISGORGEMENT SHOULD BE ORDERED

The Attorney General has overwhelmingly established Tempur-Pedic's violation of sections 63(12) and 369-a. The evidence unequivocally shows that Tempur-Pedic prohibits discounting and retailers agree to that contractual requirement. Such conduct flies in the face of section 369-a's prohibition of restraints on discounting, and Tempur-Pedic must be enjoined from restraining the retailers' ability to discount.

As specified in the Petition, the Attorney General now seeks an order finding that Tempur-Pedic violated section 63(12) and section 369-a, and enjoining Tempur-Pedic from:

(1) enforcing any contractual provision that restrains discounting;

(2) restraining any retailer from discounting Tempur-Pedic products;

(3) 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;

(4) requiring, coercing, or otherwise pressuring any retailer to maintain, adopt, or adhere to any resale price; and

(5) securing or attempting to secure any commitment or assurance from any retailer concerning the resale price at which the retailer may advertise, promote, offer for sale, or sell any product.

In addition, the Court should direct Tempur-Pedic to provide written notification to retailers that retailers have the right to determine independently the prices at which they will sell Tempur-Pedic products to consumers, including an express disclosure on every list of suggested retail prices and suggested advertised prices for any Tempur-Pedic products that Tempur-Pedic provides to retailers.

The Court should also order Tempur-Pedic to provide restitution. OAG submits that the Court should enter an order determining Tempur-Pedic's liability under section 63(12) and section 369-a and its liability for a "restitution fund" for consumers who purchased Tempur-Pedic products in New York during the period when Tempur-Pedic prohibited discounting. *See State v Princess Prestige Co.*, 42 N.Y.2d at 108; *State v. Midland Equities of New York*, 117 Misc. 2d at 208; *State v. Life Science Church*, 113 Misc. 2d at 971; *State v. Bevis Indus. Inc.*, 63 Misc. 2d 1088 (N.Y. Sup. 1970). Restitution should be paid to all purchasers of Tempur-Pedic products submitting claim forms indicating that they sought and were denied discounts on Tempur-Pedic products. *See State v. General Electric Co.*, 302 A.D.2d at 316; *People v. Helena VIP Personal Introduction Servs., Inc.*, 199 A.D.2d 186 (1993). OAG has significant experience with implementing and monitoring such claims

procedures. The aggregate amount of the restitution fund would be determined once Tempur-Pedic provides full disclosure of Tempur-Pedic sales and would constitute the amount by which Tempur-Pedic products would have been discounted but for Tempur-Pedic's prohibition on discounting. Tempur-Pedic also should be ordered to disgorge its profits by reason of the prohibition on discounting.

As noted, OAG at this time seeks from the Court a finding of liability, entry of an injunction, and entry of an order for restitution and disgorgement, with the amount of restitution and disgorgement to be determined in subsequent proceedings.

IV. THE ATTORNEY GENERAL IS ENTITLED TO COSTS PURSUANT TO CPLR § 8303(a)(6)

Courts also routinely grant costs pursuant to CPLR § 8303(a)(6), which provides that the Court may award the Attorney General "a sum not exceeding two thousand dollars against each defendant" in a special proceeding pursuant to section 63(12). *See, e.g., State v. Daro Chartours, Inc.*, 72 A.D.2d at 873; *State v. Midland Equities of New York*, 117 Misc. 2d at 208; *State v. Life Science Church*, 113 Misc. 2d at 970; *State v. Hotel Waldorf-Astoria Corp.*, 67 Misc. 2d at 92. Accordingly, an award of costs should be granted.

CONCLUSION

For the foregoing reasons, the Court should make a summary determination in petitioner's' favor and grant injunctive relief, restitution, disgorgement, and costs, as requested in the Verified Petition.

Dated: New York, New York
March 29, 2010

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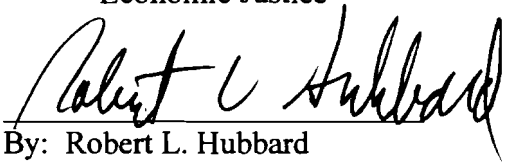

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