

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- : Index No. 400837/10

TEMPUR-PEDIC INTERNATIONAL, INC. :  
Respondent. :

-----X

Affirmation of Saami Zain

Saami Zain, an attorney admitted to practice in New York State, affirms:

1. I am an Assistant Attorney General in the Antitrust Bureau of the New York State Department of Law, and hereby affirm that the following statements are true, under the penalties of perjury.

2. Annexed hereto as EXHIBIT A, is a true and correct copy of the unpublished decision in *Tosco Corporation et al v. Bayway Refining Company*, 1999 WL 328342 (S.D.N.Y.1999).

3. Annexed hereto as EXHIBIT B, is a true and correct copy of the unpublished decision in *Jacobs v. Tempur-Pedic International*, 2007 WL 4373980 (N.D. Ga.2007).

4. Annexed hereto as EXHIBIT C, is a true and correct copy of the unpublished decision in *WorldHomeCenter.com, Inc. v. L.D.Kichler, Inc.*, 2009 WL 936675 (E.D.N.Y.2009).

5. Annexed hereto as EXHIBIT D, is a true and correct copy of the May 20, 2009 letter filed by Counsel for Tempur-Pedic to the 11<sup>th</sup> Circuit Court of Appeals in *Jacobs v. Tempur-Pedic International*, 08-12720-FF.

6. Annexed hereto as EXHIBIT E, is a true and correct copy of the April 8, 2010 letter filed by Counsel for Tempur-Pedic to the 11<sup>th</sup> Circuit Court of Appeals in *Jacobs v. Tempur-Pedic International*, 08-12720-FF.

7. Annexed hereto as EXHIBIT F, is a true and correct copy of the Bill Jacket for L. 1975, ch. 65 at 11 (Department of Commerce Memorandum dated April 28, 1975)

8. Annexed hereto as EXHIBIT G, is a true and correct copy of the Bill Jacket, Budget Report on Bills 1, 2, dated April 23, 1975.

Dated: June 10, 2010

/s/ Saami Zain

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# **EXHIBIT A**

Not Reported in F.Supp.2d, 1999 WL 328342 (S.D.N.Y.), 40 UCC Rep.Serv.2d 94  
(Cite as: 1999 WL 328342 (S.D.N.Y.))

**H**

United States District Court, S.D. New York.  
TOSCO CORPORATION and BAYWAY REFINING COMPANY, Plaintiffs,  
v.  
OXYGENATED MARKETING AND TRADING A.G., Defendant.  
**No. 98 CIV. 4695(LMM).**

May 24, 1999.

MEMORANDUM AND ORDER

MCKENNA, D.J.

\*1 This dispute involves two contracts for the sale of a gasoline blendstock known as MTBE. The first, entered into in February 1998 (“the February contract”), involved a sale by plaintiff Bayway Refining Company (“Bayway”) to defendant Oxygenated Marketing and Trading A.G. (“OMT”); the second, entered into in or about June 1998 (“the June contract”), involved a sale by OMT to Tosco Refining Company.<sup>FNI</sup> Tosco failed to pay OMT the full amount due under the June contract, claiming that it was entitled to set off against that contract the amount OMT allegedly owed Bayway for taxes incurred under the February contract.

**FNI.** Tosco Refining Company is a division of plaintiff Tosco Corporation (“Tosco”); it is not a separate corporate entity. (Basil Sept. Aff. ¶ 1 & n.1.) References herein to “Tosco” will include both Tosco Corp. and Tosco Refining Co.

OMT now moves for partial summary judgment awarding it the amount that it alleges Tosco wrongfully deducted. Plaintiffs cross-move for summary judgment awarding Bayway the taxes incurred under the February contract, and granting Tosco a declaration that it acted within its rights in setting off that amount against its contract with OMT.

For the reasons set forth below, the Court grants summary judgment in OMT's favor awarding it the amount withheld by Tosco, and grants Bayway's cross-motion for summary judgment on its claim for taxes; Tosco's motion for summary judgment on its declaratory claim is denied.

I. BACKGROUND

OMT is a Swiss corporation engaged in the purchase, sale and marketing of petrochemical products worldwide. (Ertle July Aff. ¶¶ 1-2.) Tosco is a Nevada corporation with its principal place of business in Connecticut. (Compl.¶ 2.) Bayway, a Delaware corporation with its principal place of business in New Jersey, is Tosco's wholly-owned subsidiary. (*Id.* ¶ 3.)

1. The February Contract

There is no dispute that on February 12, 1998, OMT and Bayway entered into a contract for the sale of 60,000 barrels of MTBE from Bayway to OMT. (*See* Compl. ¶ 7; Ans. ¶ 7.) Rather, the dispute concerns whether this contract included a term requiring OMT to pay certain taxes incurred in connection with this sale.

On February 12, 1998 OMT sent Bayway a confirmation fax stating, *inter alia*:

We are pleased to confirm the details of our purchase from you of MTBE as agreed between Mr. Ben Basil and Roger Ertle on 12.02.98.... This confirmation constitutes the entire contract and represents our understanding of the terms and conditions of our agreement.

(Ertle Oct. Aff. Ex. B.) It made no mention of taxes. The following day, Bayway responded by fax, stating: “WE ARE PLEASED TO CONFIRM THE FOLLOWING VERBAL AGREEMENT CONCLUDED ON FEBRUARY 12, 1998 WITH

YOUR COMPANY.” (*Id.* Ex. C at p. 1.) Bayway's fax included numerous additional terms and purported to incorporate by reference Bayway's General Terms and Conditions dated March 1, 1994.<sup>FN2</sup> (*See id.* at ¶ 14.) Paragraph 10 of Bayway's General Terms and Conditions provides:

**FN2.** The Terms and Conditions were not sent to OMT along with the fax, however.

BUYER SHALL PAY SELLER THE AMOUNT OF ANY FEDERAL, STATE AND LOCAL EXCISE, GROSS RECEIPTS, IMPORT, ... AND ALL OTHER FEDERAL, STATE AND LOCAL TAXES ... OTHER THAN TAXES ON INCOME, PAID OR INCURRED BY SELLER ... WITH RESPECT TO THE OIL OR PRODUCT SOLD HEREUNDER AND/OR THE VALUE THEREOF.

\*2 (*Id.* Ex. D at p. 4.) OMT did not object to Bayway's fax and accepted delivery of the MTBE on or about March 22, 1998. (Pls.' 56.1 St. ¶¶ 4-5.) OMT claims, however, that no such tax “indemnity” provision was discussed when the parties negotiated the contract and that it did not become aware of this term until “well after delivery under the February purchase had been completed.” (Ertle Oct. Aff. ¶ 9.)

Following delivery, Bayway learned that OMT was not registered for exemption from federal gasoline excise tax and New Jersey State sales tax liability. (Pls.' 56.1 St. ¶¶ 6-7.) Because OMT had not filed such a certificate of registration, Bayway determined that the MTBE sale was subject to federal excise and state sales taxes in the amount of \$577,520.<sup>FN3</sup> (*Id.* ¶ 7.) On or about March 27, 1998, it billed OMT \$1,891,447: the purchase price under the February contract plus the \$577,520 in taxes. (*Id.* ¶ 8.) OMT admits that it has refused to pay Bayway any of the taxes allegedly incurred. (*See Ans.* ¶ 13.)

**FN3.** As noted below, it was later determined that no state sales tax had in fact been incurred.

## 2. The June Contract

The parties also agree that, on or before June 2, 1998, Tosco and OMT entered into a contract for the sale of approximately 35,000 barrels of MTBE from OMT to Tosco; their dispute involves whether or not such agreement included a term providing for the right to set off.

On May 29, 1998, OMT sent Tosco a fax confirming the details of an oral agreement they had previously reached, which stated:

Payment shall be made in U.S. dollars via telegraphic transfer to sellers bank a/c (without any withholding, deduction, set-off or counterclaims) within ten (3)[sic] calendar days after receipt of invoice.

(Ertle July Aff. Ex. A at p. 1.) On June 2, 1998, Tosco sent OMT a “Purchase Contract Reply” informing OMT that it was in agreement with OMT, “subject to the following modifications.” (*Id.* Ex. D at p. 1.) As to payment, Tosco's reply stated:

PAYMENT SHALL BE MADE WITHOUT OFFSET OR DEDUCTION, IN U.S. DOLLARS IN IMMEDIATELY AVAILABLE FUNDS VIA WIRE TRANSFER INTO SELLER'S ACCOUNT ... 3 BUSINESS DAYS FROM INVOICE DATE, UPON RECEIPT OF INVOICE AND SUPPORTING DOCUMENTS.

(*Id.* at p. 2.) Under the heading “other terms and conditions,” it further stated:

WE KINDLY REQUEST THAT TOSCO REFINING COMPANY'S GENERAL TERMS AND CONDITIONS AND MARINE PROVISIONS DATED MARCH 01, 1998 IN CONJUNCTION WITH INCOTERMS, WHERE NOT IN CONFLICT WITH OTHER SPECIFIC TERMS AND CONDITIONS, SERVE AS A BASIS FOR OUR BUSINESS WITH ONE ANOTHER.

(*Id.* at p. 3.)

Less than two hours later, however, Tosco sent a

second “Purchase Contract Reply” to OMT, which stated “THIS FAX REPLACES OUR RESPONSE ORIGINALLY SENT TO YOU ON JUNE 02, 1998.” (*Id.* Ex. E at p. 1.) This reply deleted the payment clause entirely, and replaced it with one that did not include a “without offset or deduction” provision. (*See id.*) It again requested that Tosco's General Terms and Conditions apply; these include a term providing for set off under certain specified circumstances.<sup>FN4</sup> OMT made no objection.

FN4. Again, the Terms and Conditions were not sent to OMT along with the fax.

\*3 OMT delivered approximately 33,000 barrels of MTBE to Tosco on or about June 6, 1998 and thereafter submitted an invoice to Tosco for \$957,999. (Ertle July Aff. ¶ 5.) On June 15, 1998, it received a payment from Tosco of \$370,507.54, which represented the amount due under the June contract less the \$587,481.46 OMT allegedly owed Bayway for taxes under the February contract.<sup>FN5</sup> (Pls.' 56.1 St. ¶ 14.) Tosco informed OMT on June 16 that “full payment was not made by us due to taxes owed to us [under the February contract].” (Ertle July Aff. Ex. I.)

FN5. This figure includes the \$577,526.97 tax liability plus interest thereon of \$9,954.49. (*Id.*)

### 3. The Litigation

Tosco and Bayway subsequently filed suit in this Court seeking a declaratory judgment that Tosco was entitled to such an offset. In the alternative, the complaint seeks a judgment in favor of Bayway against OMT for the taxes allegedly owed. (Compl.¶ 1.)<sup>FN6</sup> OMT answered and counter-claimed for judgment against plaintiffs for the amount wrongfully withheld by Tosco.

FN6. The amounts originally sought by the parties have since been reduced. On July 22, 1998, Bayway refunded \$113,486.85 to OMT after it determined that no state sales

tax was incurred on the sale. (Ertle Aff. ¶ 25.) Accordingly, plaintiffs now seek only \$464,035.12 (the \$577,520 tax figure originally calculated minus the \$113,486.85 refunded), plus interest thereon (*see* Pls.' Notice of Cross-Motion at 1). Defendant likewise seeks only \$474,004.61 (the \$587,491.46 that Tosco withheld minus the \$113,486.85 refund), plus interest. (*See* Ertle Oct. Aff. ¶ 25.)

## II. DISCUSSION

### A. Legal Standard

Summary judgment should be ordered when the court determines that “there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c). A genuine issue for trial does not exist unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict in its favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). In resolving the motion, all reasonable inferences are drawn, and all ambiguities resolved, in favor of the non-moving party. *Id.* at 255; *Wernick v. Federal Reserve Bank of N.Y.*, 91 F.3d 379, 382 (2d Cir.1996). “In a contract dispute, a motion for summary judgment may be granted if the agreement's language is unambiguous and conveys a definite meaning.” *Suzy Phillips Originals, Inc. v. Coville, Inc.*, 939 F.Supp. 1012, 1016 (E.D.N.Y.1996), *aff'd*, 125 F.3d 845 (2d Cir.1997); *see Sayers v. Rochester Tel. Corp.*, 7 F.3d 1091, 1094 (2d Cir.1993).

### B. OMT's Liability To Bayway for Taxes Under the February Contract

OMT disputes that it owes Bayway for any taxes incurred in connection with the February sale. It argues that the term in Bayway's General Terms and Conditions obligating OMT as buyer to pay excise

and sales taxes did not become part of the parties' contract because it materially altered the oral agreement they had previously reached. The Court disagrees.

As an initial matter, the fact that Bayway's fax sought to incorporate its Terms and Conditions by reference, rather than including them in full, does not preclude a finding that they became part of the parties' agreement. It is well established that parties may incorporate terms into their agreement by reference to extrinsic writings. See *Ronan Assocs., Inc. v. Local 94-94A-94B, Int'l Union of Operating Eng'rs*, 24 F.3d 447, 449 (2d Cir.1994); *American Dredging Co. v. Plaza Petroleum Inc.*, 799 F.Supp. 1335, 1338 (E.D. N.Y.1992), *vacated in part on other grounds*, 845 F.Supp. 91 (E.D.N.Y.1993). As long as "the document to be incorporated [is] referred to and described in the contract so that the referenced document may be identified beyond doubt," it can become part of the contract. *American Dredging*, 799 F.Supp. at 1338. Furthermore, OMT's alleged ignorance of the term at issue is not grounds to free it from any obligation to which it is otherwise determined to be bound. Bayway's Terms and Conditions were available for OMT to review; any lack of knowledge on its part resulted from its failure to do so. See *Level Export Corp. v. Wolz, Aiken & Co.*, 305 N.Y. 82, 87 (1953) (where contract incorporated by reference the provisions of a "Standard Cotton Textile Salesnote," which included term requiring arbitration of disputes, buyer could not avoid arbitration by claiming that he was unaware of term and never read the incorporated document).

\*4 Accordingly, the only issue here is whether or not the tax indemnity term, as OMT refers to it, became a part of the February contract. This question must be determined by reference to N.Y. U.C.C. § 2-207, which addresses situations such as this involving additional or different terms in an acceptance or confirmation. That section provides:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent

within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

- (a) the offer expressly limits acceptance to the terms of the offer;
- (b) they materially alter it; or
- (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

N.Y. U.C.C. § 2-207 (McKinney's 1993).

First, it is clear that Bayway's confirmation constituted an acceptance pursuant to § 2-207(1); although it included additional terms, it was not "expressly made conditional on assent to the additional or different terms." *Id.*; see *AEL Indus. Inc. v. Loral Fairchild Corp.*, 882 F.Supp. 1477, 1485 (E.D.Pa.1995) (under N.Y. law, response will constitute acceptance unless it expressly makes acceptance conditional on assent to additional or different terms); *St. Charles Cable TV, Inc. v. Eagle Comtronics, Inc.*, 687 F.Supp. 820, 827 (S.D.N.Y.1988) (same), *aff'd*, 895 F.2d 1410 (2d Cir.1989). Second, it is undisputed that both OMT and Bayway are "merchants" as that term is defined in the U.C.C. See U.C.C. § 2-104. Accordingly, the additional terms included in Bayway's response became part of the contract unless one of the three exceptions in § 2-207(2) applies; OMT relies on the material alteration exception of § 2-207(2)(b).

The burden is on the party objecting to the inclusion of additional terms to show that they "materially alter" the contract. See *Comark Merchandising Inc. v. Highland Group Inc.*, 932 F.2d 1196, 1201 (7th Cir.1991); *KIC Chems., Inc. v.*

*ADCO Chem. Co.*, 1996 WL 122420, at \*4 (S.D.N.Y. March 20, 1996); *In re Chateaugay Corp.*, 162 B.R. 949, 956 (Bankr.S.D.N.Y.1994). “Material” alterations are those that “would result in surprise or hardship if incorporated without express awareness by the other party.” U.C.C. § 2-207 cmt. 4; see *KIC Chems.*, 1996 WL 122420 at \*4; *St. Charles Cable*, 687 F.Supp. at 827.<sup>FN7</sup> Surprise “consists of both a subjective and objective element; what did the assenting party know and what should it have known.” *In re Chateaugay*, 162 B.R. at 957; see also *Union Carbide Corp. v. Oscar Mayer Foods Corp.*, 947 F.2d 1333, 1336 (7th Cir.1991) (Posner, J.) (“An alteration is material if consent to it cannot be presumed.... What is expectable, hence unsurprising, is okay; what is unexpected, hence surprising, is not.”); *KIC Chems.*, 1996 WL 122420 at \*3. Custom and practice in the industry, as well as the course of dealing between the parties, are therefore relevant to the surprise issue because, where it is customary for contracts to include a certain term, it would be difficult for a party to show surprise. See *Suzy Phillips*, 939 F.Supp. at 1017-19 (noting that cmt. 4’s examples of material alteration all have in common that they “significantly alter standard industry practice and thus could surprise a buyer who would not have expected to be operating under such terms”); *KIC Chems.*, 1996 WL 122420 at \*4.

FN7. Examples of clauses which would normally materially alter a contract include, *e.g.*, those negating standard warranties of merchantability or fitness for a particular purpose. On the other hand, examples of clauses involving no unreasonable surprise include, *e.g.*, those providing for interest on overdue invoices, or those setting forth the seller’s exemption due to supervening causes. See U.C.C. § 2-207, cmts. 4-5.

\*5 The Court finds that OMT has not met its burden of showing surprise or hardship. OMT makes the conclusory claim that it was “objectively surprised

to learn of the existence of the tax indemnity term well after delivery,” arguing that, if it had believed before taking delivery that it had become contractually bound to pay almost one quarter more than the contract price, it would have walked away from the deal. (Def.’s Mem. at 9.) It also claims that the parties had no prior course of dealing that would have made OMT aware of such a term (Ertle Oct. Aff. ¶ 11); it does not, however, submit any evidence of industry custom.

Bayway, on the other hand, has submitted affidavits from petroleum industry experts indicating that it is the custom of the industry for the buyer to reimburse the seller for all excise and sale taxes incurred by the seller as a result of the sale (see Purvis Aff. ¶ 6; Raven Aff. ¶ 10), and that Bayway’s particular term requiring such reimbursement reflects the general commercial practice in the industry. (Purvis Aff. ¶ 8; Raven Aff. ¶ 10.) Furthermore, these statements are supported by the General Terms and Conditions of other buyers and sellers of MTBE-including CITGO, Chevron, Texaco, and Conoco-which include similar terms requiring the buyer to reimburse the seller for excise and sales taxes. (See Basil Oct. Aff. ¶ 8 & Ex. A.) Plaintiffs have also submitted affidavits from independent industry experts stating that it is customary for petroleum buyers to obtain a certificate of exemption from applicable excise and sales taxes. (See Purvis Aff. ¶ 5; Raven Aff. ¶ 13.) OMT must be presumed to be aware of industry practice; in light of the evidence submitted by plaintiffs, the Court finds its claim of surprise to be unpersuasive. See *Suzy Phillips*, 939 F.Supp. at 1018-19 (defendant’s evidence that inclusion of limitation of damages clause was standard trade practice contributed to finding that it did not materially alter contract).

Furthermore, to the extent that hardship qualifies as a separate ground for finding material alteration, *but see Union Carbide*, 947 F.2d at 1336, OMT has failed to satisfy its burden of showing that payment of the excise taxes would subject it to such hardship. It simply asserts that, as a small trading com-

pany whose business depends on the slight profit margin between buying and selling petrochemical products, it would be an extreme hardship to have to pay the taxes at issue. (See *Ertle Oct. Aff.* ¶ 13.) Plaintiffs, however, have submitted evidence that OMT could have exempted itself from the imposition of any excise tax simply by filing a certificate of exemption pursuant to 26 U.S.C. § 4101 on Form 637. (See *Raven Aff.* ¶ 13; *Penacho Aff.* ¶ 3.) Apparently, such “637 licenses” are well-known and widely used in the industry (*see id.*); in fact, “traders [of MTBE] are assumed to possess documentation that is needed to exempt their transaction from applicable excise and sales taxes.” (*Purvis Aff.* ¶ 5.) Moreover, it appears that OMT may still obtain a refund of the excise tax by qualifying for a “First Payers Exemption.” (See 26 U.S.C. § 4081(e); *Penacho Aff.* ¶¶ 4-8 and Ex. 8; *Raven Aff.* ¶¶ 14-16.) Bayway has indicated its willingness to assist OMT in obtaining such a refund. (See *Penacho Aff.* ¶¶ 5-6.) OMT therefore cannot persuasively argue that it would suffer substantial hardship were it required to pay the taxes at issue.

\*6 The cases cited by OMT do not alter this conclusion. In *Union Carbide*, the court did not conclude that a contract provision requiring the buyer to pay sales and other taxes on a single purchase would materially alter the contract. Rather, it found that a term, if interpreted (incorrectly, in the court's view) as plaintiff urged, to impose upon the buyer an “open-ended liability to pay back taxes, interest, and even fraud penalties” many years after taking delivery, would work a material alteration of the contract. 947 F.2d at 1334-36. It implied that a provision like the one at issue here would not be a material alteration, noting that “[t]o assume responsibility for taxes shown on an individual invoice is quite different from assuming an open-ended, indeed incalculable liability for back taxes.” *Id.* at 1337. Similarly, the court in *Advanced Mobilehome Sys. of Tampa, Inc. v. Alumax Fabricated Prods. Inc.*, 666 So.2d 166 (Fl.App.1995), while finding that a provision imposing liability on the buyer for all sales taxes did materially alter the contract,

noted that “[a]ssuming responsibility for the tax on one invoice is quite different from assuming an open-ended liability for back taxes.” *Id.* at 169. As in *Union Carbide*, the provision at issue would have required the buyer to pay several years of back taxes due to the seller's mistake in calculating tax liability. Such is not the case here. FN8

FN8. The other cases cited by OMT are inapposite, as they involve broad indemnity provisions which are not analogous to the tax term at issue here. See, e.g., *Charles J. King, Inc. v. Barge “LM-10”*, 518 F.Supp. 1117 (S.D.N.Y.1981) (additional term in confirmation requiring seller to “indemnify Buyer against any and all actions, claims, damages, liabilities and expenses, including attorneys' fees, for any personal injury or property damage” was a material alteration of parties' agreement).

The foregoing compels the conclusion that the additional tax term did not work a material alteration of the parties' agreement. It is therefore incorporated into the February contract, and OMT is obligated to reimburse Bayway for the taxes incurred.

Finally, OMT's argument that Bayway's cross-motion for summary judgment should be denied because Bayway has failed to establish that it actually incurred such tax liability is also unavailing. It is apparent, as a matter of law, that the sale of MTBE to OMT was subject to federal excise tax at the rate of 18.4 cents per gallon. (See 26 U.S.C. § 4081; *see also Raven Aff.* ¶¶ 11-13). Furthermore, Bayway has submitted an affidavit stating that it paid \$464,035.12 in excise tax with respect to this sale. (*Penacho Aff.* ¶¶ 2-3.) OMT has submitted no evidence that contradicts these facts. Although OMT raises the possibility that a tax may not have been imposed on this sale if there was a “prior taxable removal” under 26 U.S.C. § 4081(a), Bayway has submitted evidence that there was no such prior taxable removal. (See *Basil Oct. Aff.* 15 & Exs. G, H.) Bayway's cross-motion for summary judgment is therefore granted.

### C. Tosco's Alleged Right to Set Off Under the June Contract

OMT moves for partial summary judgment on its counterclaim, arguing that Tosco had no right to set off the amount of the unpaid excise tax because the term purporting to provide for such a right never became part of the parties' contract.<sup>FN9</sup> Tosco argues, without legal support, that even though its first reply provided for payment without offset or deduction, its second reply—which deleted this clause—is “controlling.” The Court disagrees.

**FN9.** Alternatively, OMT argues that even if this term did become part of the contract, it did not apply in this case. The Court finds it unnecessary to reach this issue.

\*7 The parties do not dispute that they reached an agreement as to this sale on or before June 2, 1998. The Court finds as a matter of law that this agreement did not include a term providing a right to set off. OMT's May 29, 1998 confirmation fax stated that “payment shall be made ... without any withholding, deduction, set-off or counterclaims.” (Ertle July Aff. Ex. A.) Tosco's first reply, which stated that it was “in agreement subject to the following modifications,” likewise provided that “payment shall be made without offset or deduction.” (*Id.* Ex. D.) As discussed above, the inclusion of additional or different terms in Tosco's reply did not preclude it from constituting an acceptance or confirmation because it was not expressly made conditional on assent to those additional or different terms. *See U.C.C. § 2-207(1)*.

At this point, then, the parties had an enforceable agreement, which provided that payment was to be made without set off. The Court finds that Tosco's attempt to “replace” its first reply with one purporting to delete this provision was ineffective. First, Tosco could not unilaterally alter the terms of the parties' agreement by sending a subsequent fax purporting to delete an agreed-upon provision. *See Be-sicorp Group, Inc. v. Thermo Electron Corp.*, 981 F.Supp. 86, 98 (N.D.N.Y.1997) (once agreement

has been reached, § 2-207 does not operate to make additional terms proposed unilaterally by one party in later writing part of the agreement); 2 Ronald A. Anderson, *Uniform Commercial Code* § 2-209:17, at 323-24 (3d ed.1982). Although the parties could, of course, subsequently agree to modify the terms of their contract, *see U.C.C. § 2-209*, there is no evidence that such an agreement was ever reached. Tosco provides no support for its conclusory assertion that its second reply is “controlling.”

Second, even if the Court were to ignore Tosco's first reply and focus on the one that purported to replace it, the parties' contract still would not include a provision providing for set off. This is because such a different (*i.e.* conflicting) term could not become part of the contract through *U.C.C. § 2-207(2)*; that provision only applies to “additional” terms. *See 1 White & Summers, Uniform Commercial Code* § 1-3, at 10-11 (4th ed. 1995) (“[T]he text of 2-207(2) only refers to ‘additional’ terms.... it would be more than a little difficult to view a different term in an acceptance as a proposal for addition to the contract where the offer already includes a contrary term.”).

The Court therefore finds that the June contract did not provide Tosco with the right to offset the amount owed to Bayway under the February contract, and Tosco therefore did not act within its rights in doing so. Tosco's cross-motion for summary judgment on its declaratory judgment claim is therefore denied, and judgment is entered in favor of OMT on this claim.

### CONCLUSION

Defendant's motion for summary judgment is granted and the Clerk is directed to enter final judgment in favor of defendant OMT against plaintiff Tosco Corporation in the amount of \$474,004.61, plus interest at 9% per annum on \$587,491.46 from June 15, 1998 to July 22, 1998, and interest at 9% per annum on \$474,004.61 from July 22, 1998 to the date of entry of judgment.

Not Reported in F.Supp.2d, 1999 WL 328342 (S.D.N.Y.), 40 UCC Rep.Serv.2d 94  
(Cite as: 1999 WL 328342 (S.D.N.Y.))

\*8 Plaintiffs' cross-motion for summary judgment is granted to the extent that the Clerk is directed to enter final judgment in favor of plaintiff Bayway and against defendant OMT in the amount of \$464,035.12, plus interest from March 27, 1998, and otherwise denied.

The foregoing having disposed of the substance of the parties' claims, all other claims are dismissed as moot.

SO ORDERED.

S.D.N.Y., 1999.

Tosco Corp. v. Oxygenated Marketing and Trading  
A.G.

Not Reported in F.Supp.2d, 1999 WL 328342  
(S.D.N.Y.), 40 UCC Rep.Serv.2d 94

END OF DOCUMENT

# **EXHIBIT B**

Not Reported in F.Supp.2d, 2007 WL 4373980 (N.D.Ga.), 2008-1 Trade Cases P 76,005  
(Cite as: 2007 WL 4373980 (N.D.Ga.))

**C**

Only the Westlaw citation is currently available.

United States District Court,  
N.D. Georgia,  
Rome Division.  
Benny and Wanda JACOBS, on behalf of a class  
similarly situated, Plaintiffs,  
v.  
TEMPUR-PEDIC INTERNATIONAL, INC., and  
Tempur-Pedic North America, Inc., Defendants.  
**Civil Action No. 4:07-CV-02-RLV.**

Dec. 11, 2007.

Cameron Cohick, Donna M. Donlon, Phillip D. Bartz, Stephen M. Lastelic, McKenna Long & Aldridge, Washington, DC, Craig Gordon Harley, James M. Wilson, Jr., Martin D. Chitwood, Michael Ryan Peacock, Chitwood Harley Harnes, Atlanta, GA, Robert Kirtley Finnell, The Finnell Firm, Rome, GA, for Plaintiffs.

Brandon L. Bigelow, William N. Berkowitz, Bingham McCutchen, LLP, Boston, MA, Jesse Anderson Davis, Brinson Askew Berry Siegler Richardson & Davis, Rome, GA, for Defendants.

*ORDER*

ROBERT L. VINING, JR., Senior District Judge.

\*1 This is an antitrust action, in which the plaintiffs allege that the defendants are violating section 1 of the Sherman Act, 15 U.S.C. § 1. Pending before the court are the defendants' motion to dismiss Counts I and III of the complaint [Doc. No. 43], the plaintiffs' motion to compel discovery [Doc. No. 44], the defendants' motion for protective order [Doc. No. 46], and the defendants' motion for leave to file a sur-reply brief in opposition to the plaintiffs' motion to compel [Doc. No. 56].

I. FACTUAL BACKGROUND <sup>FN1</sup>

FN1. On a motion to dismiss, the court accepts the allegations of the complaint as being true and views them in a light most favorable to the plaintiff. *Castro v. Secretary of Homeland Security*, 472 F.3d 1334 (11th Cir.2006). Consequently, the facts set out are drawn from the plaintiffs' complaint.

In the early 1970's the National Aeronautic and Space Administration developed a visco-elastic memory foam and later released this technology to the public, Tempur-Pedic International, Inc., along with its parents and subsidiaries (hereinafter "TPX") <sup>FN2</sup> further developed this foam technology and introduced its own version of the foam in 1991 for home and medical use. Today, TPX manufactures and sells a variety of products made from this foam, including premium foam mattresses.

FN2. The defendants note that even though they are separate legal entities, the plaintiffs refer to them in the complaint as the single entity "TPX." However, they, and the court, will accept the characterization of the defendants as a single entity for purposes of the pending motion.

Tempur-Pedic mattresses are sold at "full prices" because TPX requires distributors to agree to adhere to a minimum resale price set by TPX and not to discount the price. In addition to distributing its mattresses through third-party distributors, TPX also sells mattresses directly to the public at the same prices it has agreed with its distributors to charge.

On November 7, 2005, the plaintiffs purchased a Tempur-Pedic mattress from a TPX distributor in Rome, Georgia, paying \$2793.97, plus tax, for the mattress. The plaintiffs allege that this price is artificially inflated because of agreements entered into

between TPX and its distributors that allow TPX to set the prices at which the distributors must sell Tempur-Pedic mattresses. Consistent with these resale pricing agreements, Tempur-Pedic distributors often advertise that they sell at “lowest factory authorized pricing” or at the “Lowest Possible Price.”

According to the complaint, these agreements between TPX and its distributors result in there being virtually no price competition among the retailers and dealers in the sale of Tempur-Pedic mattresses. Consistent with these minimum resale pricing agreements, the actual retail sales prices of Tempur-Pedic mattresses vary little nationally, whether sold over the internet or through brick-and-mortar retailers.

## II. LEGAL DISCUSSION

By previous order, this court dismissed Counts II and III of the plaintiffs' complaint to the extent that they purported to state causes of action for horizontal price-fixing. The defendants now seek dismissal of Counts I and III to the extent that they purport to state causes of action for vertical price-fixing. The basis of the defendants' motion is the recent case of *Leegin Creative Leather Products, Inc. v. PSKS*, --- U.S. ---, 127 S.Ct. 2705 (2007), in which the Supreme Court held that vertical minimum resale price agreements were no longer per se unlawful but had to be analyzed under a rule of reason standard. The plaintiffs counter that even though Count I may have alleged a per se violation, the complaint as a whole can still be read to allege an antitrust violation even under the rule of reason.  
 FN3

FN3. “Indeed, Counts I and III are based on the same illegal competitive conduct of TEMPUR-Pedic, *i.e.*, unlawful vertical pricefixing. Plaintiffs included two separate counts in the Complaint because TEMPUR-Pedic's illegal conduct implicated two potentially applicable legal standards. Count III adds explicit geographic and

product market allegations-allegations which only potentially became relevant after the Supreme Court overruled the per se standard in *Leegin*.” Plaintiffs' Opposition to Defendants' Motion to Dismiss Counts I & III of Plaintiffs Complaint at 3.

\*2 Motions to dismiss are generally disfavored since they short circuit a plaintiff's case at a very early stage of the litigation. However, they also serve the useful function of ending non-meritorious cases before a defendant is subjected to possibly extensive discovery and litigation costs. This is especially true in anti-trust litigation, and even more so when the anti-trust case seeks class action status. The Supreme Court recognized this tension in another case decided just this year:

Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery ... but quite another to forget that proceeding to antitrust discovery can be expensive. As we indicated over 20 years ago in *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528, n. 17, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), “a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.” See also *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (C.A. 7 1984) (“[T]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint”)....

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through “careful case management” ..., given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. See, *e.g.*, *Easterbrook, Discovery as Abuse*, 69 B.U.L.Rev. 635, 638 (1989) (“Judges can do little about impositional discov-

ery when parties control the legal claims to be presented and conduct the discovery themselves”).... Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no “ ‘reasonably founded hope that the [discovery] process will reveal relevant evidence’ “ to support a § 1 claim. *Dura [Pharmaceuticals, Inc. v. Broudo]*, 544 U.S., at 347, 125 S.Ct. 1627 (quoting *Blue Chip Stamps [Manor Drug Stores]*, *supra*, [421 U.S.] at 741, 95 S.Ct. 1917; alteration in *Dura* ).

*Bell Atlantic Corp. v. Twombly*, --- U.S. ----, ----, 127 S.Ct. 1955, 1967 (2007).

In *Twombly*, the Supreme Court specifically held that to survive a motion to dismiss a plaintiff had to allege sufficient facts (taken as true) that would show “plausible grounds” from which to infer an anti-trust violation. It is with *Twombly* firmly in mind that the court considers the defendants' motion to dismiss in the instant case.

The plaintiffs are correct in stating that *Leegin* changed the standard for deciding a minimum resale price claim but did not change the standard for pleading a rule of reason violation. However, *Twombly* emphasized that a plaintiff's obligation to plead the plausible ground showing entitlement to relief “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, --- U.S. at ---, 127 S.Ct. at 1965.

\*3 In *Spanish Broadcasting System of Florida, Inc. v. Clear Channel Communications, Inc.*, 376 F.3d 1065, 1071 (11th Cir.2004) (footnote omitted), the court stated the requirements for proving a rule of reason violation:

Under Eleventh Circuit case, alleged Section One agreements analyzed under the Rule of Reason require a plaintiff “to prove (1) the anticompetitive effect of the defendant's conduct on the

relevant market, and (2) that the defendant's conduct has no pro-competitive benefit or justification.

To prove an anticompetitive effect on the market, “the plaintiff may either prove that the defendants' behavior had an ‘actual detrimental effect’ on competition, or that the behavior had ‘the potential for genuine adverse effects on competition. In order to prove the latter, the plaintiff must define the relevant market and establish that the defendants possessed power in that market.” *Levine v. Central Florida Medical Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir.1996), quoting *FTC v. Indiana Federation of Dentists*, 476 U.S. 476 U.S. 447, 460-61, 106 S.Ct. 2009, 2019 (1986). Thus, a plaintiff must allege either “actual harm to competition” or “potential for genuine adverse effects on competition.” *Id.* It is only the second method of alleging anticompetitive effect that the plaintiff must plead the relevant market.

With respect to “actual harm,” the plaintiffs allege in their complaint that the prices that they and all putative class members have paid for the purchase of Tempur-Pedic mattresses “have been artificially elevated due to the conduct of TPX and its distributors in eliminating price competition for TPX mattresses.” Complaint at ¶ 43. The plaintiffs also allege that the defendants violated section 1 “by eliminating price competition in the sales of Tempur-Pedic mattresses.” Complaint at ¶ 47. Additionally, the plaintiffs allege, “As a result of the unlawful agreements identified herein, Tempur-Pedic has harmed the Plaintiffs and all putative class members by overcharging substantially for Tempur-Pedic mattresses.” Complaint at ¶ 49.

These allegations are precisely the kind of “labels and conclusions” and “formulaic recitation of the elements of a cause of action” that the Supreme Court condemned in *Twombly*. After carefully analyzing the *factual* allegations in the plaintiffs' complaint, the court concludes that they are insufficient to make a plausible showing of actual harm. Therefore, the court proceeds to the alternative method of

alleging anticompetitive conduct.

To successfully allege “potential” anticompetitive effects, a plaintiff must allege a relevant market, since “competition occurs only in a market.” *All Care Nursing Service, Inc. v. High Tech Staffing Services, Inc.*, 135 F.3d 740, 749 (11th Cir.1998). The Eleventh Circuit has cogently stated: “On a very simplistic level, antitrust law is concerned with abuses of power by private actors in the marketplace. Therefore, before we can reach the larger question of whether [a defendant] violated any of the antitrust laws, we must confront the threshold problem of defining the relevant market. Markets are defined in terms of two separate dimensions: products and geography.” *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1572 (11th Cir.1991).

\*4 A “market” is any grouping of sales whose sellers, if unified by a monopolist or a hypothetical cartel, would have market power in dealing with any group of buyers. See Phillip Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 518.1b, at 534 (Supp.1993) .... If the sales of other producers substantially constrain the price-increasing ability of the monopolist or hypothetical cartel, these other producers must be included in the market. Stated differently, a “market” is the group of sellers or producers who have the “actual or potential ability to deprive each other of significant levels of business.” *Thurman Indus.*, 875 F.2d at 1374. Market definition is crucial. Without a definition of the relevant market, it is impossible to determine market share.

*Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421 (11th Cir.1995).

Not surprisingly, the plaintiffs and defendants disagree on what constitutes the “relevant market” in this case—both as to the product and the geographical area.

The plaintiffs contend that the relevant geographical market is the entire United States; the defendants

counter that a much narrowed geographical market is appropriate since the mattress is substantially local in nature. The court need not resolve this issue because the court concludes that the plaintiffs have failed to allege facts regarding the appropriate product market.

The plaintiffs urge the court to conclude that the relevant product market is the “visco-elastic foam mattress market.” The defendants argue that the relevant product market is simply the “mattress market.” The court agrees with the defendants. The court's decision is counseled by *United States v. E.I. du Pont de Nemours and Co.*, 351 U.S. 377, 396-97 76 S.Ct. 994, 1008 (1956), wherein the Supreme Court stated, “In determining the market under the Sherman Act, it is the use or uses to which the commodity is put that control.”

In *du Pont*, the Court held that the relevant product was not simply cellophane (as urged by the United States) but, instead, was “flexible packaging materials,” which also included glassine, foil, and paper. “We conclude that cellophane's interchangeability with the other materials mentioned suffices to make it a part of this flexible packaging material market.” *Id.* at 400, 76 S.Ct. at 1010. Such interchangeability is key. See, e.g., *Maris Distributing Co. v. Anheuser-Busch, Inc.*, 302 F.2d 1207 (11th Cir.2002) (“beer market” is not interchangeable with “beer distributorship market”).

The defendants' visco-elastic foam mattresses may be very different from innerspring mattresses, but they are still a product on which people sleep. Aluminum foil is quite different from cellophane, but both are flexible packaging materials. The court concludes that the relevant market is the mattress market, and the plaintiffs have not alleged that the defendants' actions have had an effect on *that* market.

For the foregoing reasons, the court concludes that the plaintiffs' complaint does not allege facts that would show plausible grounds from which to infer an anti-trust violation. Consequently, the defend-

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(Cite as: **2007 WL 4373980 (N.D.Ga.)**)

ants' motion to dismiss Counts I and III [Doc. No. 43] is GRANTED. The other pending motions are DISMISSED as moot. Since the court has previously dismissed Count II, the clerk will enter judgment for the defendants, dismissing the plaintiffs' complaint with prejudice.

**\*5** SO ORDERED.

N.D.Ga.,2007.

Jacobs v. Tempur-Pedic Intern., Inc.

Not Reported in F.Supp.2d, 2007 WL 4373980  
(N.D.Ga.), 2008-1 Trade Cases P 76,005

END OF DOCUMENT

# **EXHIBIT C**

Not Reported in F.Supp.2d, 2009 WL 936675 (E.D.N.Y.)  
(Cite as: 2009 WL 936675 (E.D.N.Y.))



Only the Westlaw citation is currently available.

United States District Court,  
E.D. New York.  
WORLDHOMECENTER.COM, INC., Plaintiff,  
v.  
L.D. KICHLER CO., INC., d/b/a Kichler Lighting,  
Defendant.  
**No. 08-CV-020 (DRH)(ETB).**

March 31, 2009.

Lawrence R. Lonergan, P.C., by: [Lawrence R. Lonergan, Esq.](#), New York, NY, for the Plaintiff.

Calfee, Halter & Griswold LLP, by: [John J. Eklund, Esq.](#), [David A. Ruiz, Esq.](#), Cleveland, OH, for the Defendant.

#### MEMORANDUM AND ORDER

HURLEY, Senior District Judge.

\*1 Defendant L.D. Kichler Co., Inc. d/b/a Kichler Lighting (“Defendant” or “Kichler”) moves for judgment on the pleadings pursuant to Federal Rule of Civil Procedure (“Rule”) 12(c). In its complaint, Worldhomecenter.com, Inc. (“Plaintiff”) seeks damages for Kichler's alleged violation of [New York General Business Law \(“GBL”\) § 369-a](#). For the reasons that follow, Defendant's motion is granted.

#### *Background*

The following summary of facts is taken from the Complaint.

Plaintiff is an online retailer of home improvement products, selling to and servicing customers exclusively through its web site, known as “HomeCenter.com.” Defendant manufactures and

sells lighting products exclusively to its authorized dealers.

Plaintiff purchases Kichler products for value from both exclusive and independent distributors for on-line resale to Plaintiff's customers. (Compl.¶ 8.) Because of the relatively low overhead and maintenance associated with on-line retailing, and because Plaintiff purchases a high volume of products from distributors, Plaintiff alleges that it is able to sell genuine Kichler products to consumers at sharp discounts compared to identical products offered for sale by traditional display room retailers. (*Id.*)

Plaintiff has resold Kichler products over the Internet for several years without incident or complaint. On February 1, 2005, however, Defendant initiated an Internet Minimum Advertised Price (“IMAP”) policy that is the basis for the present litigation. That policy provides in pertinent part:

Kichler Lighting (“Kichler”) has unilaterally adopted this Policy applicable to all Kichler customers effective February 1, 2005 with respect to the customer's advertising over the Internet of products supplied by Kichler.

1. Each Kichler customer remains free to establish its own resale prices. However, a customer may not A) advertise or otherwise promote Kichler Products over the Internet at a net price less than the Internet Minimum Advertised Price (“IMAP”) Kichler establishes from time to time or B) sell Kichler Products to any other person who advertises or otherwise promotes Kichler products over the Internet at a net price less than the IMAP Kichler establishes from time to time. The initial IMAP Kichler has established is 1.8 times Distributor net price.

2. If a customer violates the policy, Kichler will withdraw from the customer all rights to sell, display or list Kichler Products on the World Wide Web for a period of six (6) months, and the cus-

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tomers will cease all sales, displays and listings within (30) days from the date of Kichler's notice to that effect.

(Compl. ¶ 13 & Ex. A.). Plaintiff received Kichler's "THIRD AND FINAL NOTICE" advising its customers of potential penalties should any distributor fail to abide the IMAP policy. The notice provides as follows:

Dear Valued Customer:

Once again we are writing to inform you of a new policy from Kichler that will become *effective February 1, 2005*. We are instituting an Internet Minimum Advertised Price (I.M.A.P.) policy to help our dealers compete with companies that advertise our products at reduced prices on the web.

\*2 Due to the growth of the Internet channel of commerce, we are seeing more and more of our distributors losing sales to these low price Internet web sites. Our showrooms and electrical distributors make Kichler what it is today. We recognize the substantial financial investment you have made on our product line. With that investment in mind, it's just not possible to compete with the prices now being advertised on some Internet sites. Therefore we have created this policy to help protect our distributors, allow you to be competitive on the web, and to maintain the integrity of the Kichler line.

We'd like to reiterate one more time the responsibilities of our distributors that supply 3rd party websites. You, the dealer, must only supply web businesses that comply with Kichler's I.M.A.P. policy. If a distributor is found supplying a web site that does not comply with the policy, that distributor will suffer the consequences that are outlined in the policy. We are very serious about the enforcement of this policy, and would like to avoid any surprises.

(*Id.* ¶ 13 & Ex. B.)

This notice, together with the IMAP policy, serve

as the basis for the present suit. According to the Complaint, "In keeping with its IMAP program, Kichler has refused to ship and fill orders submitted by Plaintiff unless and until Plaintiff complies with the IMAP policy" and that refusal is "based upon Plaintiff's refusal to agree to sell Kichler's products at fixed prices (*Id.* ¶ 14, 15.) Plaintiff further contends that "Kichler's IMAP policy sets minimum resale prices and constitutes vertical price fixing." (*Id.* at ¶ 16.)

Plaintiff filed the present Complaint in New York Supreme Court, Nassau County, and it was thereafter removed to this Court on January 3, 2008. The sole cause of action alleged in the complaint is that Defendant's IMAP policy violates § 369-a of the GBL. Defendant moves to dismiss arguing that Plaintiff is not entitled to damages under § 369-a because it provides no private right of action and Plaintiff does not have standing to sue under the statute.

#### ***Rule 12(c) Standard***

A motion for judgment on the pleadings pursuant to Rule 12(c) is evaluated under the same standard as a Rule 12(b)(6) motion to dismiss for failure to state a claim. *Nicholas v. Goord*, 430 F.3d 652, 658 n. 8 (2d Cir.2005). In *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007), the Supreme Court clarified the standard applicable in evaluating a motion to dismiss under Rule 12(b)(6) and disavowed the well-known statement in *Conley v. Gibson*, 355 U.S. 41 (1957) that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 45-46. Instead, to survive a motion to dismiss under *Twombly*, a plaintiff must allege "only enough facts to state a claim to relief that is plausible on its face." 127 S.Ct. at 1974.

\*3 While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual

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allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

*Id.* at 1964-65 (citations and internal quotation marks omitted).

The Second Circuit has stated that *Twombly* does not require a universally heightened standard of fact pleading, but “instead requir[es] a flexible ‘plausibility standard,’ which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.” *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir.2007). In other words, *Twombly* “ ‘require[s] enough facts to ‘nudge [plaintiffs]’ claims across the line from conceivable to plausible.’ “ *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir.2007) (quoting *Twombly*, 127 S.Ct. at 1974). Although *Twombly* did not make clear whether the plausibility standard applies beyond the antitrust context, the Second Circuit has “declined to read *Twombly*’s flexible ‘plausibility standard’ as relating only to antitrust cases.” *ATSI Commn's, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 n. 2 (2d Cir.2007). As always, the Court must “accept[ ] all factual allegations in the complaint and draw[ ] all reasonable inferences in the plaintiff’s favor.” *ATSI Commn's, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir.2007).

### ***Discussion***

Section 369-a of the General Business Law is entitled “Price-fixing prohibited” and provides:

Any contract 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 action-

able at law.

N.Y. Gen'l Bus. § 369-a. Defendant maintains that there is no private cause of action for damages under the statute and that even if there is Plaintiff lacks standing to assert any claim. Plaintiff retorts that the statute is intended to prevent a manufacturer from fixing price and to preclude Plaintiff from suing thereunder would render the statute meaningless.

On its face, § 369-a does not provide for a private cause of action. Moreover, the parties do not cite, and the Court has not found, any express provision allowing for a cause of action for damages for violation of the statute. Under New York law, where a statute does not provide for an express cause of action, courts will, under certain circumstances, imply a private cause of action. *See, e.g., Goldman v. Simon Property Group, Inc.*, 58 A.D.3d 208, 869 N.Y.S.2d 125, 131 (2d Dept.2008) (“When ... a statute does not provide an express private right of action, the courts will imply a private right of action only upon an examination of the following three factors: (1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme.”) (internal quotations omitted); *accord Carrier v. Salvation Army*, 88 N.Y.2d 298, 302, 644 N.Y.S.2d 678 (1996); *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 325, 464 N.Y.S.2d 712, 716 (1983).

\*4 Neither party in the present case satisfactorily addresses the factors for implying a private cause of action. The Court finds it unnecessary so do so because, as set forth below, it concludes that, assuming *arguendo* that a private cause of action exists for damages under GBL § 369-a, plaintiff's claim is subject to dismissal.

By its terms, the statute prohibits the enforcement of any “contract” prohibiting a vendee from selling

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below a stipulated price. No contract is alleged in this case. Rather, the complaint only alleges a refusal “to ship and fill orders submitted by Plaintiff.”

Plaintiff's reliance on *Carl Wagner and Sons v. Appendagez, Inc.*, 485 F.Supp. 762 (S.D.N.Y.1980) as support for the proposition that Kichler's refusal to accept orders from companies that are not in compliance with its IMAP policy violates GBL § 369-a is misplaced. In *Carl Wagner*, the court did in fact find the existence of a contract between the parties. As the *Carl Wagner* stated “Appendagez's threshold contention is that the purchase orders did not give rise to binding contracts until they were accepted for shipment at the Appendagez offices in Norwood. If no contractual obligations came into existence unless and until Appendagez accepted the purchase orders ... then of course the case is at an end since ... no contractual relationships came into existence.” *Id.* at 769. The court then proceeded to determine that in fact the purchase orders gave rise to a contract because the salesman, sent by the defendant to Carl Wagner, given the attendant circumstances had apparent authority to bind the corporation. *Id.* at 770-72. Here, in contrast, there are no allegations in the complaint that Plaintiff's submission of orders resulted in a contract between it and Defendant. Rather, the complaint solely alleges a prior course of dealing between Plaintiff with “exclusive and independent distributors” of Defendant.<sup>FN1</sup>

**FN1.** The Court also notes that in *Carl Wagner*, GBL § 369-a did not serve as an independent basis for damages. The defendant in *Carl Wagner* sought to justify its refusal to ship to the plaintiff on the ground that plaintiff had violated a minimum resale price agreement. The Court rejected that defense, holding that a contrary conclusion would be tantamount to enforcing a contract provision contrary to § 369-a. 485 F.Supp. at 772.

Nor is the Court persuaded by Plaintiff's course of

dealing argument. There is no direct course of dealing in the complaint alleged as between Plaintiff and Defendant. Rather, the complaint alleges that Plaintiff purchased Defendant's products “from both exclusive and independent distributors ...” (Compl.¶ 8.)

Finally, the Court is underwhelmed by Plaintiff's argument that the statute would be rendered useless for lack of an enforcement mechanism if claims such as Plaintiff's were not permitted to proceed. First, it appears that GBL § 369-a could be enforced by the Attorney General of the State of New York pursuant to *New York Executive Law § 63* (12). *Section 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 of the state of New York, on notice of five days, for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages and, in an appropriate case, cancelling any certificate filed under and by virtue of the provisions of section four hundred forty of the former penal law or section one hundred thirty of the general business law, and the court may award the relief applied for or so much thereof as it may deem proper. The word “fraud” or “fraudulent” as used herein shall include any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or *unconscionable contractual provisions*. The term “persistent fraud” or “illegality” as used herein shall include continuance or carrying on of any fraudulent or illegal act or conduct. The term “repeated” as used herein shall include repetition of any separate and distinct fraudulent or illegal act, or conduct which affects more than one person.

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\*5 N.Y. Exec. Law § 63(12) (emphasis added). Second, distributors who have a contractual relationship with Defendant could seek, in effect, to enforce the prohibition in GBL § 369-a as the plaintiff did in *Carl Wagner*. Moreover, it is not clear that Plaintiff is not left without a remedy under New York law. To the extent that Defendant's IMAP policy constitutes illegal price-fixing, Plaintiff may assert such a claim pursuant to New York's Donnelly Act, Gen'l Bus. Law § 340.<sup>FN2</sup>

FN2. Indeed, Plaintiff has commenced an action against Defendant seeking damages under both the Sherman Act, 15 U.S.C. § 1, and the Donnelly Act, N.Y. Gen'l Bus. Law § 340. See *Worldhomecenter.com, Inc. v. L.D. Kichler Co., Inc.*, Civil Action No. 05-3297 (E.D.N.Y.).

### ***Conclusion***

For the foregoing reasons, Defendant's motion to dismiss the Complaint is granted.

**SO ORDERED.**

E.D.N.Y., 2009.

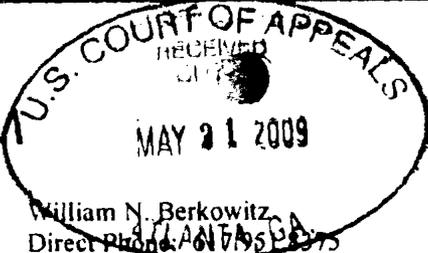
Worldhomecenter.com, Inc. v. L.D. Kichler Co., Inc.

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# **EXHIBIT D**

BINGHAM

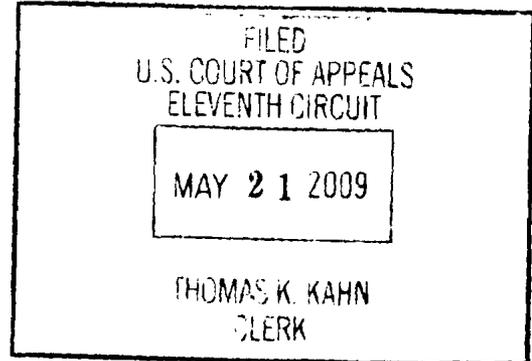


William N. Berkowitz  
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bill.berkowitz@bingham.com

May 20, 2009

**VIA FEDERAL EXPRESS**

Thomas K. Kahn, Clerk  
U.S. Court of Appeals for the 11th Circuit  
Elbert P. Tuttle United States Court of Appeals Building  
56 Forsyth St. N.W.  
Atlanta, GA 30303



**Re: *Benny Jacobs v. Tempur-Pedic International, Inc.*,  
Court of Appeals No. 08-12720-F F**

Dear Sir:

Pursuant to Fed. R. App. P. 28(j) and 11th Cir. R. 28-I.O.P. 6, enclosed are four (4) copies of this letter and the slip opinion issued by the Supreme Court this week in *Ashcroft v. Iqbal*, No. 07-1015, slip op. (May 18, 2009). In that case, a majority of the Supreme Court unequivocally stated that "the pleading standard Rule 8 announces . . . demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Slip op. at 13-14 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)).

The Court explained in *Iqbal* that "[t]wo working principles" underlie the decision in *Twombly*: "[f]irst, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"; and "[s]econd, only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 14-15. The Court held that a court considering a motion to dismiss should begin by identifying conclusory allegations that are not entitled to the assumption of truth, and then apply "judicial experience and common sense" to determine whether the remaining factual allegations of the complaint set forth a plausible claim. *Id.*

This authority was not available when the parties submitted their briefs, and supports the decision of the trial court below that plaintiffs in this case failed to allege *facts* sufficient to show either (1) there are no reasonable substitutes for mattresses made out of visco-elastic foam; or (2) Tempur-Pedic's allegedly higher prices have actually harmed interbrand competition.

Sincerely,

William N. Berkowitz

- Boston
- Hartford
- Hong Kong
- London
- Los Angeles
- New York
- Orange County
- San Francisco
- Santa Monica
- Silicon Valley
- Tokyo
- Walnut Creek
- Washington

Thomas K. Kahn, Clerk  
May 20, 2009  
Page 2

cc: *(each via Federal Express)*

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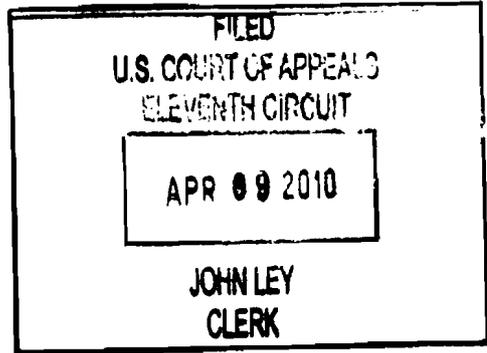
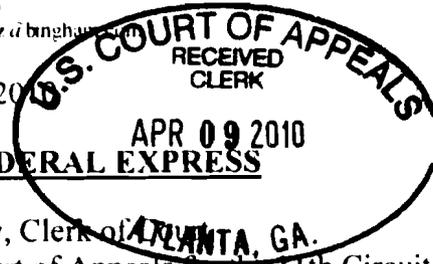
# **EXHIBIT E**

William N. Berkowitz  
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April 8, 2010

VIA FEDERAL EXPRESS

John Ley, Clerk of ~~ATLANTA, GA.~~  
U.S. Court of Appeals for the 11th Circuit  
56 Forsyth St. N.W.  
Atlanta, Georgia 30303



**Re: No. 08-12720-F, Jacobs, Appellants, v. Tempur-Pedic Int'l, Inc. and Tempur-Pedic No. Am., Inc., Appellees (collectively, "Tempur-Pedic")**

Dear Mr. Ley:

I write on behalf of Tempur-Pedic to respond to Mr. Bartz's letter to you dated April 2, 2010. Mr. Bartz's attempt to submit pleadings from an action filed in New York state court against Tempur-Pedic by the New York Attorney General ("NYAG") is patently improper. Fed. R. App. P. 28(j) permits parties to submit "supplemental citations" of "pertinent and significant authorities" to the Court. Mr. Bartz's letter, however, contains no citations, no authorities, and no law. Rather, he submits a complaint and related papers which have yet to be addressed by any court. Plainly, this does not constitute "supplemental citations" of "significant authorities." See, e.g., *Utah v. Dep't of Interior*, 535 F.3d 1184, 1195 n.7 (10th Cir. 2008) ("[T]he information submitted is not truly supplemental authority under Rule 28(j) but rather new evidence, and new evidence not submitted to the district court is not properly part of the record on appeal."). The letter should not be accepted for filing or otherwise submitted to the Court for consideration; rather, it should be stricken from the record herein.

To the extent Mr. Bartz's letter is considered, Tempur-Pedic responds that the complaint filed by the NYAG is entirely irrelevant to the issues before the Court. The NYAG does not allege any violation of the Sherman Act, 15 U.S.C. § 1 - the statute at issue in this case - but alleges only a purported violation of N.Y. Gen. Bus. Law § 369-a, a statute the NYAG contends goes beyond the Sherman Act in its reach. Tempur-Pedic disputes the NYAG's claim, but in any event, neither the NYAG nor any other state or federal agency in the United States has alleged a violation of the Sherman Act by Tempur-Pedic.

Sincerely,

*William N. Berkowitz*  
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# **EXHIBIT F**

A-3716

MEMORANDUM

Department of Commerce

April 28, 1975

ASSEMBLY  
3916

Introduced by  
Messrs. Cooperman & Sharoff

RECOMMENDATION: The Department of Commerce approves the bill.

STATUTE INVOLVED: General Business Law. The bill would repeal the present section 369-a of the Law, and insert a new section 369-a in its place.

EFFECTIVE: The 90th day after it shall become a law.

DISCUSSION:

1. Purpose of bill: To repeal the existing price-fixing law.
2. Summary of provisions: This consumer oriented bill would make illegal the fixing of the reselling price of commodities by the vendor or producer. It voids any contract provision, presently in effect, intended to bring about such result.
3. Prior legislative history: Such a bill has been introduced many times in the past, but always dying in committee.
4. Known position of others: Empire State Chamber of Commerce and the New York Chamber of Commerce and Industry take no position. Associated Industries and the New York Council of Retail Merchants oppose the bill. It is a Governor's program bill.
5. Budget implications: Unknown.
6. Arguments in support: It is a consumer oriented bill that would allow all salable commodities to sell at competitive market prices, free from artificial or contractual restrictions. Its effect would be to lower prices to the consumer for those presently price-fixed items.
7. Arguments in opposition: Those who oppose the bill contend that nobody is forced to sell fair-traded merchandise; that a decent profit to the producer tends to assure the consumer of a good service organization behind the product; that price-fixing is a useful marketing tool that should not be taken away from the producer; that it is not monopolistic, for similar items can also be purchased that are not fair-traded; that small businesses are helped by continuing the Fair Trade Law.

NOTE: The consensus of manufacturing and commerce oriented organizations is that a small business legislative package is needed to save small business from extinction, such as Assembly bill number 6702, that would establish a division for small business.



Acting Commissioner of Commerce

# **EXHIBIT G**

SENATE

Introduced by:

ASSEMBLY

No.

Messrs. Cooperman, Sharoff  
et al

No. A 3916

Law: General Business

Sections: Repeal Sec. 369-a, 369-b, 369-d;  
New Sec. 369-a; Renumb. Sec.  
369-c, 369-e, 369-f, 369-g

Division of the Budget recommendation on the above bill:

Approve:  Veto: \_\_\_\_\_ No Objection: \_\_\_\_\_ No Recommendation: \_\_\_\_\_

1. Subject and Purpose: This bill would repeal "fair trade" price-fixing provisions in current law and prohibit manufacturers or wholesalers from setting minimum resale prices for their products.
2. Summary of Provisions: Presently, the State's Fair Trade Law permits a manufacturer or wholesaler to restrict, through contractual provision, the minimum price for which his products may be resold. The wilful advertising or selling of such products at lower prices is made subject to suit by the manufacturer or other persons damaged.

This bill would repeal those provisions of the Fair Trade Law which permit the contractual setting of minimum resale prices and, in addition, specifically prohibit price-fixing by making any such contractual provisions unenforceable and unactionable at law.

This bill would take effect 90 days following passage.

3. Prior Legislative History: Several similar bills, repealing all or part of the Fair Trade Law, have been introduced this year (S4297, A5472; S1855; S2550, A3543; S3264; A2246; A3376; S1358, A597; S1299-A, A548-A), in 1974 (A706; A7586; A11714; S7830, A8328; A1613) and in 1973 (A706; A7586; A1613). None of these bills were passed.

4. Arguments in Support:

- a. This bill would promote lower prices for consumers by eliminating legal barriers to free competition in the market place. Present law permits the establishment of artificial minimum prices which may not be in the best interests of the consumer.
- b. This Governor's Program Bill is in keeping with the statement in his Annual Message that:

"All aspects of existing state law will be re-examined to eliminate unwanted barriers to competition. One such barrier which should be eliminated forthwith is the so-called "Fair Trade Law"..."

5. Possible Objections to the Bill:

- a. It may be argued that the existing Fair Trade Law protects the profit margin of small retail merchants (e.g., "mom and pop" stores) from the "unfair" competition of larger retail chains.

Date: \_\_\_\_\_ Examiner: \_\_\_\_\_

Disposition:

Chapter No.

Veto No.

- b. It may be argued that existing law protects the manufacturer against "injury to his good will" resulting from price cutting of products bearing his name or trademark.
  - c. It may be argued that the guarantee of a fixed high rate of return on fair traded items permits a manufacturer to expect or require reputable service for those items.
6. Other State Agencies Interested: The Consumer Protection Board and Department of Commerce may be interested in this bill.
  7. Known Position of Others: Several organizations representing manufacturers and merchants have expressed opposition to this bill, including: Empire State Chamber of Commerce; Associated Industries of New York State; Council of Retail Merchants; and Marketing Policy Institute.
  8. Budgetary Implications: As far as we can determine, this bill would have no significant budgetary effects.
  9. Recommendation: This bill seeks to promote lower consumer prices by prohibiting manufacturers or wholesalers from setting minimum resale prices for their products.

This office recommends approval.

In addition, we urge Governor's Counsel to examine similar restrictive provisions in the Alcoholic Beverage Control Law for possible amendment.

DATE: April 23, 1975

EXAMINER: Raymond D. Sweeney *RS*

Vincent E. LaFleche, Assistant Chief Budget Examiner (Management) *KL*

*L. Corrigan*  
*KL*