

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

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

Petitioner, :

-against- :

TEMPUR-PEDIC INTERNATIONAL, INC. :

Respondent.

Index No.
RJI No.
Date filed:

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Affirmation of Linda Gargiulo

Linda J. Gargiulo, 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. I have worked on the Bureau’s investigation of Tempur-Pedic International (“Tempur-Pedic”).

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

3. Tempur-Pedic products are sold at virtually uniform, high prices by all New York retailers of Tempur-Pedic products. Discounting occurs rarely, if ever. These uniformly high

retail prices result from Tempur-Pedic's prohibition on discounting. As a condition of establishing, maintaining, or continuing a business relationship with Tempur-Pedic, all retailers are required to sell Tempur-Pedic products at the retail prices specified by Tempur-Pedic. Despite that requirement, Tempur-Pedic labels the retail prices for each model it provides to retailers as "suggested" retail prices ("SRP").

4. This office's investigation of Tempur-Pedic was commenced after receiving a letter from a consumer, dated February 12, 2007, regarding his attempts to purchase a Tempur-Pedic mattress at a competitive price. The consumer complained that it was impossible to purchase a Tempur-Pedic mattress at a discount. The consumer stated that he was "told by every place selling the mattresses that [he] visited that Tempur-Pedic dictates prices of resellers and will not allow discounts." Consumer Letter dated February 5, 2007 (Exh. 1).

5. Our investigation confirmed the complainant's concerns.

Tempur-Pedic Admits that it Fixes Retail Prices in New York.

6. In response to a Subpoena dated February 7, 2008, Tempur-Pedic initially provided Interrogatory Responses to this office dated April 28, 2008. (Exh. 2.) Beginning shortly after receiving this Response through July 2009, this office advised Tempur-Pedic that its response to the Subpoena was deficient in various ways. Part of Tempur-Pedic's response was to submit Amended Interrogatory Responses to this office dated July 20, 2009. (Exh. 3.) The Amended Interrogatory Responses confirm that, despite concerns expressed by this office about the legality of Tempur-Pedic's actions, Tempur-Pedic continues to prohibit discounting. In its Amended Interrogatory Responses, Tempur-Pedic admits that since 2002 Tempur-Pedic has conveyed that it will "suspend doing business with any retailer who does not adhere substantially" to Tempur-Pedic's resale prices. (Exh. 3, Resp. Nos. 5, 19.) Tempur-Pedic interprets a failure to

adhere substantially to its prices as including both a persistent and intentional deviation from those prices. (Exh. 3, Resp. No. 19.)

7. Tempur-Pedic further admits that it is not aware of any retailer who does not “adhere substantially” to the resale prices it sets. (Exh. 3, Resp. No. 19.)

8. Tempur-Pedic’s Amended Interrogatory Responses further state that deviations from the resale prices set by Tempur-Pedic occur only when a retailer is inadvertently using an outdated price list or when an individual salesperson, employed by a Tempur-Pedic retailer, is acting without the knowledge of his superiors. (Exh. 3, Resp. No. 19.)

9. Tempur-Pedic thus does not dispute that adhering to its fixed resale prices is a condition of being a Tempur-Pedic retail account. Nor does it dispute that its practices have resulted in widespread retailer adherence to its fixed resale prices.

10. Tempur-Pedic’s initial Interrogatory Responses and its Amended Interrogatory Responses list numerous occasions on which it has communicated with New York retailers concerning their sale of Tempur-Pedic Products at resale prices less than those set by Tempur-Pedic. (Exh. 2, Resp. No. 4; Exh. 3, Resp. No. 4.) Tempur-Pedic lists numerous communications between and among Tempur-Pedic and competing New York retailers concerning retailers’ pricing, including pricing below Tempur-Pedic’s fixed prices (Exh. 2, Resps. No. 14, 17), (Exh. 3, Resps. No. 14, 17.)

11. Tempur-Pedic thus does not dispute that it and its retailers together monitor and enforce its prohibition on discounting.

Adhering to Tempur-Pedic’s Fixed Prices is a Condition of Being a Retail Account

12. This office subpoenaed various stores to probe the relationship that Tempur-Pedic has with its New York retailers. Among the documents produced by Tempur-Pedic and various

subpoenaed retailers is a document that Tempur-Pedic provides to each of its retailers. The most recent version of this document, entitled “Retail Partner Obligations & Advertising Policies” (“Retail Partner Agreement”), is effective June 8, 2009 (Exh. 4). An earlier version of the Retail Partner Agreement was effective October 2007 (Exh. 5). Both versions of the Retail Partner Agreement set forth terms and conditions to which a retailer must agree to establish and maintain its status as a retailer of Tempur-Pedic products. The Retail Partner Agreement specifically states that as a Tempur-Pedic North America Retail Partner “you agree to abide by the requirements of the *Retail Partner Obligations & Advertising Policies*” and each includes an Acknowledgement Page for dealers to sign. This office’s investigation has established that Tempur-Pedic monitors and enforces, 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.

13. Provisions of the current Tempur-Pedic Retail Partner Agreement restrain retailers from offering discounts to customers in any form. For instance, Tempur-Pedic deems the following practices unacceptable: a free gift with purchase or “purchase with purchase” offers (retail value over \$100) with the sale of Tempur-Pedic products, gift cards, rebates, coupons or other “in-store credits” that can be applied towards the purchase of Tempur-Pedic products. Tempur-Pedic also prohibits its retailers from effectively providing a discount by prohibiting retailers from stating that “we pay sales tax” (Exhs. 4, 5).

14. In the cover letter sent to every Tempur-Pedic retailer, along with the October 2007 Retail Partner Agreement, Tempur-Pedic explicitly states that it will “not do business with any retailer who chooses to charge retail prices which are different than our suggested retail prices on all Tempur-Pedic products including mattresses, foundations, adjustable bed bases, pillows and accessories.” Moreover, if Tempur-Pedic “discover(s) that an account has chosen to charge

prices lower than our suggested retail prices, and it is more than an isolated incident, promotional item, or a liquidation sale of discontinued Tempur-Pedic merchandise, we will cease doing business with that account” (Exh. 6). On May 1, 2009, Tempur-Pedic sent another letter to all of its retail accounts reiterating that Tempur-Pedic will not do business with any retailer who fails to adhere to the prices set by Tempur-Pedic. In this most recent letter, Tempur-Pedic further tightens its control over the retail prices charged by retailers and seeks to close a perceived gap in that control. Tempur-Pedic explicitly advises retailers that any attempts to discount Tempur-Pedic products by offering to rebate or discount any sales tax owed is considered a deviation from Tempur-Pedic’s suggested retail prices (Exh. 7). Those retailers that sell Tempur-Pedic mattresses have accepted those contractual requirements.

15. In responses to Interrogatories issued by this office, a major furniture retailer Raymour & Flanigan (“Raymour”), confirmed that it sells Tempur-Pedic products at prices specified by Tempur-Pedic and that its adherence to the prices set by Tempur-Pedic is attributable to Tempur-Pedic’s suggested retail price (“SRP”) requirements. This retailer further stated in its Interrogatory Response to this office:

If not subject to SRP policy, we would evaluate the pricing for Tempur-Pedic products as for other products - by market conditions and internal profitability criteria (Raymour & Flanigan Interrogatory Response 18, Exh. 8).

16. An Affidavit provided to this office by Raymour & Flanigan Senior Vice President of Merchandising, Neil Rosenbaum, confirms that because of Tempur-Pedic, Raymour sells all Tempur-Pedic products at the suggested retail price and that if not subject to the SRP policy, Raymour would evaluate the pricing of Tempur-Pedic products as for other products, by market conditions and internal profitability criteria. Affidavit of Neil Rosenbaum, dated July 7,

2009 (Exh. 9).

17. In an internal email exchange between Tempur-Pedic's Lori Williams and numerous other Tempur-Pedic team members, Williams reported that training meetings with Raymour & Flanigan have started out strong. She further reported that during these meetings "a question on discounting came up. When asked if you can discount our products, the answer should be simply No." This email provides further confirmation that Raymour & Flanigan's adherence to SRP is attributable to Tempur-Pedic's mandate that it adhere to its suggested prices, and not determine pricing independently (Exh. 10).

18. The Interrogatory Response of another retailer, Sleepys, Inc. ("Sleepys"), further confirmed that Tempur-Pedic's price fixing restrains retailers from selling Tempur-Pedic products at less than the prices stipulated by Tempur-Pedic. When asked for the reasons for its decision to sell Tempur-Pedic products at the manufacturer's suggested retail price, this retailer responded:

Sleepy's decision to sell Tempur-Pedic products at the manufacturer's suggested retail price as a general matter, . . . is based on Tempur-Pedic's stated unilateral policy communicated to Sleepy's in writing, of declining to do business with any retailer who chooses to charge retail prices which are different than Tempur-Pedic's suggested retail prices (Sleepy's Interrogatory Response, 4-6) (Exh. 11).

19. Sleepy's Interrogatory Response further stated that:

Although a store customer is always free to attempt to negotiate over the prices for Tempur-Pedic products displayed at the store as explained in Response to Interrogatories 3 and 6 above, attempted negotiation will, in general, not result in a sale at other than Tempur-Pedic's suggested retail price for the product involved except where a departure from such price is made to meet or beat the price at which a competitor offers to sell such product to the customer (Sleepy's Interrogatory Response, 21) (Exh. 11).

20. Sleepy's would occasionally, but rarely, meet the prices offered by retail competitors below SRP to fulfill its competitive price guarantee. In these instances, Sleepy's

allows a salesperson to deviate from the SRP only after getting proof of the competitor's lower price (usually in the form of an invoice) and obtaining the required approvals from Sleepy's management. At the same time, Sleepy's reported to Tempur-Pedic those retailers that discounted Tempur-Pedic products thereby limiting the need to match or beat the competitive pricing of another retailer. (Sleepy's Interrogatory Response 5, 14) (Exh.11).

21. An Affidavit provided to this office by Sleepy's representative Michael Bookbinder confirmed that Sleepy's, one of Tempur-Pedic's largest retailers, understood that pricing at SRP is a condition of being a Tempur-Pedic account. Affidavit of Michael Bookbinder, dated July 9, 2009 (Exh. 12).

Tempur-Pedic Aggressively Monitors New York Retailers for Any Discounting and Acts Swiftly to Stop any Attempts to Discount Tempur-Pedic Products

22. Tempur-Pedic works to ensure that its prohibitions against discounting are followed. In an email dated May 10, 2007, Tempur-Pedic's Thomas Rehwinkel reminded Macy's about its prohibition on discounting. "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 Tempurpedic 'teddy bear' but not additional discounts. There is no wiggle room on this point" (Exh. 13).

23. On August 7, 2007, upon learning of a 5% discount off of the SRP being offered by Rotmans, Tempur-Pedic's Paul Cowie informed Lynn Glick of Rotmans that "it has been brought to my attention that Rotmans 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." Rotmans responded to

Tempur-Pedic's demand for the cessation of all discounting, the next day, stating:

Sorry for the confusion on the extra 5% off - the salespeople were told that Tempur-Pedic & Ekornes were excluded from the promotion but not everyone understood. I left everyone a voicemail this morning so it will be very clear to them! (Exh. 14).

24. On isolated occasions when a Raymour & Flanigan store charged less than the mandated SRP for Tempur-Pedic products, Tempur-Pedic asked Raymour representatives to commence an investigation into these price deviations. On November 30, 2007, Paul Cowie sent an email to Patrick Judd advising him of pricing violations by Raymour & Flanigan. Cowie wrote:

It has been brought to my attention that one of your sales associates sold a Tempur-Pedic Deluxe full set for \$2,018.00 This price is \$381.00 below our SRP of \$2,399.00 Would you please investigate and let me know? Thanks (Exh. 15).

25. On July 3, 2008, Tempur-Pedic's Paul Cowie advised Patrick Judd of other SRP violations by Raymour. Cowie wrote:

This 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's RSA's have sold Tempur-Pedic products for less than SRP . . . I would appreciate you following up on these matters (Exh. 16).

26. In an email, dated September 10, 2008, Tempur-Pedic's Paul Cowie Jr. advised Raymour's Patrick Judd that "the attached file from the Danbury store is very clear that Tempur-Pedic is being offered at 10% below SRP at the Bed & Breakfast event this Sunday, 9/14 which is in violation of our pricing policies. Please instruct Danbury to exclude Tempur-Pedic from this event. Would you also please send out an email to remind all stores to exclude Tempur-Pedic from future similar events" (Exh. 17).

27. Patrick Judd, Director of Bedding, at Raymour & Flanigan confirms that as a result of Tempur-Pedic's price policy Raymour excludes Tempur-Pedic products from all sales events.

Raymour understands that it must follow Tempur-Pedic's price policy as a condition of maintaining the Tempur-Pedic line of products. Affidavit of Patrick Judd dated July 7, 2009, attached hereto as Exh. 18.

28. In August 2007, Tempur-Pedic's Joe Ginsburgh requested that his supervisor, Bob McCarthy, accompany him to meetings with three upstate New York retailers, Metro Mattress, Dunk & Bright and Mattress Firm. Ginsburgh's email to McCarthy stated,

Now that we have the official new dealer agreement, I would like you to attend meetings with Metro Matt, Dunk & Bright (Syracuse), NY and Mattress Firm, (Buffalo), N.Y. The presences of your position will give weight to our absolute compliance to SRP pricing without exceptions. These are the troublemakers and once they conform to the SRP issue, the regional problems will resolve it for the other dealers, with Raymours coming on, the sooner the better for these meeting (Exh. 19).

29. In September 2007, after meeting with Tempur-Pedic representatives regarding Tempur-Pedic's new Retail Partner Agreement, Mark Bell of Metro Mattress advised the Metro Mattress sales team that:

Effective TODAY, there are a few changes made to the Tempur-Pedic pricing. The CLASSIC BED & DELUXE BED prices have been increased. This increase is a national price update, and all Tempur-Pedic retailers are affected Effective TODAY there is no longer any price drop on the Tempur-Pedic product. **ASSOCIATES**
CAN NO LONGER DROP 10%!!! This guideline MUST be followed to ensure Metro Mattress can retain the Tempur-Pedic lineup (Exh. 20) (emphasis in original).

30. In February 2008, Tempur-Pedic again took action to insure that Raymour & Flanigan and Sleepys adhered to Tempur-Pedic's fixed resale prices. By email dated February 13, 2008, Tempur-Pedic's Andrew Tarter advised Tempur-Pedic's Dan Setlak that "we are getting a lot of customers calling in saying stores are giving free shipping and NO TAX. Sleepy's and Raymor & Flannigan in particular" (Exh. 21).

31. Tempur-Pedic also routinely scrutinized the advertisements of retailers of Tempur-Pedic products to insure that retailers did not discount. In an email dated December 5, 2007, for example, Tempur-Pedic's Suzette Dryer advised Sleepy's Ira Fishman that the phrase "Sleepy's has guaranteed low prices and the largest display of Tempur-Pedic samples in the country," on its website violates Tempur-Pedic's advertising guidelines. Dryer further stated that it is unacceptable to advertise "On Sale Now," "Best Prices," "Lowest Prices," "Guaranteed Lowest Prices," etc., with Tempur-Pedic products (Exh. 22).

Retail Competitors Also Vigorously Enforce Tempur-Pedic's Resale Price Fixing Scheme

32. Retailers who are prohibited by Tempur-Pedic from discounting are vigilant in their efforts to insure that competing retailers are similarly constrained. Retailer complaints about competitors' attempts to discount are addressed at the highest level of Tempur-Pedic management. Tempur-Pedic's Amended Interrogatory Response reveals that Tempur-Pedic Executive Vice-President and President, North America, Richard Anderson, had several phone conversations with Sleepy's, in the summer and fall of 2008, regarding complaints about other New York customers selling Tempur-Pedic products at discounted prices. In January 2009, Anderson met with Steven Goldberg, President of Raymour & Flanigan, at which time Anderson addressed Raymour's concerns about instances of discounting of Tempur-Pedic products by Sleepy's (Exh. 3, Resp. No. 14).

33. Metro Mattress owner Dave Shiroff also advised Tempur-Pedic about pricing violations by competitor Dave Hayes Appliance Center. By email dated October 29, 2007, 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 on 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" (Exh. 23).

34. Dave Hayes Appliance Center's failure to adhere to the retail prices specified by Tempur-Pedic resulted in its being terminated as a Tempur-Pedic account. Just one day after learning about Dave Hayes Appliance Center's discounting the Tempur-Pedic Classic Mattress below SRP, Tempur-Pedic Regional Sales Manager Bob McCarthy sent an email to Joe Ginsburgh stating that Tempur-Pedic should consider closing Dave Hayes Appliance Center. Ginsburgh responded that "Paul and I have already agreed on closing him. I will get the necessary paperwork started. This gives us one more concrete issue to point to" (Exh. 24).

35. Dream City Mattress ("Dream City"), a bedding retailer operating stores in Upstate New York, was terminated as a retailer of Tempur-Pedic products in May 2008. Upon information and belief, Tempur-Pedic's termination of Dream City was due to Dream City's discounting of Tempur-Pedic products.

36. By email dated February 16, 2007, Sleepy's Ira Fishman reported to Tempur-Pedic's Thomas Rehwinkel and Suzette Dryer that pricing below the SRP by competitor Relax the Back, "is a continuing problem. We have reported this many times." 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 (Exh. 25).

37. In an email dated September 5, 2007, from Raymour & Flanigan's Patrick Judd to Tempur-Pedic representatives Paul Cowie Jr. and Bob McCarthy, Raymour advises Tempur-Pedic "As we discussed, 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. I would like to resolve as quickly as possible, please respond.” 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” (Exh. 26).

38. On August 25, 2007, Randy Drewniak, a representative of the New York Mattress Factory, advised Tempur-Pedic that Raymour & Flanigan was offering a discount on Tempur-Pedic mattresses to customers who apply for a Raymour Club Card. He stated that a customer approved for a “card” immediately saves \$150.00 on a Tempur-Pedic set. He asks, “is this acceptable with the selling contract agreed upon with Tempur?” Tempur-Pedic’s Paul Cowie thanked the New York Mattress Factory for bringing this matter to his attention and stated “I will address it” (Exh. 27).

39. On July 2, 2007, Tempur-Pedic received a complaint from Mattress Discounters, regarding Boscov Department Store’s (“Boscov’s”) practice of giving \$100 off a Tempur-Pedic mattress plus two pillows and delivery to any customer signing up for a Boscov’s credit card. When the representative of Mattress Discounters asked whether this conduct violates the Tempur-Pedic pricing policy, the Tempur-Pedic representative stated:

Yes, it does. I have spoken to TSM in charge of Boscov’s and she will discuss this with the buyer tomorrow. If you have any invoices or other evidence, can you please forward them to me? (Exh. 28)

40. On November 17, 2007, Mattress Discounters was the subject of a complaint by Sleepy’s, who advised Tempur-Pedic that Mattress Discounters 5% price beat does not exclude Tempur-Pedic as is required by Tempur-Pedic’s policy (Exh. 29).

41. In an email dated August 27, 2007, Tempur-Pedic representative Peter Benoit reported on a meeting between himself, Joe Casey and Nick Cardi of Cardi’s Department Store

("Cardi's"). Benoit advised his superiors at Tempur-Pedic that Cardi's complained about Sleepy's discounting of Tempur-Pedic products and Tempur-Pedic's failure, in his view, to address this issue. Cardi's also advised Benoit that it was going to begin discounting the prices of Tempur-Pedic products to be competitive and that it would advertise those discounted prices. Benoit reported that he asked Cardi's to "refrain from altering his policies and pricing." Benoit also suggested that a phone call to Cardi's from someone high in the Tempur-Pedic hierarchy is "warranted on the pricing policy and what we do to monitor participation and handle non-compliance" (Exh. 30).

42. By email dated March 9, 2008, retailer Our Country Hearts advised Tempur-Pedic's Joe Ginsburgh about a 10% off sale on Tempur-Pedic's products being offered by Raymour & Flanigan. The complaining retailer stated that one of his customers asked him to match the Raymour discounted price, "We cannot have this happening! This is exactly what all your legal documentation is meant to avert and yet here we go!" Tempur-Pedic responded to this complaint on March 10, 2008, stating "This will be looked into and addressed" (Exh. 31).

43. Retailers of Tempur-Pedic products fully understand that charging at least Tempur-Pedic's SRP is required to become and remain an account with Tempur Pedic. Those retailers have accepted this contractual requirement. Accordingly, Tempur-Pedic has achieved almost universal retailer compliance with SRP and virtually no discounting of Tempur-Pedic products exists in the marketplace.

New York Retailers Uniformly Refuse to Discount Tempur-Pedic Products.

44. This office's investigation confirmed that, because it is a requirement of having and maintaining an account, virtually all New York retailers adhere to Tempur-Pedic's fixed resale prices. Tempur-Pedic establishes, maintains, monitors, and enforces a pervasive system in

which all Tempur-Pedic retailers understand that Tempur-Pedic products must be sold at the prices established and mandated by Tempur-Pedic. Accordingly, New York state consumers pay more when they purchase Tempur-Pedic products at artificially high prices set by Tempur-Pedic.

45. To assess retail prices of Tempur-Pedic products, investigators from the Attorney General's office visited or called Tempur-Pedic retailers throughout the state to determine the prices at which Tempur-Pedic products are being sold. The information compiled during these visits and calls reveals uniform adherence to the minimum prices set by Tempur-Pedic.

46. Investigators posed as shoppers and asked sales persons for discounts or the dates of possible future sales that included Tempur-Pedic products. Virtually every retailer that an investigator visited said expressly and largely without prompting that they would lose the Tempur-Pedic line of products if they offered discounts on Tempur-Pedic products.

47. On September 4, 2007, Investigators Karen Richardson and Robin Womack shopped a Sleepy's mattress store on Montague Street in Brooklyn. They spoke to a salesman named Giles. During the course of this shop, Giles stated the following:

Tempur-Pedic is a price control company, which means that everywhere you go, the price stays the same (Sleepy's 9/4/07, 3) (Exh. 32).

. . . whoever deals with Tempur-Pedic, whatever they do, it's uniform with everywhere (Sleepy's 9/4/07, 4) (Exh. 32).

. . . the queen set, it's price controlled (Sleepy's 9/4/07, 7) (Exh. 32).

So the concept is, Tempur-Pedic, no matter where you go, the price stays the same. When they increase the price everyone has to price-increase with them. (Sleepy's 9/4/07, 9) (Exh. 32).

48. Because Tempur-Pedic also retails its mattresses, the Sleepy's salesman offered to call the Tempur-Pedic 800 number to inquire about purchasing a mattress directly from Tempur-Pedic. Posing as a customer, the salesman called 1-800-790-0094 and asked the person

answering the call for the price of the Tempur-Pedic Queen Classic Set. The phone representative stated that “the price is \$1,899.” When asked for a lower price, the phone representative stated:

We don’t discount the price of the mattress (Sleepy’s 9/4/07, 14) (Exh. 32).

49. When the Sleepy’s salesman asked if he could get a better price elsewhere, the Tempur-Pedic phone representative stated:

They’ll give the exact same price. No matter where you go, it would be the same price. If it’s not, then it’s not a Tempur-Pedic or it’s a returned Tempur-Pedic. But it’s a fixed price (Sleepy’s 9/4/07, 14) (Exh. 32).

50. After disconnecting the Tempur-Pedic direct sales line, the Sleepy’s sales representative reiterated what he said several times before:

No matter where you go, the price is fixed (Sleepy’s 9/4/07, 15) (Exh. 32).

51. On September 4, 2007, the investigators shopped the 1-800-Mattress Store, 136 Montague Street, Brooklyn, New York. When the salesman was asked about possible sales on Tempur-Pedic mattresses he stated:

This Tempur-Pedic they don’t run sales. . . . Not at all. (1-800-Mattress 9/4/07, 27, 28) (Exh. 33).

Because it’s like the Tempur-Pedic brand and the . . . they don’t negotiate price and we cannot touch their price. Is one price everywhere you go (1-800-Mattress 9/4/07, 28) (Exh. 33).

52. When the investigator asked whether that is a Tempur-Pedic policy or something, the salesman stated:

Yeah. For the Tempur-Pedic it is (1-800-Mattress 9/4/07, 28) (Exh. 33).

Nobody gets--I mean, if you go through Sleepy, Macy’s, same price (1-800-Mattress 9/4/07, 28, 29) (Exh. 33).

53. The investigators’ final stop on September 4, 2007, was at the Levitz Furniture Store on 486 Fulton Street, Brooklyn, New York. The investigators asked a Levitz sales

representative if he had any sales on Tempur-Pedic mattresses. The salesman responded:

Well nothing Tempur-Pedic sells itself. It . . . it's something that they don't normally run on sale (Levitz Furniture Store 9/4/07, 37) (Exh. 34).

54. The investigator again asked - does Tempur-Pedic ever go on sale? The salesman replied:

Not normally. See, like us, we got Serta that goes on sale, we got Sealy that goes on sale. But Tempur-Pedic . . . it's firm. Transcript (Levitz Furniture Store 9/4/07, 38) (Exh. 34).

55. On September 17, 2007, Investigator Peter Eiss of the Buffalo Regional Office visited a Raymour & Flanigan Furniture Store located at 1359 Niagara Falls Boulevard, Amherst, New York. Eiss dealt with salesman Steve Starr. Eiss inquired about purchasing a Queen size Tempur-Pedic mattress. He was told that Raymour stocks two Queen size Tempur-Pedic models, the Deluxe model for \$2,599 and another for \$2,999. When Eiss stated he was going to wait for these mattresses to go on sale, the salesman said:

Actually, this is what we have to sell them for. . . . everybody sells them at the same price. . . . They will take away your--the product if they catch you selling it at a discount. Whether you buy it online - no matter where you buy it from, . . . this is what these mattresses are supposed to sell for. . . . There have been a few retailers busted on it. . . . Tempur-Pedic will take it away (Raymour & Flanigan, 9/17/07, 9-10) (Exh. 35).

He added later:

We're not supposed to do any discounting on these. They are very strict we gotta be - 'cause we're really pushing, because we are catching other vendors, and reporting them to Tempur-Pedic. . . . Tempur-Pedic is cracking down on - I mean, if you go online with Tempur-Pedic, you will see these price points (Raymour & Flanigan, 9/17/07, 16) (Exh. 35).

If you get caught, . . . they can pull the line (Raymour & Flanigan, 9/17/07, 16, 17). So if you do find it for less, that's fine. Then we'll honor that. . . . And if you can find it for less, let me know. . . . I would report it to Tempur-Pedic. (Raymour & Flanigan, 9/17/07, 20) (Exh. 35).

56. Investigator Eiss next visited the Bon Ton Department Store at 4545 Transit Road, Williamsville, New York and dealt with salesperson Debbie Provenzo. When Eiss asked Ms. Provenzo about upcoming sales on Tempur-Pedic mattresses, she stated that:

They're always at this price and there's no extra discounts off of them. . . . Well it's the manufacturer's request that we sell them at this--this is the everyday price. (Bon-Ton, 9/17/07, 32) (Exh. 36).

Eiss then asked: "They meant to do this?" The salesperson responded:

Yeah, this is the agreement with the manufacturer (Bon-Ton, 9/17/07, 33) (Exh. 36).

57. When asked if the price of these mattresses are set by the manufacturer, if a consumer goes to another store shopping, the salesperson interrupted saying:

They may be. I don't know. I don't know. These are the prices that we're set at. And there's no extra discounts. (Bon-Ton, 9/17/07, 34-35) (Exh. 36).

Tempur-Pedic also limited ways to evade the prohibition on discounting. When asked if there are any coupons in the paper, the salesperson stated:

No extra discounts. No. . . . That's always excluded . . . There is no extra discount. Believe me. It states it right on the coupons. . . . It won't be on sale here. If you find it someplace else cheaper I can't tell you that. I don't know. (Bon-Ton, 9/17/07, 35, 36) (Exh. 36).

58. Investigator Eiss next shopped at the Mattress Glen at 7660 Transit Road, Williamsville, New York. The salesperson showed Eiss the Classic Queen size mattress that sells for \$1,899 and the Rhapsody that sells for \$2,999. When the investigator asked if these mattresses ever go on sale, the salesperson said:

They set the price. Manufacturer sets the price (Mattress Glen, 9/17/07, 43) (Exh. 37).

59. When the investigator asked if the price of these mattresses will be the same no

matter where he goes, the salesperson stated:

No matter. It can be higher, but this [is] the lowest price allowed. So they can sell them for more . . . Can't sell them for less. (Mattress Glen, 9/17/07, 47) (Exh. 37).

60. On October 4, 2007, Investigator Susan White of the Albany office of the Attorney General visited New York Mattress Factory at 1529 Central Ave, Albany, New York. Ms. White dealt with a salesman named Tom and inquired about the price of a Tempur-Pedic Queen size Classic mattress and whether this mattress is discounted at all or on sale at all (New York Mattress Factory, 10/4/07, 7 (Exh. 38). Tom stated:

It's actually a fixed pricing system. . . . The regular Queen set would be \$1999 for this model. . . . and we throw in a free frame, we could throw in two free pillows, which are usually \$150 each. But Tempur-Pedic has a fixed pricing system, so no matter where you go, it's exactly the same price and there's never any sales on them (New York Mattress Factory, 10/4/07, 7) (Exh. 38).

When the investigator asked if there is ever a sale, he stated:

No, they don't – they don't allow us to. . . . unless the store wants to risk losing-- losing their – dealing with Tempur-Pedic – (New York Mattress Factory, 10/4/07, 8) (Exh.38).

61. The investigator then asked if you can do better online. The salesman replied:

Same price . . . online it would be the same.

Look up any Tempur-Pedic web site, and they should have all the same thing. . . . everybody's keeping everybody else honest, so. (New York Mattress Factory, 10/4/07, 8-9) (Exh.38).

When the investigators asked what would happen if you dropped the price, the salesman said:

Probably call Tempur-Pedic on us. . . . Since we're not allowed to go down and somebody else does have down and . . . want to take a gamble (New York Mattress Factory, 10/4/07, 9-10) (Exh.38).

62. On October 4, 2007, Investigator White also visited the Mooradian's Furniture

Store on 800 Central Ave., Albany, N.Y. Ms. White asked if there were any sales on Tempur-Pedic mattresses. The salesman stated:

The Tempur-Pedics, they are what they call price protected. So Tempur-Pedic says you have to sell them at this price, not below, it. A lot of people jack them up and then lower them down to the retail, the lowest retail. . . . We just sell them at the lowest retail already (Mooradian's, Inc., 10/4/07, 4) (Exh. 39).

The investigator then asked what would happen if Mooradians sold below the specified price.

The salesman stated:

They might pull our license. . . . all the stores can't sell it below this price (Mooradian's Inc., 10/4/07, 5) (Exh. 39).

63. On October 11, 2007, Investigator Susan White visited Boscov's Department Store in Clifton Park, New York and spoke with salesperson Robin Rousseau. When Investigator White asked if Boscov's was running any sales on Tempur-Pedic mattresses the salesperson responded:

Tempur-Pedic will not allow for sales. And at one point they allowed us to give two pillows with a mattress away. That stopped and – they put a stop to it. So now, um, we're offering a three-year payment plan with no interest. You just make your minimum payment but you have three years to pay it off. And that's all we can offer . . . (Boscov's, 10/11/07, 3-4) (Exh. 40).

64. On September 25, 2007, Investigator Richardson also placed a call to Tempur-Pedic Mattress.com and spoke to Cassandra about purchasing a Celebrity Queen size mattress. The price quoted by Cassandra was \$3,499. When asked if Tempur-Pedic offers any discounts, Cassandra stated:

No ma'am. The prices are the same, regardless of where you go. It's just the trial periods that are different. . . . Well, when you order directly through Tempur-Pedic, it's a money back guarantee. If you're not satisfied you're just responsible for the one-time shipping fee (Tempur-PedicMattress.com, 9/25/07, 3-4) (Exh. 41).

65. When the investigator asked "but the prices are gonna be the same in all stores,"

Cassandra responded:

Nobody gives a discount on Tempur-Pedic, ma'am. The prices are always the same . . . We never have a discount on the products. The prices are always the same (Tempur-PedicMattress.com, 9/25/07, 5) (Exh. 41).

66. On November 23, 2009, at my request, Arlene Leventhal, a paralegal in the Antitrust Bureau, surveyed the retail prices charged for the Tempur-Pedic Classic Queen size mattress by three retailers of Tempur-Pedic products. The retailers surveyed were Sleepy's, Raymour & Flanigan, and Macy's. The price set by Tempur-Pedic for this item is \$1,699.00. Ms. Leventhal's shop revealed that all three retailers contacted price this item at the price level mandated by Tempur-Pedic (See Leventhal Affidavit, attached hereto as Exh. 42).

67. On March 2, 2010, again at my request, Ms. Leventhal contacted Sleepy's, Raymour & Flanigan and Macy's to survey the current retail prices charged for The GrandBed Queen size mattress and for The GrandBed Queen size mattress and boxspring set. The prices set by Tempur-Pedic for these items are \$6,299 and \$6,799 respectively. Ms. Leventhal's current shop of these items reveals that all three retailers continue to price at the levels mandated by Tempur-Pedic. (Exh. 42).

Dated: March 24, 2010


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