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

PEOPLE OF THE STATE OF NEW YORK by ANDREW M. CUOMO, Attorney General of the State of New York, Petitioner, -against- TEMPUR-PEDIC INTERNATIONAL, INC. Respondent.	Index No. 400837/10

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PETITION AND IN OPPOSITION TO MOTION TO DISMISS

TABLE OF CONTENTS

Preliminary Statement.....1

Argument.....3

I. Tempur-Pedic Has Entered Into Contracts With Its Retailers In Violation of Section 369-a.....3

a. Prevailing case law holds that the prohibition on discounting is a contract term forbidden under section 369-a.....6

b. Tempur-Pedic's claim that the prohibition on discounting is a unilateral term and therefore not part of the contract is factually unsupportable.....8

c. Tempur-Pedic's argument that OAG must demonstrate that an implied contract was entered into is without basis.....9

II. FEDERAL ANTITRUST LAW IS NEITHER CONTROLLING NOR PERSUASIVE AUTHORITY IN THIS NEW YORK SPECIAL PROCEEDING.....10

III. OAG May Enforce Section 369-a's Prohibitions.....14

a. The Attorney General's Office did not previously take a contrary Position on the interpretation of the Statute.....16

b. The Attorney General has the power under 63(12 to enjoin the Implementation of legally unenforceable provisions.....18

IV. The Attorney General Has Also Demonstrated That Tempur-Pedic Committed Persistent Fraud in Violation of Section 63(12).....19

V. The Relief Sought by the Attorney General's Office is Appropriate.....20

VI. Conclusion

TABLE OF AUTHORITIES

Cases

Aceros Prefabriacados v. Tradebed, Inc., 282 F.3d 92 (2d Cir. 2001) 4
Anheuser-Busch, Inc. v. Abrams, 71 N.Y.2d 327 (1988)..... 12, 16, 17
Battista v. Radesi, 491 N.Y.S.2d 81 (4th Dep't 1985)..... 3
Bayway Refining Co. v. Oxygenated Mktg. & Trading A.G., 215 F.3d 219 (2d Cir. 2000) 4
Benson v. Beame 50 N.Y.2d 994 (1980)..... 21
Bunker's Glass Co. v. Pilkington, PLC, 75 P.3d 99 (Ariz. Sup. Ct. 2003)..... 11
California v. ARC Am. Corp., 490 U.S. 93 (1989) 10, 11
Carl Wagner & Sons v Appendagez, Inc., 485 F. Supp. 762 (S.D.N.Y. 1980) 7, 8, 20
Cherry River Music Co. v. Simitar Enter., Inc., 38 F. Supp. 2d 310 (S.D.N.Y. 1999) 6
East Europe Domestic Int'l Sales Corp. v. Island Creek Coal Sales Co., 572 F. Supp. 702 (S.D.N.Y.1983)..... 5
Fasolino Foods Co. v. Banca Nazionale del Lavoro, 761 F. Supp. 1010 (S.D.N.Y. 1991) 6
Feinberg v. Federated Department Stores, 832 N.Y.S.2d 760 (Sup. Ct. New York Co. 2007) 6
In *Benson v. Beame* 50 N.Y.2d 994 (1980) 21
In re Synergy Dev. Corp., 140 B.R. 958 (Bank. S.D.N.Y. 1992) 18
In *State v. Mobil Oil*, 38 N.Y.2d 460 (1976..... 21
Jacobs v. Tempur Pedic Int'l, Inc., No. 08 12720-F (appeal pending of *Jacobs v. Tempur-Pedic Int'l, Inc.*, 2007 WL 4373980 (N.D. Ga. 2007)..... 11
Julien J. Studley, Inc. v. New York News, Inc., 70 N.Y.2d 628 (1987) 10
Locker v. American Tobacco Co., 195 N.Y. 565 (1909) 14
Matter of Gross v Perales, 72 NY2d 231 20
Matthew Bender & Co. v. Jaiswal, 463 N.Y.S.2d 78 (3d Dep't 1985) 3
Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984)..... 14
People v. Federated Radio Corp., 244 N.Y. 33 (1926)..... 19
People v. Rattenni, 81 N.Y.2d 166 (1993)..... 12
Pitchford v. PEPI, Inc., 531 F.2d 92 (3d Cir. 1975)..... 14
Port Distributing Corp. v. Pflaumer, 880 F. Supp. 204 (S.D.N.Y.1994), *aff'd*, 70 F.3d 8 (2d Cir. 1995)..... 5
Roberts v. Tishman Speyer Properties, L.P., 13 N.Y.3d 270 (2009)..... 20
Sperry v. Crompton Corp., 8 N.Y.3d 204 12
State v. B.P. Oil Corp., 80 Misc. 2d 566 (Sup. Ct. Nassau Co. 1975)..... 13
State v. Mobil Oil Corp., 38 N.Y.2d 460 (1976) 7, 13, 21
Tosco Corp. v. Oxygenated Marketing & Trading, 1999 WL 328342, *3 (S.D.N.Y.1999) 4
United States v. Colgate & Co., 250 U.S. 300 (1919)..... 13, 14
United States v. Parke, Davis & Co., 362 U.S. 29 (1960)..... 13, 14
Valley National Bank of Long Island v. Babylon Chrysler-Plymouth, Inc., 53 Misc. 2d 1029 (Sup. Ct. Nassau Co.1967), *aff'd*, 28 A.D.2d 1092 (2d Dep't 1967)..... 6
Viacom Int'l v. Lorimar Productions, 486 F. Supp. 95 (S.D.N.Y. 1980)..... 6
Walk-In Medical Centers, Inc. v. Breuer Capital Corp., 818 F.2d 260 (2d Cir.1987)..... 6
Webster's Red Seal Publ'ns v. Gilberton World-Wide Publ'ns, 67 A.D. 2d 339 (1st Dep't 1979), *aff'd*, 53 N.Y.2d 643 (1981) 6
Worldhomecenter.com v. Kichler, 2009 WL 936675 (E.D.N.Y. 2009) 15

WorldHomeCenter.com v. L.D. Kichler Co., 2009 U.S. Dist. LEXIS 28123 (E.D.N.Y. 2009) 21
X.L.O. Concrete Corp. v. Rivergate Corp., 83 N.Y.2d 513 (1994) 18, 19
Yentsch v. Texaco, Inc., 630 F.2d 46 (2d Cir. 1980) 13

Statutes

Ariz. Rev. Stat. Ann. § 44-1408(a) 11
Executive Law § 63(12) ..... passim
GBL § 622(a) 18
GBL § 622(a)(9) 18
General Business Law § 340.6 ..... 11, 17
General Business Law § 369-a ..... passim
L. 1975, ch. 65 7
New York Commercial Code § 2-202 6

Other Authorities

Article 24A- Fair Trade Law 12
Bill Jacket for L. 1975, ch. 65 at 11 (Department of Commerce Mem. dated April 28, 1975) 16
Bill Jacket, Budget Report on Bills 1, 2 (April 23, 1975) 16, 21
Public Papers of Hugh L. Carey 77 (1982) 16

Rules

Fed. R. App. Proc. 28(f) 11

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

PEOPLE OF THE STATE OF NEW YORK by ANDREW M. CUOMO, Attorney General of the State of New York, Petitioner, -against- TEMPUR-PEDIC INTERNATIONAL, INC. Respondent.	Index No. 400837/10

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PETITION AND IN OPPOSITION TO MOTION TO DISMISS

Petitioner submits this consolidated memorandum in response to Respondent's Memorandum of Law in Support of Respondent's Motion to Dismiss (Respondent Dis. Mem.) and in reply to Respondent's Memorandum of Law in Opposition to Verified Petition (Respondent Opp. Mem) (collectively "Respondent's Memoranda")).

Preliminary Statement

Tempur-Pedic does not and cannot contest the central facts of this case, that Tempur-Pedic has: (1) repeatedly communicated with retailers to ensure that retailers understood and agreed that Tempur Pedic will not do business with those who do not adhere to its "suggested" retail price; (2) enforced this contractual prohibition by monitoring retailers' pricing and threatening those who violate or consider violating its provision with loss of the business; (3) through its efforts, effectively ended any discounts on its products; and (4) caused consumers to pay more for its products. Indeed, in its filings with this Court, Tempur-Pedic admits that it will "not sell[] its products to retailers who choose not to follow Tempur-Pedic's suggested retail prices." This admission alone warrants the relief sought in this proceeding.

In Respondent's Memoranda, Tempur-Pedic attempts to divert the Court's attention from these material, admitted facts with a series of meritless and inapplicable arguments. First, Tempur-Pedic argues that its prohibition on discounting is not a contractual term thereby excusing itself from section 369-a's clear prohibition. This is simply incorrect. The factual record and prevailing case law clearly demonstrate that the parties entered into a contract, a material term of which was that the retailer is forbidden from discounting its resale prices below the figure set by Tempur-Pedic. Second, Tempur-Pedic claims that federal antitrust law (which it incorrectly believes would be more favorable) should be applied to analyze its conduct. This contention has no merit either, as this action is brought solely under New York law and both federal and New York law reject any preemption argument. Third, Tempur-Pedic asserts that the New York Legislature in 1975, in using the word "unenforceable" rather than "illegal" in the text of section 369-a, somehow intended to allow manufacturers to ban discounting without recourse by the Attorney General. This nonsensical argument ignores the common meaning of the statute's plain language, its title, its legislative history, and applicable case law. Indeed, Tempur-Pedic's proffered interpretation of section 369-a would eviscerate its entire purpose, which is to prevent bans on discounting, such as are admitted in this proceeding. Tempur-Pedic's arguments before this Court, if accepted, would leave enforcement of the statute with neither retailers nor the Attorney General, merely permitting retailers to assert a defense they will never actually assert because they will lose Tempur-Pedic's business altogether if they fail to comply with the contractual ban on discounting. Neither section 369-a nor Executive Law Section 63(12), granting the Attorney General broad civil enforcement powers, permits such a result.

The Court should see Tempur-Pedic's arguments for what they are, groundless attempts to justify openly illegal behavior and continue practices explicitly banned by the New York State Legislature. Accordingly, the Court should grant the OAG's petition in full and provide New York's consumers the relief to which they are entitled.

ARGUMENT

I. Tempur-Pedic Has Entered Into Contracts With Its Retailers In Violation of Section 369-a

OAG in its Petition and supporting papers has provided the Court with ample evidence demonstrating that the contracts between Tempur-Pedic and its retailers ban discounting.[1] Indeed, Tempur Pedic admits that since 2002, Tempur-Pedic has persistently communicated to its retailers that Tempur-Pedic will terminate its contractual relationship with anyone who discounts its mattresses. Verified Answer dated May 12, 2010 ¶ 12; Affidavit of Richard Anderson dated May 10, 2010 ¶¶ 5-6. This alone refutes Tempur-Pedic's attempt to claim that its discount ban is not a contractual matter. In addition, Tempur-Pedic states unequivocally in cover letters, signed by its president and provided with its Retail Partner Obligations and Advertising Policies ("RPOAP") – a document Tempur-Pedic admits is a contract -- that "[i]f we discover that an account has chosen to charge prices lower than our suggested retail prices . . . we will cease doing business with that account." Affirmation of Linda Gargiulo dated March 24, 2010, ¶ 14, Exh. 6; Verified Answer ¶¶ 13,15; Anderson Aff. ¶¶ 5-6 & Exh. C.

---

[1] Tempur-Pedic acknowledges contractual relationships with its retailers, but claims that "the only 'contract provision'" it has with a retailer is limited to the terms of the Retail Partner Obligations and Advertising Policies ("RPOAP"). Respondent Opp. Mem. at 7, 9. Neither the facts nor New York law supports this position. For example here, in addition to the RPOAP, contract provisions were agreed between the parties through purchase orders and other exchanges. *See, e.g., Battista v. Radesi*, 491 N.Y.S.2d 81 (4th Dep't 1985) (purchase invoices provided all the essential terms to the agreement); *Matthew Bender & Co. v. Jaiswal*, 463 N.Y.S.2d 78 (3d Dep't 1985) (same). Thus, the only question is whether Tempur-Pedic's prohibition against discounting is part of the contracts with retailers, which the evidence demonstrates it is.

Thus, the RPOAP, which is agreed to by the retailer and attached to a cover letter specifying the ban on discounting, requires the retailer to "agree to abide by" and "Accept Tempur-Pedic Retail Partner Termination Policies," thereby incorporating Tempur-Pedic's ban on discounting into RPOAP. Gargiulo Aff., Exhs. 6, 7; Anderson Aff. at ¶ 9 (obligations under RPOAP are "accepted by Tempur-Pedic retailers"). This discounting prohibition is therefore part of Tempur-Pedic's contract with its retailers. *See Aceros Prefabriacados v. Tradebed, Inc.*, 282 F.3d 92, 97-98 (2d Cir. 2001). ("Applying New York law, we have found that 'parties to a contract are plainly free to incorporate by reference, and bind themselves *inter sese* to terms that may be found in other agreements.'") (citations omitted); *Tosco Corp. v. Oxygenated Marketing & Trading*, 1999 WL 328342, *3 (S.D.N.Y.1999) (terms and conditions referenced in facsimile held incorporated by reference into the contract, because "it is well established that parties may incorporate terms into their agreement by reference to extrinsic writings."), *aff'd sub nom. Bayway Refining Co. v. Oxygenated Mktg. & Trading A.G.*, 215 F.3d 219 (2d Cir. 2000).

The Court should reject Tempur-Pedic's absurd claim that its president's cover letter, setting out the grounds for termination if a retailer discounts, should be considered separately from the *attached* contract -- the very same contract in which the retailers accept Tempur-Pedic's termination policies. Tempur-Pedic admits that its contracts with retailers are not limited to the RPOAP and include other materials incorporated by reference. *See* Respondent Opp. Mem. at 5-6 ("The RPOAP incorporates by reference Tempur-Pedic's advertising practices, which dictate the use of the Tempur-Pedic brand

name and logos.").[2] Like the advertising policies, the president's cover letter clearly conveys that the retailer must follow Tempur-Pedic's ban on discounting as part of the agreed retailer contract. *See Port Distributing Corp. v. Pflaumer,* 880 F. Supp. 204, 207-08 (S.D.N.Y.1994) (looking at the "entire transaction" as evidenced by Purchase and Sale Agreement, promissory notes, and guarantees, to determine parties' intent), *aff'd*, 70 F.3d 8 (2d Cir. 1995); *East Europe Domestic Int'l Sales Corp. v. Island Creek Coal Sales Co.*, 572 F. Supp. 702, 708-09 (S.D.N.Y.1983) (letter of credit referring to "dry metric tons" was admissible in a dispute over whether contract was for "wet metric tons" or "dry metric tons," to show "the existence of a common basis between the parties for interpreting 'metric tons' to be consistent with a contract for metric tons").

Further evidencing that the ban on discounting is a contractual term, the evidence is overwhelming that Tempur-Pedic has enforced this provision by monitoring retailers' pricing and threatening those who violate or consider violating the ban with contract termination. *E.g.*, Gargiulo Aff. Exs. 21, 26, 29, 30, 31, 33, 37. Retailers are well aware that they will lose their account with Tempur-Pedic if they charge consumers less than the resale price set by Tempur-Pedic. *See, e.g.,* Gargiulo Aff. Exh. 12 (affidavit of Michael Bookbinder, Executive Vice President of Sales at Sleepy's), Gargiulo Aff. Exh. 18 (affidavit of Patrick Judd, Director of Bedding at Raymours). As a result, the retailers agree as part of their contractual business relationship with Tempur-Pedic to not discount its product. Under New York law, such evidence demonstrating course of dealings and course of performance between the parties is very relevant and fully admissible to interpret the terms of a contract, even where the contract is unambiguous on its face. *See*

[2] OAG argued the advertising policies alone violate section 369-a. Memorandum of Law In Support of Petition dated March 29, 2010 ("Petitioner Memorandum") at 17 n.8. Even though Tempur-Pedic admits that these advertising policies are part of the contract, Tempur-Pedic does not address OAG's argument.

Feinberg v. Federated Department Stores, 832 N.Y.S.2d 760, 763 (Sup. Ct. New York Co. 2007) ("Contrary to plaintiff's claims, the parties' written agreement(s) . . . may be explained or supplemented by course of dealing, usage of trade or course of performance . . . Such evidence is relevant to the interpretation of the contract(s), without regard to any contractual ambiguity") (citations omitted); *Valley National Bank of Long Island v. Babylon Chrysler-Plymouth, Inc.*, 53 Misc. 2d 1029 (Sup. Ct. Nassau Co.1967) (evidence of course of performance and usage of trade under UCC admitted to supplement terms of a contract), *aff'd*, 28 A.D.2d 1092 (2d Dep't 1967); *Walk-In Medical Centers, Inc. v. Breuer Capital Corp.*, 818 F.2d 260, 264 (2d Cir.1987) ("Evidence of trade usage was properly admitted pursuant to New York Commercial Code § 2-202, which authorizes the use of such evidence to explain a contract, whether or not the term has been found to be ambiguous"); *Viacom Int'l v. Lorimar Productions*, 486 F. Supp. 95, 98 n.3 (S.D.N.Y. 1980) ("The practical interpretation of a contract by the parties, manifested by their conduct subsequent to its formation for any considerable length of time before it becomes a subject of controversy, is entitled to great, if not controlling weight in the construction of the contract") (citing numerous New York cases); *Webster's Red Seal Publ'ns v. Gilberton World-Wide Publ'ns*, 67 A.D. 2d 339, 341 (1st Dep't 1979 ("We think the most persuasive evidence of the agreed intention of the parties in those circumstances is what the parties did when the circumstances arose."), *aff'd*, 53 N.Y.2d 643 (1981).[3]

[3] Indeed, Tempur-Pedic appears to acknowledge that custom, course of dealing, and course of performance are relevant to interpreting the terms of an existing contract, by quoting language in two cases to that effect. Respondent Opp. Mem at 10-11 (citing *Cherry River Music Co. v. Simitar Enter., Inc.*, 38 F. Supp. 2d 310, 319 (S.D.N.Y. 1999) ("While industry custom and usage or a prior course of dealing between the parties is relevant to determine the meaning of a contract, it cannot create a contract where there has been no agreement."); *Fasolino Foods Co. v. Banca Nazionale del Lavoro*, 761 F. Supp. 1010, 1021 (S.D.N.Y. 1991) ("A prior course of dealing . . . is a tool for interpreting existing contracts and may not be used to establish formation.")).

a. Prevailing case law holds that the prohibition on discounting is a contract term forbidden under section 369-a

Case law interpreting section 369-a also supports OAG's contention that the discounting ban is part of Tempur-Pedic's contract with retailers. In *Carl Wagner & Sons v Appendagez, Inc.*, 485 F. Supp. 762 (S.D.N.Y. 1980), the court expressly rejected the argument that Tempur-Pedic makes here, that a manufacturer can implement a ban on discounting without running afoul of section 369-a. In *Carl Wagner*, representatives of Appendagez (the manufacturer) told Carl Wagner (the retailer) that it required the resale of its products at least at the price set by the company. No written acknowledgement of this requirement was requested or received. *Id.* at 766-67. Carl Wagner refused to comply, and sold Appendagez products below the price the company had set. In response, Appendagez refused to fill Carl Wagner's orders. Carl Wagner sued for breach of contract. After concluding that a contract between the parties existed, the court held that Appendagez "could not legally implement" the ban on discounting and could not apply that ban to "the transactions between the present parties." *Id.* at 772. As such, the court held that the ban was illegal and that "transactions between the parties" were "contract provisions" subject to section 369-a. *See State v. Mobil Oil*, 38 N.Y.2d 460, 465 (1976) (citing L. 1975, ch. 65, the law that enacted section 369-a, as a reason to reject a commentator's view that New York courts "have consistently upheld" bans on discounting).

Carl Wagner is right on point. Indeed, the facts of this case, showing a clear contractual prohibition on discounting and widespread enforcement of the prohibition by Tempur-Pedic, are even stronger than the facts in *Carl Wagner*. Tellingly, Tempur-Pedic does not cite *Carl Wagner* in its opposition to the verified petition. Its only cite to *Carl*

Wagner is in a footnote in its motion to dismiss, in which Tempur-Pedic argues that *Carl Wagner* did not give Tempur-Pedic notice of Petitioner's construction of section 369-a. Respondent Dis. Mem. 19 n.18. Tempur-Pedic has no answer to *Carl Wagner* because the case dooms its position.

b. Tempur-Pedic's claim that the prohibition on discounting is a unilateral term and therefore not part of the contract is factually unsupportable

Tempur-Pedic next seeks to avoid the consequences of section 369-a by arguing that its conduct is unilateral rather than contractual and is set out only "in separate one-way transmittals that neither request nor invite expression of assent by the recipient." Respondent Dis. Mem. at 6. This contention is both factually and legally inaccurate.

As an initial matter, Tempur-Pedic's conduct is far from unilateral. As noted above, Tempur-Pedic's regular exchanges with its retailers about the discounting prohibition and its enforcement of the prohibition indisputably show that Tempur-Pedic's retailers have agreed to the ban on discounting. Specifically, as set forth in the Petition and the Gargiulo Affirmation, OAG's investigation has uncovered numerous communications between Tempur-Pedic and its retailers on the discounting ban and the meaning of the ban. For example, Raymour & Flanigan ("Raymour") began selling Tempur-Pedic products in August 2007. At the outset of their business relationship, Tempur-Pedic advised Raymour about its retail price policy and the "prohibition on discounting." (Gargiulo Aff., ¶ 4, Exh. 9.) The ensuing communications with Raymour about pricing made clear that the prohibition on discounting was part of the contract to which Raymour agreed. In Tempur-Pedic's own document, dated August 20, 2007, National Retail Sales Training Director Lori Williams reports on training meetings with Raymour and reminded Tempur-Pedic trainers that when asked "if Raymour can discount

our products, the answer should be simply No." (Gargiulo Aff., Exh. 10.) Further evidencing that the prohibition on discounting is part of the contract, Raymour complained to Tempur-Pedic in September 2007 about discounting by a retail competitor, Metro-Mattress, stating, "*as stated in our agreement there is no discounting . . . you have committed to us that this will be taken care of.*" *Id.* (emphasis added). Tempur-Pedic responded to this email by reporting that Metro-Mattress would cease any further attempts at discounting, stating that the "situation has been addressed. We have assurances that it will end no later than Friday 9/7." (Gargiulo Aff., Exh. 26.)

When another retailer, Rotmans, tried selling Tempur-Pedic mattresses at 5% off in addition to 5% tax free, Tempur-Pedic contacted Rotmans and told it "Stop this practice." Rotmans apologized and demonstrated its continued commitment to avoid discounting by advising Tempur-Pedic that Tempur-Pedic's products would be excluded from any Rotmans' sales going forward. (Gargiulo Aff., Exh.14.)

Tempur-Pedic does not address, much less rebut, any of this evidence of how Tempur-Pedic ensured that the ban on discounting was followed by retailers who understood the ban to be a contractual commitment. Gargiulo Aff. Exh. 12 (Affidavit of Michael Bookbinder, Executive Vice President of Sales for Sleepy's, at ¶ 6) ("Sleepy's understands that Tempur-Pedic makes charging [manufacturer's suggested retail prices] a condition for being a Tempur-Pedic account and maintaining that status."); Gargiulo Aff. Exh. 18 (Affidavit of Patrick Judd, Director of Bedding for Raymour, at ¶ 4) ("Raymour understands that it must follow Tempur-Pedic's price policy as a condition of maintaining the Tempur-Pedic line of products.").

c. Tempur-Pedic's argument that OAG must demonstrate that an implied contract was entered into is without basis

Tempur-Pedic next claims that OAG has not demonstrated that retailers contractually agreed not to discount Tempur-Pedic products and therefore must establish that an implied contract has been formed. Respondent Opp. Mem. at 9-11. This argument is a red herring. As explained above, OAG has established that the discounting ban was a provision of the contract, expressly and by course of dealing. As a result, implied contract analysis is unnecessary. *Julien J. Studley, Inc. v. New York News, Inc.*, 70 N.Y.2d 628, 629 (1987) ("A contract cannot be implied in fact where there is an express contract covering the subject matter involved.").

II. FEDERAL ANTITRUST LAW IS NEITHER CONTROLLING NOR PERSUASIVE AUTHORITY IN THIS NEW YORK SPECIAL PROCEEDING

Tempur-Pedic seeks to avoid the results of the above unfavorable state law by contending that federal law instead should govern the interpretation of the New York state statutes at issue in this proceeding. Respondent Dis. Mem. at 13-15. Tempur-Pedic also argues that the Court should look to the Donnelly Act to interpret section 369-a notwithstanding that section 369-a is in a different part of the General Business Law. Each of these arguments is unavailing.

First, the United States Supreme Court has held that federal antitrust law does not preempt or otherwise limit the application of state law or state antitrust law, including state law that may contradict federal antitrust law. *California v. ARC Am. Corp.*, 490 U.S. 93, 102 (1989). In *ARC America*, the Court considered whether a claim barred under federal antitrust law was also barred under *state* antitrust law. The Court unanimously held that state antitrust law could be contrary to federal antitrust law, regardless of whether the state antitrust law was enacted or construed before or after the contrary federal antitrust law. Indeed, as the U.S. Supreme Court has made clear, a state

court may construe state antitrust law differently than federal law, even if the federal and state statutes used the same language. *Id.* at 102-03 (considering Ariz. Rev. Stat. Ann. § 44-1408(a)). Arizona did precisely that, construing state antitrust law to allow recovery by indirect purchasers and expressly rejecting the contrary federal antitrust law. *Bunker's Glass Co. v. Pilkington, PLC*, 75 P.3d 99, 102 (Ariz. Sup. Ct. 2003). *See generally id.* at 104-05 (discussing the "idiosyncratic" picture of how state law diverges from federal law on this question).[4] Thus, even were there contrary interpretations of New York and federal antitrust law applicable here, Tempur-Pedic's argument for application of federal law would fail.

Moreover, Tempur-Pedic's argument that federal antitrust law somehow applies to this New York state court proceeding is inconsistent with its argument to the Eleventh Circuit Court of Appeals in *Jacobs v. Tempur Pedic Int'l, Inc.*, No. 08 12720-F (appeal pending of *Jacobs v. Tempur-Pedic Int'l, Inc.*, 2007 WL 4373980 (N.D. Ga. 2007)). There, in letters addressing whether this proceeding and the prior investigation were "supplemental authorities" under Fed. R. App. Proc. 28(f), Tempur-Pedic argued that federal antitrust law has "nothing to do" with and is "entirely irrelevant to" this New York action. Letters of William Berkowitz dated March 6, 2009 and April 8, 2010.

In short, federal antitrust law simply does not apply to this special proceeding. Section 369-a has no counterpart under federal antitrust law and, thus, there is no issue in this case of possible contrary application of state and federal law. Moreover, section 369-a was specifically enacted by New York's legislature in 1975 to ensure that restraints on discounting are expressly prohibited and made unenforceable, not just subject to the

[4] New York has also chosen to diverge from federal antitrust law by amending the Donnelly Act to expressly permit recovery by indirect purchasers. GBL § 340.6.

antitrust laws that already existed at the time. Memorandum of Law in Support of Petition dated March 29, 2010 ("Petitioner Memorandum") at 15-16. Rather than relying on antitrust law, section 369-a reflects New York's express and clear decision that contract terms shall not restrain discounting. The statute is clear, concise and to the point—and should be enforced here. To the extent that section 369-a conflicts (and it does not) with federal antitrust law, under both New York and federal holdings, New York law controls here. *See People v. Rattenni*, 81 N.Y.2d 166, 171 (1993) (New York State antitrust law should be "given a different interpretation . . . where State policy, differences in the statutory language or the legislative history justify such a result.") (quoting *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 335 (1988)); *see Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 215 (2007) (rejecting application of federal antitrust law precedent for class actions when the court was "presented with a state law question that federal precedent is not very helpful in resolving").

Tempur-Pedic, perhaps realizing the weakness of its position, next attempts to bootstrap the application of federal law by asserting that this Court should look to the Donnelly Act and cases under the Donnelly Act for its interpretation of section 369-a. This argument has no basis. OAG's Petition does not allege a claim under the Donnelly Act (although such a claim is supportable). Instead, OAG alleges violations of section 369-a and section 63(12) of the Executive Law. Tellingly, when enacting section 369-a, the New York Legislature did not make that statute part of or subordinate to the Donnelly Act. Quite the contrary, the Legislature chose to enact a new statute in a separate Article (Article 24A- Fair Trade Law). Tempur-Pedic's argument that this Court should be guided by the Donnelly Act undermines the legislature's clear decision.

In any event, the Donnelly Act does not help Tempur-Pedic's position on the

merits. Like section 369-a, the Donnelly Act prohibits agreements not to discount as illegal restraints of trade. And, the Donnelly Act presents an even lesser evidentiary burden for a plaintiff seeking to establish an unlawful agreement than federal law. For example, the New York Court of Appeals in *State v. Mobil Oil Corp.*, 38 N.Y.2d 460 (1976) rejected the argument that New York's Donnelly Act reached price discrimination, when the federal Sherman Act did not. While discussing the Donnelly Act's use of the word "arrangement," the Court observed that "undoubtedly the sweep of Donnelly may be broader than that of Sherman" and might reach a "commitment on the part either of the oil company or of its dealers or any of them." *Id.* at 464; *see State v. B.P. Oil Corp.*, 80 Misc. 2d 566, 568 (Sup. Ct. Nassau Co. 1975) ("the tone of the [Donnelly Act] is broad enough to reach the unilateral exertion of power by the defendant in stifling competition").

Nor does *United States v. Colgate & Co.*, 250 U.S. 300 (1919) insulate Tempur-Pedic from liability in this case. As noted above, section 369-a is a state statute that is to be analyzed under state law, not federal law. But even were federal law relevant, *Colgate* does not provide any validation for Tempur-Pedic's conduct. Tempur-Pedic incorrectly cites *Colgate* as creating a "right" to unilaterally set minimum prices and to enforce them. *Colgate* does not create such a right. *Colgate* only allows a manufacturer the limited right to declare minimum prices for its product and to terminate an account that does not follow its practices. *Colgate* does not permit the actions undertaken here, which include actively pressuring retailers and policing compliance. *See United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960) (conduct beyond "exposition, persuasion and argument" for the "suggested" price, such as policing compliance, goes beyond what is permitted by *Colgate*); *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 53 (2d Cir. 1980) ("threats of termination

[to] secure adherence to the fixed price" is an "illegal combination"); *Pitchford v. PEPI, Inc.*, 531 F.2d 92, 98 (3d Cir. 1975) (requiring "approval" of dealer deviations from list prices is concerted action).[5]

In *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984), a case with facts similar to this case, the Court upheld a jury verdict for the plaintiff. In so doing, the Court rejected a *Colgate* defense and cited as "direct" evidence that Monsanto was not acting unilaterally in that Monsanto: (i) twice told discounters that they would not get supplies if they discounted; and (ii) went to the parent of a non-assenting distributor to ensure that the distributor would charge the suggested price. *Id.* at 765.

Here, as in *Monsanto* and *Parke, Davis*, Tempur-Pedic went beyond merely announcing its policy and terminating accounts that did not comply. Tempur-Pedic requires accounts to adhere to its policies, including the ban on discounting. Tempur-Pedic pressures companies to comply, polices its retailers, and threatens them with losing their ability to sell its products if they did not follow the policy. Through these actions, Tempur Pedic lost whatever *Colgate* defense it might have had.

III. OAG May Enforce Section 369-a's Prohibitions

In another effort to defeat this law enforcement action, Tempur-Pedic argues that because section 369-a uses the word "unenforceable," and not illegal or prohibited, OAG's law *enforcement* action fails because, according to Tempur-Pedic, the statute – which has no standing limitation -- only permits retailers to assert a defense were Tempur-Pedic to seek to enforce its contracts in a court of law. Respondent Dis. Mem. at

[5] The case cited by Tempur-Pedic as extending the *Colgate* doctrine to New York, *Locker v. American Tobacco Co.*, 195 N.Y. 565, 566 (1909), similarly does not permit concerted action. *Locker* holds that a company can choose with whom it deals, but cannot make that choice as part of concerted action.

9-13. Tempur-Pedic's position undermines the entire point of the statute. If accepted, such an interpretation would eviscerate the legislature's stated purpose, which is to eliminate bans on discounting, because enforcement would be left entirely to retailers who have no choice but to comply with the contract provision or lose the business. Tempur-Pedic's narrow interpretation also ignores the statute's title and legislative history clearly demonstrating the intent to end suppliers' efforts to require retailers to charge consumers more. The Legislature titled the section "Price-Fixing Prohibited," not price-fixing unenforceable. This Court should not ignore the words chosen by the legislature and should reject Tempur-Pedic's argument.[6]

Moreover, Tempur-Pedic's argument completely ignores the Attorney General's separate authority under Executive Law section 63(12) to enforce all laws. Indeed, Tempur-Pedic's argument was rejected by the court in *Worldhomecenter.com v. Kichler*, 2009 WL 936675 (E.D.N.Y. 2009). In *Worldhomecenter.com*, the court rejected the private plaintiff's claim under section 369-a on the grounds that no contract existed, but also addressed plaintiff's argument that it should be permitted to enforce section 369-a because the retailers that agreed to ban discounting would not be able to enforce the statute. In response, the court stated "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)." 2009 WL 936675 at *4. That is this case.

Contrary to Tempur-Pedic's interpretation, the legislative language and intent of section 369-a is clear, and it is to make price-fixing illegal. Petitioner's Memorandum at

[6] The authorities cited by Tempur-Pedic, Respondent Dis. Mem. at 12, are not to the contrary. Those cases only stand for the unremarkable proposition that the language of a statute controls when the heading of the statute alters, limits, or trumps the wording of the statute. Here, prohibiting the conduct in the title is completely consistent with the Legislature's use of the word unenforceable and unactionable at law in the text. Section 369-a makes restraints on discounting illegal, unenforceable, and unactionable at law.

14-17. When enacted, the legislation did not simply repeal New York's Fair Trade Law, which gave a vendor or producer the ability to set the resale price for its product, but also codified section 369-a to prohibit contractual bans on discounting. Governor Carey stated that the goal of the legislation was to "restore full competition to the marketplace and to insure that consumers are not victimized by price-fixing schemes." Public Papers of Hugh L. Carey 77 (1982). The Department of Commerce wrote that the "*bill would make illegal the fixing of the reselling price of commodities by the vendor or producer. . . . This bill seeks to promote lower consumer prices by prohibiting manufacturers or wholesalers from setting minimum resale prices for their products.*" Bill Jacket for L. 1975, ch. 65 at 11 (Department of Commerce Mem. dated April 28, 1975) (emphasis added). "The Budget Department similarly noted that 'to promote lower consumer prices,' the repealer would 'specifically prohibit price-fixing by making any such contractual provisions unenforceable and unactionable at law." Bill Jacket, Budget Report on Bills 1, 2 (April 23, 1975).

In sum, section 369-a makes bans on discounting illegal, unenforceable, and not actionable at law. The Attorney General, in his law enforcement capacity and pursuant to his statutory authority under Executive Law § 63(12), has full power to enforce this law and bring this action.

a. The Attorney General's Office did not previously take a contrary position on the interpretation of the Statute

Tempur-Pedic distorts and mischaracterizes a statement by OAG in a brief written over 20 years ago. Respondent Dis. Mem. at 1, 11-12. In that 1987 *Anheuser Busch* brief, OAG stated that "[section 369-a] did not make [vertical price fixing or prohibitions on discounting] illegal," which Tempur-Pedic now interprets as the OAG somehow

accepting the view that section 369-a can only be used by a private party asserting a defense to a breach of contract claim. OAG said no such thing. Indeed, as the context of the quoted statement makes clear, OAG was simply saying that section 369-a did not make bans on discounting illegal for the first time, because the Donnelly Act had already made such bans, that is vertical price fixing, illegal. This statement does not support Tempur-Pedic's position that it somehow can ignore section 369-a altogether and avoid this law enforcement action.

In *Anheuser Busch*, the respondent beer brewers, referred to in the OAG brief as Beer Companies, had required that their beer bottlers limit their sales to specific geographic areas. OAG commenced an investigation and, in response, the Beer Companies argued that the geographic market restraints were per se legal under New York antitrust law because, they argued, the Donnelly Act did not prohibit vertical restraints other than price fixing. In support of their position, the Beer Companies pointed to section 369-a, arguing that bans on discounting were only illegal under section 369-a and not the Donnelly Act. OAG agreed that section 369-a prohibited bans on discounting (the same position advocated by OAG here), but argued that the Donnelly Act prohibited anticompetitive vertical restraints as well, including the bans on discounting prohibited by section 369-a. Thus, contrary to Tempur-Pedic's suggestion, <u>both</u> sides in *Anheuser Busch* read section 369-a to prohibit bans on discounting, which is the same position advocated by OAG here. Significantly, the Court of Appeals rejected the Beer Companies' positions that the attorney general lacked authority to investigate and that geographic market restraints were per se legal. Accordingly, in these circumstances, Tempur-Pedic's attempt to gain any support for its position by quoting the

1987 brief out of context and claiming it is dispositive of the OAG's former position is a gross misrepresentation, which the Court should give no heed.

b. The Attorney General has the power under 63(12) to enjoin the implementation of legally unenforceable provisions

The OAG's power to seek to enjoin "illegal" or "fraudulent" acts under section 63(12) includes the authority to seek to enjoin parties from imposing "unenforceable" contract provisions. In *In re Synergy Dev. Corp.*, 140 B.R. 958 (Bank. S.D.N.Y. 1992), OAG successfully brought a section 63(12) claim against the debtor and owner of a health spa. OAG's claim was based on the health spa's violation of GBL § 622(a), which required state health clubs to provide financial security to protect members in the event that the club closed. GBL § 622(a)(9) does not refer to "illegal" nor "fraudulent" acts, but does state that "no contract for services shall be enforceable against the buyer if the seller has failed to comply with any requirements of this section." By granting the relief OAG sought, the court recognized that merely prohibiting the health club from enforcing the contracts did not "satisfy the state regulatory requirements" and that OAG's action under section 63(12) was within the "police power" exception to the automatic stay in bankruptcy. *Id.* at 960-61. So too here.

Indeed, to accept Tempur-Pedic's argument would permit the continuation of practices that the Legislature has prohibited under section 369-a. In *X.L.O. Concrete Corp. v. Rivergate Corp.*, 83 N.Y.2d 513, 515 (1994), a subcontractor sought payment from a general contractor who refused to pay because the work had been rigged pursuant to a conspiracy that violated state and federal antitrust law. The general contractor argued that the contract for this rigged work was unenforceable because it was part of that illegal conspiracy. The New York Court of Appeals held that the contract was legal

on its face but remanded the case to the trial court to determine whether the contract was "so integrally related to the agreement . . . in restraint of competition that its enforcement would result in compelling performance of the precise conduct made unlawful by the antitrust laws." *Id.* at 518. Similarly, this Court should not allow Tempur-Pedic to require that its retailers agree to not discount and threaten to terminate retailers who discount, which would in effect be enforcing the precise conduct expressly made unenforceable under section 369-a. At the very least, the Attorney General has ample authority to enforce New York's statutes.

IV. The Attorney General Has Also Demonstrated That Tempur-Pedic Committed Persistent Fraud in Violation of Section 63(12)

Tempur-Pedic's claim that the OAG has not properly alleged that it committed fraud is incorrect. In making this argument, Tempur-Pedic ignores the definition of "fraud" under section 63(12) and New York law. Section 63(12) defines "fraud" as "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual clauses." This definition is broader than the common law definition of fraud, which includes "all deceitful practices contrary to the plain rules of common honesty...[and] should therefore be given a wide meaning, so as to include all acts . . . which do by their tendency to deceive or mislead the purchasing public come within the purpose of the law." *People v. Federated Radio Corp.,* 244 N.Y. 33, 38-39 (1926).

Tempur-Pedic's restraints on discounting easily fit within section 63(12)'s definition of fraud. Tempur-Pedic misleads retailers into believing that restraints on discounting are enforceable, thus ensuring compliance to its demands. Moreover, customers are deceived into believing that the retailer has no ability to provide discounts,

when in fact retailers do have that right under the law. Such conduct is actionable, fraudulent conduct, which is persistent and repeated where, as here, it affects more than one individual. Petitioner Memorandum at 11 n.5.

V. The Relief Sought by the Attorney General's Office Is Appropriate

The Court should also reject Tempur-Pedic's argument that OAG's enforcement of section 369-a in this case is improper because it is "unforeseeable and unconstitutionally expansive." Respondent Dis. Mem. at 17-19. The statute alone provides whatever notice is required, and the fact that it has not been widely enforced is completely irrelevant. In *Roberts v. Tishman Speyer Properties, L.P.*, 13 N.Y.3d 270 (2009), plaintiffs argued a new interpretation of a statute, which the Court of Appeals accepted. Here, by contrast, OAG's position is consistent with the statute's plain language and case law, including *Carl Wagner & Sons v. Appendagez, Inc.*, 485 F. Supp. 762, 772 (S.D.N.Y. 1980). Nonetheless, in *Roberts*, the interpretation accepted by the Court was a significant change from how the statute had been previously interpreted. Even there, in response to the defendants' claim that it would suffer dire consequences due to inability to predict the Court's interpretation of the statute, the Court stated:

> Defendants predict dire financial consequences from our ruling, for themselves and the New York City real estate industry generally. . . . If the statute imposes unacceptable burdens, defendants' remedy is to seek legislative relief. . . . That the courts and litigants may experience some additional burden . . . is no reason to eschew what we view as the only correct interpretation of the statute (cf. Matter of Gross v Perales, 72 NY2d 231, 237 [1988]).

13 N.Y.2d at 287.

Other notice was provided as well. As noted, *Carl Wagner & Sons v. Appendagez, Inc.*, 485 F. Supp. 762, 772 (S.D.N.Y. 1980) is a reported decision that directly rejected Tempur-Pedic's interpretation of the statute. Moreover,

WorldHomeCenter.com v. L.D. Kichler Co., 2009 U.S. Dist. LEXIS 28123 (E.D.N.Y. 2009) agreed with OAG's position here. Indeed, even the Court of Appeals gave notice of OAG's interpretation. In *State v. Mobil Oil*, 38 N.Y.2d 460 (1976), the Court stated that section 369-a might be a reason to reject a commentator's view that New York courts "have consistently upheld" bans on discounting. *Id.* at 465. The Court cited L. 1975, ch. 65, the law that enacted section 369-a, as a *but cf.*, illustrating the Court's view that section 369-a did not appear to allow bans on discounting.

The Court similarly should reject Tempur-Pedic's contention that it is entitled to a free pass here because this is the first enforcement action by the Attorney General of a statute enacted in 1975. In *Benson v. Beame* 50 N.Y.2d 994 (1980), plaintiffs attacked the constitutionality of the New York Rent Control Law, claiming that a lack of enforcement mandated finding the statute unconstitutional. The Court of Appeals flatly rejected that claim:

> The role of the judiciary is to enforce statutes and to rule on challenges to their constitutionality . . . . Any problems that result from pervasive nonenforcement are political questions for the solution of which recourse would have to be had to the legislative or executive branches; the judiciary has neither the authority nor the capabilities for their resolution.

Id. at 996. The same result is warranted here.

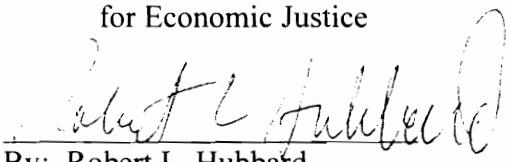
VI. Conclusion

For the reasons set forth above and in Petitioner's Memorandum, the Court should make a summary determination in Petitioner's favor and grant injunctive relief, restitution, disgorgement, and costs, as requested in the Verified Petition.

Dated: New York, New York
June 10, 2010

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

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



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

Of Counsel:

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