

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- :

Index No. 400837/10

TEMPUR-PEDIC INTERNATIONAL, INC. :

Respondent. :

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**PETITIONER'S MEMORANDUM OF LAW IN  
OPPOSITION TO MOTION TO STRIKE**

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clear Tempur-Pedic is not entitled to disclosure in this special proceeding. Accordingly, Tempur-Pedic's Motion to Strike should be denied in its entirety.

## ARGUMENT

### **A. The Gargiulo Affirmation Is Fully Admissible**

As summarized in the Affirmation, during OAG's investigation of Tempur-Pedic, OAG investigators visited retailers of Tempur-Pedic products throughout New York State who provided direct evidence that retailers do not discount Tempur-Pedic products. In its papers in opposition to this proceeding, Tempur-Pedic freely admits that it refuses to deal with retailers who refuse to agree not to discount. Tempur-Pedic nevertheless seeks to strike portions of the Affirmation that summarize the OAG visits—set forth in attached transcripts of the conversations recorded by OAG investigators.<sup>1</sup> Even putting aside that Tempur-Pedic's concession to the underlying facts makes Tempur-Pedic's motion to strike entirely disingenuous, an attorney's affirmation properly may describe and summarize the underlying evidence set forth in the exhibits attached to the attorney's affirmation.

An "affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide evidentiary proof in admissible form." *Zuckerman v. City of New York*, 49 N.Y.2d 557, 563 (1980) (quotation omitted); see *Dorkin v. American Express Co.*, 43 A.D.2d 877 (3d Dep't 1974) (attorney affidavit properly relied upon a deposition and other exhibits to form the factual basis for statements included in the affidavit); *Prudential Sec. Inc. v. Rovello*, 262 A.D.2d 172, 172

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<sup>1</sup> Tempur-Pedic challenges paragraphs 3, 6, 8, 9, 11, 12, 13, 32, 43 and 44 of the Affirmation, which discusses the conceded fact that Tempur-Pedic products are not discounted, as well as the evidence gathered during OAG's investigation regarding the commercial relationship between Tempur-Pedic and its retailers. Tempur-Pedic also seeks to strike Exhibits 32-42, which are excerpts of transcripts of OAG investigator visits to retailers. Exhibit 42 is the Affidavit of Arlene Leventhal, conveying the specifics of her communications with retailers. Respondent's arguments do not fit this affidavit, which is by the individual with personal knowledge and is not a transcript. Tempur-Pedic does not object to Affirmation Exhibits 1 through 31, including those exhibits that are summarized by the statements that it seeks to strike.

(1st Dep't 1999) (attorney affidavit, supported by documentary evidence, held admissible to support summary judgment motion); *Getlan v. Hofstra University*, 41 A.D.2d 830, 830-31 (2d Dep't 1973).

Tempur-Pedic's reliance on *Clark v. Foley*, 240 A.D.2d 458 (2d Dep't 1997), is misplaced. In *Clark*, an attorney submitted an affidavit that did not attach the underlying evidence. In clear contrast to the affidavit in *Clark*, the Affirmation here simply summarizes the underlying evidence attached to the Affirmation. Attached to this Memorandum is a chart, the first columns of which copy the chart that accompanied Tempur-Pedic's Motion to Strike, with an additional column showing, as to each challenged paragraph, that the Affirmation summarizes the attached evidence, much of which constitutes statements by Tempur-Pedic itself. The Affirmation is fully admissible.

**B. The Transcripts of OAG Investigator Visits to Tempur-Pedic Retailers Are Admissible**

Next, Tempur-Pedic seeks to strike as inadmissible the excerpts from the transcripts attached to the Affirmation of conversations that OAG investigators had while visiting Tempur-Pedic retailers. These transcripts are fully admissible. In her Affirmation, Ms. Gargiulo sets out the foundation for admission of the transcripts and attaches them as exhibits. Those excerpts comprise all of the relevant portions of the conversations about the pricing of Tempur-Pedic products. In *People v. Baranov*, 18 Misc. 3d 930, 936 (Sup. Ct. Kings Co. 2008), the court articulated the evidentiary rule of completeness as follows: "According to this doctrine a party offering part of the contents of a prior statement, whether of an adversary or of a witness, may be required to introduce all relevant part of the statement, including those favoring the adversary, to avoid misleading the trier of fact about the statement's tenor." See *Richardson on Evidence* (11<sup>th</sup> ed.) § 1-102, at 2; *People v. Gallo*, 12 N.Y.2d 12, 15 (1962). Here, OAG has fully complied with this rule in that all relevant portions of the transcripts were provided to Tempur-

Pedic and this Court in OAG's moving papers.

To avoid needless disputes, however, OAG submits with this Memorandum affidavits of the OAG investigators who visited the stores, which simply repeat the foundation information included in Ms. Gargiulo's Affirmation in order to respond to Tempur-Pedic's evidentiary contentions. The investigators also attach to their respective affidavits copies of full transcripts of the recorded conversations previously attached as exhibits to Ms. Gargiulo's Affirmation, including those portions of the transcripts that do not in any way relate to the pricing of Tempur-Pedic products.

**C. Tempur-Pedic Is Not Entitled to Disclosure in This Special Proceeding**

As explained in OAG's moving memorandum, Tempur-Pedic is not entitled to disclosure in this special proceeding. *See* Petitioner's Mem. at 9-11. In *People v. Bestline*, 41 N.Y.2d 887 (1977), the New York Court of Appeals reversed the trial court's order granting discovery to the respondents in a special proceeding, like this one, brought by the Attorney General under Executive Law section 63(12). The Court held that ordering discovery is an abuse of discretion where the record provides ample detail about the practices being challenged by the Attorney General, as is the case here. *Id.* at 888.

Indeed, a party seeking discovery in a special proceeding under section 63(12) bears a "heavy burden." *Spitzer v. Condor Pontiac, Cadillac, Buick & GMC Trucks*, 2003 WL 21649689 at \*4 (Sup. Ct. N.Y. County July 2, 2003) ("Because of the expedited nature of special proceedings, respondent must demonstrate special or unusual circumstances which would justify permitting discovery."). An even heavier burden is required of a party seeking disclosure from the State, where as here, it is acting in its law enforcement capacity. *Lefkowitz v. Raymond Lee Org., Inc.*, 94 Misc. 2d 875 (Sup. Ct. N.Y. County 1978), *aff'd*, 66 A.D.2d 656 (1st Dep't 1978). In *Raymond Lee Organization*, the respondent sought disclosure of the State's

investigatory file. The trial court denied the request holding:

[T]hough nominally a party plaintiff, the Attorney General is acting in his governmental (or discretionary) capacity . . . to enforce the laws of this State on behalf of its citizens. In fact, the relief sought by the complaint is an order enjoining and restraining the defendant from violating [state law. An enforcement action] must override the usual litigation considerations so that limited disclosure may be available under the CPLR, but only within the “strictly circumscribed discretion” of the Court and upon the showing of special or unusual circumstances.

94 Misc. 2d at 876-77 (citations omitted). Tempur-Pedic has not offered any justification for disclosure that meets the “heavy burden” or the “special or unusual” required in this enforcement action such as this. Tempur-Pedic’s request for OAG’s investigative file, therefore, should be denied.

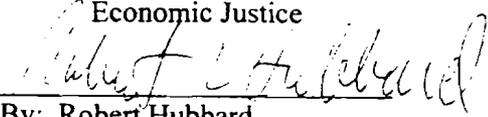
**D. Conclusion**

For the reasons above, the Court should deny Tempur-Pedic’s motion to strike or for leave to take discovery.

Dated: New York, New York  
June 10, 2010

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**APPENDIX A**

<b><u>¶/Ex. No.</u></b>	<b><u>Description</u></b> <sup>1</sup>	<b><u>Objection</u></b>	<b><u>Factual Basis</u></b>
¶ 3	<p>Tempur-Pedic products are sold at virtually uniform, high prices by all New York retailers of Tempur-Pedic products.</p> <p>Discounting occurs rarely, if ever.</p> <p>These uniformly high retail prices result from Tempur-Pedic's prohibition on discounting.</p> <p>As a condition of establishing, maintaining, or continuing a business relationship with Tempur-Pedic, all retailers are required to sell Tempur-Pedic products at retail prices specified by Tempur-Pedic.</p> <p>Despite that requirement, Tempur-Pedic labels the retail prices for each model it provides to retailers as "suggested" retail prices</p>	Lack of Foundation	<p>Exh. 3, Tempur-Pedic's Amended Interrogatory Response, produced in response to investigative subpoena issued by the Attorney General's office.</p> <p>Response No. 5:                      "Tempur-Pedic announced that the Company was adopting a unilateral policy to suspend doing business with any retailer who does not adhere substantially to our suggested retail price ranges."</p> <p>Response No. 19:                      Tempur-Pedic has not become aware of any New York Customer who has chosen not to adhere substantially to the Company's suggested retail price ranges." When Tempur-Pedic has inquired about a sale at less than the prices suggested by Tempur-Pedic it often "finds that the New York Customer was unaware that an individual salesperson had made such a sale, or that the New York Customer had been inadvertently using an outdated price list."</p> <p>Exh. 6, Tempur-Pedic's letters to retailers, "it remains policy of Tempur-Pedic North America, Inc. not to do business with any retailer who chooses to charge retail prices which are different than our suggested retail prices..."</p> <p>Exh. 7, Tempur-Pedic's letter to retailers, dated May 1, 2009, with language similar to Exh. 6.</p> <p>Exh. 9, Affidavit of Neil Rosenbaum, Senior Vice President of Merchandising at Raymour &amp; Flanigan ("Rosenbaum Affidavit"), states: "As a result of Tempur-Pedic's pricing policy, Raymour &amp; Flanigan ("Raymour") sells all Tempur-Pedic products at the suggested retail price ("SRP") set by Tempur-Pedic.</p>

<sup>1</sup> The language contained in Description and Objection columns above is identical to the language in the chart attached as Appendix A to Respondent's Motion to Strike.

<u>¶/Ex. No.</u>	<u>Description</u> <sup>1</sup>	<u>Objection</u>	<u>Factual Basis</u>
	("MSRP").		<p>Exh. 18, Affidavit of Patrick Judd, Director of Bedding at Raymour, ("Judd Affidavit"), states: "Raymour understands it must follow Tempur-Pedic's price policy as a condition of maintaining the Tempur-Pedic line of products."</p> <p>Exh. 10, Tempur-Pedic internal email regarding meetings with Raymour &amp; Flanigan ("Raymour"): "When asked if you can discount our products the answer should be simply NO."</p> <p>Exh. 11, Sleepy's Interrogatory Response, produced in response to investigative subpoena issued by the Attorney General's office. Par. 6: Sleepy's decision to sell Tempur-Pedic products at the manufacturer's suggested retail price as a general matter, is based upon Tempur-Pedic's policy.</p> <p>Exh. 12, Affidavit of Michael Bookbinder, Executive Vice President of Sales for Sleepy's, ("Bookbinder Affidavit") states: "Sleepy's sells Tempur-Pedic products at the manufacturer's suggested retail price ("SRP") because Tempur-Pedic declines to do business with retailers who charge less than the retail prices set by Tempur-Pedic. . ."</p>
¶ 6	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.	Lack of Foundation	<p>Exh. 3, Tempur-Pedic's Amended Interrogatory Responses Response No. 5: "Tempur-Pedic announced that the Company was adopting a unilateral policy to suspend doing business with any retailer who does not adhere substantially to our suggested retail price ranges."</p> <p>Exh. 7, Letter from Tempur-Pedic to retailers, dated May 1, 2009, stating: "[I]t remains the unilateral policy of Tempur-Pedic North America, LLC not to do business with any retailer who chooses to charge retail prices which are different than our suggested retail prices on all Tempur-Pedic products. . ." If we discover that an account has chosen to charge prices lower than our suggested retail prices, and it is more than an isolated incident, . . . we will cease doing business with that account."</p>

¶/Ex. No.	Description	Objection	Factual Basis
¶ 8	Tempur-Pedic's Amended Interrogatory Responses further state that deviations from the resale prices set by Tempur-Pedic occur <b>only</b> 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. (emphasis added).	Lack of Foundation	Exh. 3, Tempur-Pedic's Amended Interrogatory Responses Response 19: "When Tempur-Pedic has inquired as to the reasons that a New York Customer has sold a Tempur-Pedic product at a price less than the prices suggested by Tempur-Pedic, it often finds that the New York Customer was unaware that an individual salesperson had made such a sale, or that the New York Customer had been inadvertently using an outdated price list."
¶ 9	Tempur-Pedic thus does not dispute that adhering to its fixed resale prices is a condition of being a Tempur-Pedic retail account.	Lack of Foundation	Exh. 3, Tempur-Pedic's Amended Interrogatory Response Response No. 5: "On or about April 15, 2002, Tempur-Pedic announced that the company was adopting a unilateral policy to suspend doing business with any retailer who does not adhere substantially to our suggested retail price ranges." "Tempur-Pedic has continuously maintained that policy since April 2002."  Response No. 19: "When Tempur-Pedic has inquired as to the reasons that a New York Customer has sold a Tempur-Pedic product at a price less than the prices suggested by Tempur-Pedic, it often finds that the New York Customer was unaware that an individual salesperson had made such a sale, or that the New York Customer had been inadvertently using an outdated price list."  Exhs. 6-7 Tempur-Pedic letters to retailers advising them of Tempur-Pedic's policy not to do business with any retailer who chooses to charge retail prices which are different than Tempur-Pedic's suggested retail prices.

<u>¶/Ex. No.</u>	<u>Description</u>	<u>Objection</u>	<u>Factual Basis</u>
¶ 11	Tempur-Pedic thus does not dispute that it and its retailers together monitor and enforce its prohibition on discounting.	Lack of Foundation	<p>Exh. 3, Tempur-Pedic's Amended Interrogatory Responses Response No. 11: "Tempur-Pedic has on occasion received complaints from New York Customers concerning the pricing of Tempur-Pedic Products by other New York Customers."</p> <p>Response Nos. 12-14: Lists verbal communications between representatives of Tempur-Pedic and retailers, concerning the retail pricing practices of a second retailer. These communications include the following: In summer/fall 2008, Tempur-Pedic's Executive Vice President and President North America, Richard Anderson, received three or four telephone calls from Sleepy's representatives who complained about the retail pricing of other New York retailers. Mr. Anderson also met with representatives of Raymour &amp; Flanigan for the purpose of discussing the price at which Sleepy's sold Tempur-Pedic Products."</p> <p>Exh. 13: Tempur-Pedic email to Macy's: advising Macy's of Tempur-Pedic's "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."</p> <p>Exh. 14: Tempur-Pedic email to Rotman's: "It has been brought to my attention that Rotman's is selling Tempur-Pedic for 5% off in addition to 5% tax free. This is a violation of our SRP policy. Please stop this practice."</p> <p>Exh. 15-17: Email is from Tempur-Pedic to Raymour bringing a "pricing violation" and "SRP violations" to Raymour's attention.</p> <p>Exh. 23: Email from retailer Metro-Mattress to Tempur-Pedic, complaining about the pricing of Dave Hayes Appliance Center. Tempur-Pedic responds to this complaint stating: "This</p>

¶/Ex. No.	Description <sup>1</sup>	Objection	Factual Basis
			<p>will be addressed today with Dave Hayes.”</p> <p>Exhs. 25-28, 30-31: Emails produced by Tempur-Pedic that relate to complaints by one retailer about discounting incidents by a second retailer.</p>
¶ 12	<p>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.</p> <p>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.</p>	Lack of Foundation	<p>Exh. 4, Retail Partner Obligations &amp; Advertising Policies, effective June 8, 2009. Exh. 5, Retail Partner Obligations &amp; Advertising Policies, effective October 1, 2007.</p> <p>Exh. 13, Tempur-Pedic email to Macy’s: Tempur-Pedic advising Macy’s of Tempur-Pedic’s “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.”</p> <p>Exh. 14, Tempur-Pedic email to Rotman’s: “It has been brought to my attention that Rotman’s is selling Tempur-Pedic for 5% off in addition to 5% tax free. This is a violation of our SRP policy. Please stop this practice.”</p> <p>Exh. 15-17, Email is from Tempur-Pedic to Raymour, bringing a “pricing violation” and “SRP violations” to Raymour’s attention.</p> <p>Exh. 23, Email from retailer Metro-Mattress, to Tempur-Pedic, complaining about the pricing of Dave Hayes Appliance Center. Tempur-Pedic responds to this complaint stating: “This will be addressed today with Dave Hayes.”</p> <p>Exhs. 25-28, 30-31, Emails produced by Tempur-Pedic that relate to complaints by one retailer about a discounting incident by a second retailer.</p>
¶ 13	Provisions of the current Tempur-Pedic Retail Partner Agreement restrain retailers	Lack of Foundation	Exh. 5, Tempur-Pedic Retail Partner Agreement

<u>¶/Ex. No.</u>	<u>Description</u> <sup>1</sup>	<u>Objection</u>	<u>Factual Basis</u>
	from offering discounts to customers in any form.		
¶ 32	Retailers who are prohibited by Tempur-Pedic from discounting are vigilant in their efforts to insure [sic] that competing retailers are similarly constrained. Retailer complaints about competitors' attempts to discount are addressed at the highest level of Tempur-Pedic management.	Lack of Foundation	<p>Exhs. 23-24: Complaint of retailer Metro-Mattress about an advertisement by Dave Hayes Appliance Center offering a Tempur-Pedic Mattress at \$100.00 less than the suggested retail price. Tempur-Pedic responds that the matter will be "addressed today with Dave Hayes."</p> <p>Exh. 25: Sleepy's complaint about pricing practices of Relax the Back.</p> <p>Exh. 26: Raymour &amp; Flanigan complaint about a discounting incident by Metro-Mattress. Tempur-Pedic responds to complaint stating "this situation has been addressed we have assurances it will end no later than Friday, 9/7."</p> <p>Exh. 27-31: Retailer complaints to Tempur-Pedic, including: New York Mattress Factory's complaint that Raymour &amp; Flanigan offered a discount on Tempur-Pedic mattresses to customer's opening a credit card; Mattress Discounters complaint that Boscov's provided a \$100 discount on a Tempur-Pedic mattress to customers opening a Boscov credit card.</p>
¶ 43	<p>Retailers of Tempur-Pedic products fully understand that charging at least Tempur-Pedic's MSRP is required to become and maintain an account with Tempur-Pedic.</p> <p>Those retailers have accepted this contractual requirement. Accordingly, Tempur-Pedic has achieved almost universal retailer compliance with MSRP and virtually no</p>	Lack of Foundation	<p>Exh. 9: Rosenbaum Affidavit: "As a result of Tempur-Pedic's pricing policy, Raymour sells all Tempur-Pedic products at the suggested retail price ("SRP") set by Tempur-Pedic."</p> <p>Exh. 12: Bookbinder Affidavit: "Sleepy's understands that Tempur-Pedic makes charging SRPs a condition for being a Tempur-Pedic account and maintaining that status."</p> <p>Exh. 18: Judd Affidavit "Raymour understands that it must follow Tempur-Pedic's price policy as a condition of maintaining the Tempur-Pedic line of products."</p> <p>Exh. 20: Metro-Mattress email advising its sales force that sales associates can no longer discount Tempur-Pedic products by 10%.</p>

<u>¶/Ex. No.</u>	<u>Description</u>	<u>Objection</u>	<u>Factual Basis</u>
	discounting of Tempur-Pedic products exists in the marketplace.		Exh. 26: Email from Raymour to Tempur-Pedic referencing their no discounting agreement.  Transcripts of store visits and calls to stores.
¶ 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.	Lack of Foundation	Exh. 3, Tempur-Pedic's Amended Interrogatory Responses Response No.19: "Tempur-Pedic has not become aware of any New York Customer who has chosen not to adhere substantially."  Exh. 8, Interrogatory Responses of Raymour & Flanigan, Response No.18 states: "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."  Exh. 9, Rosenbaum Affidavit: "As a result of Tempur-Pedic's pricing policy, Raymour sells all Tempur-Pedic products at the suggested retail price ("SRP") set by Tempur-Pedic."  Exh. 11, Interrogatory Response by Sleepy's: Response No. 18: Tempur-Pedic's suggested retail prices, in combination with Tempur-Pedic's announced unilateral written policy not to do business with any retailer who chooses to charge retail prices which are different than Tempur-Pedic's suggested retail prices, has affected the price at which Sleepy's sells and has sold Tempur-Pedic Products.  Transcripts of store visits and calls to stores.
¶¶ 46-65	Summary of transcripts from undercover shops of Tempur-Pedic retailers.	<ul style="list-style-type: none"> <li>• Lack of Foundation</li> <li>• Unattested</li> <li>• Incomplete</li> </ul>	Gargiulo Affirmation, Paragraphs 45-46 Affidavits of four investigators and complete transcripts of store visits attached thereto.

<b>¶/Ex. No.</b>	<b>Description<sup>1</sup></b>	<b>Objection</b>	<b>Factual Basis</b>
Exs. 32-42	Fragments from transcripts of undercover shops of Tempur-Pedic retailers. <sup>2</sup>	<ul style="list-style-type: none"> <li>• Unattested</li> <li>• Incomplete</li> </ul>	Gargiulo Affirmation, Paragraphs 45-46 Affidavits of four investigators and complete transcripts of store visits attached thereto.

<sup>2</sup> Petitioner objects to Respondent's reference to "fragments from transcripts." All portions of the transcripts of store visits that pertain to pricing or discounting of Tempur-Pedic products, were attached as Exhibits to the Gargiulo Affirmation of March 2010.

**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-** : **Index No. 400837/10**

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**Respondent.**

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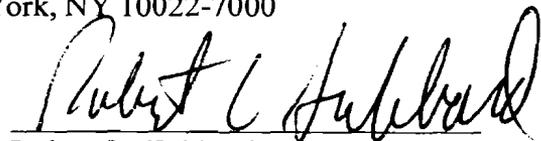
**Affirmation of Robert L. Hubbard**

Robert L. Hubbard, an attorney admitted to practice in New York State, affirms that I sent Petitioner's Memorandum of Law in Opposition to Motion to Strike dated June 10, 2010 to Tempur-Pedic's counsel, William Berkowitz, Brandon Bigelow, Diane Hertz, and Daniel McGillicuddy by email on June 10, 2010 and again on June 11, 2010. The tables included with the June 10 distribution follow this affirmation. The corrected tables included with the June 11 distribution follow the cover page of the Memorandum. I also caused the June 11 distribution to be sent on June 11, 2010 by overnight mail to:

William Berkowitz  
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Dated: June 15, 2010



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