

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

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JONATHAN MINTZ, Commissioner of the :
Department of Consumer Affairs of the City :
of New York, and the CITY OF NEW YORK, :
: Index No. 07402902
: **FINAL CONSENT JUDGMENT**
Plaintiffs, :
--against-- :
SLEEPY'S, INC., and 1-800-SLEEPY'S, INC :
Defendants. :
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WHEREAS, this action was instituted by plaintiffs Jonathan Mintz, Commissioner of the Department of Consumer Affairs of the City of New York ("DCA") and The City of New York (collectively referred to as "the Department") alleging violations of the Consumer Protection Law of 1969 ("the Consumer Protection Law" or "CPL"), Title 20, Chapter 5, Subchapter 1 of the Administrative Code of the City of New York ("the Administrative Code"). The defendants in this action are Sleepy's, Inc. ("Sleepy's") and 1-800-Sleepy's, Inc. ("1-800-Sleepy's") (collectively referred to as "Defendants"), and

WHEREAS, DCA has alleged that since at least November 1, 2003, Defendants have violated the Consumer Protection Law by routinely delivering to consumers stained or otherwise damaged, defective and/or non-conforming mattresses; exchanging damaged, defective, and/or non-conforming merchandise for other damaged, defective, and/or non-conforming merchandise; forcing consumers to pay additional delivery fees for replacement of a damaged and/or defective mattresses; using stains as a pretext to deny consumers exchanges to which they were entitled; failing to issue refunds or

credits to consumer accounts despite persistent requests by consumers; failing to respond to consumers' telephone calls, letters, and/or emails; and failing to notify consumers that no delivery or only partial delivery of their furniture would take place by the latest estimated delivery date on the consumers' orders, and

WHEREAS, Defendants maintain that they always have operated in compliance with the applicable provisions of the Consumer Protection Law, and

WHEREAS, DCA and Defendants agree that the Supreme Court of the State of New York, County of New York has jurisdiction over the subject matter of this case and shall have exclusive jurisdiction over all provisions of this Final Consent Judgment ("Consent Judgment") and over any and all disputes of any kind relating in any way to, or arising in any way out of, this Consent Judgment, and

WHEREAS, DCA and Defendants have agreed that this action should be resolved without further protracted and costly litigation, the parties do hereby consent to the entry of this Consent Judgment. By agreeing to this Consent Judgment, the Defendants do not admit to any liability to the Plaintiffs.

THEREFORE, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

Section I

For the purposes of this Consent Judgment, the following terms shall have the meanings set forth below:

1. "Action" shall refer to the action titled Jonathan Mintz, Commissioner of the Department of Consumer Affairs of the City of New York, and the City of New York v. Sleepy's, Inc. and 1-800- Sleepy's, Inc

2. "Clearly and conspicuously" shall mean a statement that is presented in a manner that is readily apparent and understandable by an ordinary person. The statement should be placed within reasonable proximity to information or item that it is modifying, explaining, clarifying or describing
3. "Comfort Exchange Fees" shall refer to those fees, other than Delivery Fees, that Defendants require Consumers to pay in order to exchange Merchandise under the Comfort Exchange Policy
4. "Comfort Exchange Policy" shall refer to Defendants' current policy whereby a Consumer may request an exchange of Merchandise based on comfort, among other things within twenty-one (21) days of delivery, with payment of additional Delivery Fees and Comfort Exchange Fees. This definition shall include any modifications to Defendants' Comfort Exchange Policy that take effect after the Effective Date, including a change of name.
5. "Complaint" shall refer to the Complaint filed in the Action.
6. "Consumer" refers to a person who has ordered and/or purchased Merchandise from Defendants.
7. "Consumer Protection Law" shall refer to the Consumer Protection Law of 1969, Title 20, Chapter 5, Subchapter 1 of the Administrative Code of the City of New York and all rules and regulations promulgated thereunder.

8. "Customer Service Agent" shall refer to any person employed by Defendants who, among other things, receives, logs-in and handles Consumer complaints and inquiries.
9. "Damaged" shall refer to Merchandise that is stained, ripped, marked, or otherwise soiled at or about the time of delivery.
10. "Defective Merchandise" shall refer to Merchandise that is unfit for its intended use at any time prior to the expiration of any applicable manufacturer's warranty.
11. "Defendants" shall refer to Sleepy's, Inc. and 1-800-Sleepy's, Inc, and their officers, agents, employees, representatives, successors, assigns and all other persons acting on their behalf, directly, or indirectly, or through any corporate or other entity.
12. "Delivery Fees" shall refer to fees, other than Comfort Exchange Fees, that Defendants require Consumers to pay for the delivery of Merchandise.
13. "Delivery Person" shall refer to persons who, through direct employment relationship, independent contract or otherwise, are responsible for the delivery of Defendants' Merchandise to Consumers.
14. "Effective Date" shall mean the date this Consent Judgment is filed with the Court.
15. "Inspection Letter" shall refer to the document to be given to Consumers that describes the Inspection Process.

16. "Inspection Process" shall refer to the process by which Defendants and/or the Inspectors commence and complete the inspection of Merchandise.
17. "Inspection Report" shall refer to the document that the Inspectors prepare and give to Consumers upon the completion of the Inspection Process.
18. "Inspector" shall refer to any person who, through direct employment relationship, independent contractor or otherwise, is responsible for conducting an inspection of Merchandise following delivery to Consumers.
19. "Mediation Unit" shall refer to the mediation unit of DCA.
20. "Merchandise" shall refer to those products manufactured, packaged, marketed, advertised, solicited, distributed, and/or otherwise offered for sale by Defendants including, but not limited to, mattresses, box springs, bed frames, futons, beds and other bedding supplies.
21. "Non-Conforming Merchandise" shall refer to Merchandise that differs from the Merchandise that a Consumer ordered or purchased or Merchandise that differs in quality and characteristics from Representations made by Defendants to Consumers at the time of sale and excludes warranty exchanges.
22. "Partial Delivery" shall refer to delivery of less than all of the Merchandise ordered or purchased by a Consumer.
23. "Parties" shall refer to all Plaintiffs and Defendants in this Action.
24. "Prior Purchaser" shall refer to a Consumer who purchased, and subsequently returned, a mattress to Defendants.

25. "Promised Delivery Date" shall mean the latest estimated delivery date on the Consumer's order within the meaning of 6 RCNY § 5-50.
26. "Represent" means to state or imply through claims, statements, questions, conduct, graphics, symbols, lettering, formats, devices, language, documents, messages or any other manner or means by which meaning might be conveyed. This definition applies to other forms of the word "represent" including, without limitation, "representation."
27. "Sales Person" shall refer to any shall refer to persons who, through direct employment relationship, independent contract or otherwise, are responsible for the sale of Defendants' Merchandise to Consumers.
28. "Warranty Exchange" shall refer to the exchange of Defective Merchandise pursuant to a warranty offered by a manufacturer or Defendants.

Section 2

I. INJUNCTIVE RELIEF

Defendants shall continue to comply with all state and/or federal laws, rules and regulations as now constituted or as may hereafter be amended including, but not limited to § 20-700 of Title 20 of the Administrative Code ("Administrative Code"), 6 RCNY § 5-50, Administrative Code § 20-264 et seq. and 6 RCNY § 2-101 et seq.

A. Business Practices

1. Within thirty (30) days of the Effective Date, Defendants shall develop, implement and distribute policies and procedures to ensure that:

Delivery

- a. all material terms relating to delivery including, but not limited to, delivery fees, are Clearly and Conspicuously disclosed to Consumers in their in-store solicitations and sale of Merchandise;
- b. all ordered Merchandise is delivered by the promised delivery date. In the event Defendants fail to deliver ordered Merchandise, make only a Partial Delivery or deliver Damaged, Defective and/or Non-Conforming Merchandise by or on the promised delivery date, Defendants shall comply with the requirements of 6 RCNY § 5-50(d);
- c. Consumers are informed with written notice at the time of sale and at the time of delivery informing them that: (i) they can contact 1-800-Sleepy's to address delivery-related issues; (ii) they must inspect delivered Merchandise before the Delivery Person leaves the Consumer's residence; and (iii) that they may refuse delivery of Damaged, Defective or Non-Conforming Merchandise;
- d. delivery personnel are instructed to remove all wrappings on Merchandise before leaving a Consumer's home subsequent to a delivery and to fully expose Merchandise delivered to the Consumer. Delivery schedules shall allow sufficient time for Consumers to inspect their purchases;
- e. Delivery Fees are not charged to Consumers who replace Damaged, Defective and/or Non-conforming Merchandise or to

complete a Partial Delivery made due to Defendants' inability to complete the order;

Inspections of Defective Merchandise

- f. mattresses are inspected when requested by Consumers or pursuant to Defendants' offer to inspect. When such a request originates with a Consumer, the specific basis for the request will be entered onto a request form to be transmitted to the inspector performing the inspection. If Defendants are unable to provide a copy of such request to the requesting Consumer in advance of the inspection, then the Inspector shall provide the requesting Consumer with a copy of the request form prior to performing the inspection. If the instructions on the form are inconsistent with the Consumer's request, the Consumer may call Defendants' customer service department at a number indicated on the request form to confirm that the inspector will evaluate the conditions that gave rise to the inspection request;
- g. Defendants mail a copy of the Inspection Report to the Consumer within fourteen (14) business days of the inspection. The Inspection Report shall clearly state that in the event a Consumer is dissatisfied with the Inspection Report, the Consumer may request a second inspection, free of charge, from a different Inspector;
- h. Merchandise which is determined by an Inspector to be defective pursuant to the manufacturer's warranty is promptly exchanged;

Warranties

- i. warranty information is accessible at each of Defendants' retail locations and sales persons inform Consumers that warranty information is available to view;
- j. Sales persons shall provide Consumers with the relevant manufacturer's warranty at the point of sale, or upon a customer's request;
- k. warranties permitting the exchange of defective mattresses are honored;

Refunds, Returns and Exchanges

- l. Defendants do not charge Consumers exchanging Merchandise pursuant to the Comfort Exchange Policy the "non-sale" price of the new Merchandise when the new Merchandise is "on-sale" at the time of the exchange, or depreciate the value of the original Merchandise based on the time in the Consumer's possession so that Consumers must pay additional money in order to purchase or obtain the new Merchandise;
- m. in in-store solicitations and sales of Merchandise, Defendants clearly and conspicuously disclose to Consumers: (i) any refund policy; (ii) any exchange policy, including, but not limited to, any policy concerning a Comfort Exchange and Warranty Exchange; (iii) the existence of any fees associated with the Comfort Exchange Policy; (iv) all actions that a Consumer must take in

order to exchange Merchandise under the Comfort Exchange Policy. Defendants shall process all requests for credit card refunds within two (2) to five (5) business days and checking account refunds within fifteen (15) days ; and

Communication

- n. supervisory staff shall be made available to speak with a requesting Consumer no more than one (1) business day after the Consumer's request and will respond within two (2) days of receipt to telephone calls, letters and emails.

B. Training

- 1. Within thirty (30) days of the Effective Date, Defendants shall develop and implement a training program to ensure that all current employees are provided with and receive training with regard to the terms of this Consent Judgment and the policies and procedures developed pursuant thereto, and that employees hired subsequent to the date of such training(s) shall be provided with training within 15 days of such employee's start date.

II. MONETARY RELIEF

- 1. Sleepy's, Inc. shall pay the total sum of \$200,000, not later than ten (10) days from the Effective Date as follows:
 - a. \$50,000 in settlement of all claims alleged in the instant action and to fund future consumer initiatives;

- b. \$100,000 in reimbursement of the City of New York's attorney's fees; investigative expenses, and expenses associated with administering restitution claims; and
- c. \$50,000 to be used for Consumer restitution.

2. Checks shall be made payable to "New York City Department of Consumer Affairs," c/o Margaret P. Stix, Director of Research and Investigations, New York City Department of Consumer Affairs, 42 Broadway, 8th Floor, New York NY 10004. All monies remaining after the processing of claims shall revert to the Department of Consumer Affairs.

III. RESTITUTION CLAIM PROCEDURES

1. Consumers may be eligible for restitution if they: (a) filed complaints with Defendants, DCA, the Better Business Bureau, the New York State Attorney General's Office, or any other governmental body during Calendar Year 2006 alleging that Defendants (i) delivered damaged, defective and/or non-conforming merchandise, and/or (ii) charged a delivery fee for an exchange of damaged and/or defective and/or non-conforming merchandise, or (iii) refused to honor warranties on defective merchandise, and (b) received no compensation or relief of any kind (collectively, "NYC purchasers")

2. Within thirty (30) days of the Effective Date, Defendants shall supply a listing of the name and last-known address or telephone number of each Consumer who filed a complaint with Defendants during calendar year 2006 who received compensation in the form of a store credit, exchange or refund. Defendants shall

submit an affidavit attesting to the completeness of the information supplied to Plaintiffs, via USPS First Class Mail, c/o Margaret P. Stix, at the address listed in the preceding section.

3. After receipt of the list of Consumers supplied pursuant to Paragraph 1 of this section, the Department shall send a notice by first class mail to the subset of NYC purchasers who filed complaints with the Department, the Better Business Bureau or the Office of the Attorney General notifying them of the settlement and the procedure to submit a claim for restitution. NYC purchasers will have thirty (30) days to submit claims which must include written proof of purchase, written proof that they lodged a complaint against Defendants and a notarized affidavit stating that they received no compensation or relief.

4. DCA shall be the sole and final arbiter of the validity of the claims submitted and the amount of any restitution to be paid to the NYC purchasers. DCA shall render its determinations within 120 days of the date of the mailing unless impracticable.

5. If the total of all claims received by DCA exceeds the \$50,000 paid to DCA by Defendants for restitution, then restitution to NYC purchasers shall be pro-rated at the sole discretion of DCA.

6. DCA shall provide a Release to each NYC purchaser who is determined by DCA to be entitled to receive Consumer restitution according to the procedures detailed above and the NYC purchaser shall be required to sign a Release prior to being paid any Consumer restitution by DCA.

7. DCA shall forward Defendants each release executed by a NYC purchaser. Releases shall be transmitted by first class mail to the Sleepy's Executive Vice President and General Counsel, Adam Blank, at 175 Central Avenue South, Bethpage, N.Y. 11714-4940, or to such other person and/or fax number as Sleepy's may designate, in writing, for this purpose.

IV. MONITORING

1. For a period of three (3) years from the Effective Date, DCA shall monitor compliance with the terms of the Consent Judgment. Defendants shall appoint a senior executive to serve as the Compliance Officer responsible for ensuring adherence to the policies, protocols and procedures implemented in conformance with the Consent Judgment. The Compliance Officer shall prepare a report, quarterly during the first year, and annually for the next two years, that details the actions Defendants have taken to ensure adherence to the policies, protocols and procedures implemented in conformance with the Consent Judgment. Reports shall be accompanied by an affidavit by the Compliance Officer attesting to their accuracy. With fifteen (15) days notice to Defendants, DCA shall have access to any books, reports, records, or other documents, or to employees the Department reasonably deems necessary to ascertain compliance with this Consent Judgment.

V. FUTURE COMPLAINTS FILED WITH DCA

1. Within ten (10) days of execution, Defendants shall provide to DCA the name, address, phone number, email address and title of the individual responsible for

addressing Consumer complaints forwarded to Defendants for resolution by DCA. Defendants shall respond to complaints forwarded by DCA within ten (10) days of receipt.

2. Defendants shall develop and implement policies and procedures to ensure that Consumer complaints filed with DCA are handled promptly. If Defendants dispute a Consumer's complaint filed with and/or forwarded to DCA and/or requested relief, Defendants' written response shall include copies of all documents concerning Defendants' dispute of the complaint. If Defendants do not dispute the Consumers' complaint and requested relief, Defendants' written response shall so inform the Consumer and shall remit to them the appropriate restitution and/or documents evidencing that any necessary adjustments have been made.

3. Defendants shall maintain files which shall be available for inspection upon 10 days notice by the Department documenting the resolution of Consumer complaints filed with DCA. These files shall include the following:

- (a) an identification of any Restitution provided;
- (b) copies of all documents evidencing any such Restitution;
- (c) in the event the Restitution was returned as undeliverable, the efforts Defendants undertook to locate the Consumer; and
- (d) confirmation that Defendants sent all mailings to the Consumer as required by this Section.

4. The parties may agree in writing to alter any time periods or deadlines set forth in this section.

VI. RELEASE

In consideration of the injunctive relief, payments, undertakings and acknowledgements provided for in this Final Consent Judgment, Plaintiffs hereby agree to release Defendants and their subsidiaries, affiliates, successors and the officers, directors, agents, employees, insurers and assigns of each, from any and all civil, or Consumer-related administrative claims which arise from violations or alleged violations of the Consumer Protection Law and/or Chapter 1, Title 20 or Chapter 2, Title 20 of the Administrative Code with respect to any and all matters addressed in this Final Consent Judgment which occurred or may have accrued up until the Effective Date.

VII. MISCELLANEOUS PROVISIONS

1. The Parties agree to cooperate fully, to execute any and all supplementary documents, and to take all additional actions which may be necessary or appropriate to give full force and effect to the terms and intent of this Consent Judgment

2. The Parties may execute this Consent Judgment in counterparts, and the execution of counterparts shall have the same effect as if the Parties had signed the same instrument. Facsimile signatures shall be considered as valid signatures as of the date of this Consent Judgment, but the original signature pages shall be subsequently appended to this Consent Judgment and filed with the Court.

3. This Consent Judgment contains the entire, complete, and fully integrated statement of each and every term and provision agreed to by the Parties, shall supersede all other prior agreements between the Parties regarding the matters set forth herein, and is not subject to any condition not provided for in this Consent Judgment. This Consent Judgment shall not be modified in any material respect

except in writing signed and executed by all the Parties to this Consent Judgment and adopted by the Court. In entering this Consent Judgment, neither of the Parties has made or relied upon any warranty or representation not specifically set forth in this document.

4. Except as provided in this Consent Judgment, the Supreme Court of the State of New York, County of New York, shall have exclusive jurisdiction over all provisions of this Consent Judgment and over any and all disputes of any kind relating in any way to, or arising in any way out of, this Consent Judgment. The Court shall retain jurisdiction over this matter for the purpose of effectuating such relief as it deems necessary to carry out and effectuate the terms thereto.

5. The Parties agree that there have been no findings of fact rendered or admissions of liability made by Defendants in the Action, and that this Consent Judgment shall not be construed as an admission of any violation of any statutes or regulations including, but not limited to, the Consumer Protection Law.

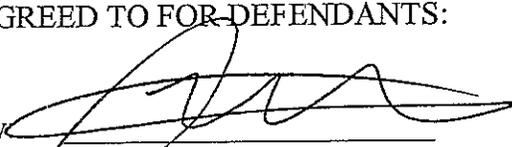
6. Counsel for the Parties have reviewed and revised this Consent Judgment, and any rule of construction, by which any ambiguities are to be resolved against the drafting party, shall not be applied in the interpretation of this Consent Judgment.

7. If a court of competent jurisdiction declares any provision of this Consent Judgment invalid (except for Section 2 (VI)) or determines that any of the provisions encompassed by this Consent Judgment are unconstitutional, then any such provisions so affected will become void, but the remainder of the Consent Judgment shall remain in place.

8. Nothing herein shall be construed to limit the authority of the Department to exercise its enforcement powers under Chapter 1, Title 20 or Chapter 2, Title 20 of the Administrative Code.

9. The Parties agree that this Consent Judgment shall be submitted to the court to be "so ordered" by a Justice of the Supreme Court of the State of New York.

AGREED TO FOR DEFENDANTS:

By: 

Adam S. Blank, Esq.
Sleepy's Inc.

Date

AGREED TO FOR PLAINTIFFS

By: 


General Counsel
Department of Consumer
Affairs
Of Counsel to:


Corporation Counsel of the
City of New York
Attorney for Plaintiffs

May 3rd, 2007
Date



Jonathan Mintz
Commissioner of Department of
Consumer Affairs

Date

So Ordered: _____

J.S.C.

on: _____