

‘Something Smells’ At Tempur Sealy, Investor Tells Chancery

By **Vince Sullivan**

Law360, Wilmington (November 8, 2018, 8:34 PM EST) -- A shareholder of mattress maker Tempur Sealy International Inc. told a Delaware Chancery judge Thursday that an odor of wrongdoing accompanied the loss of the company’s largest customer and that the investor needed access to corporate books and records to determine if any misconduct had occurred.

During a one-day trial in Wilmington, shareholder attorney Roger Sachar of Newman Ferrara LLP said his client wanted to inspect the company’s documents surrounding the 2017 termination of Tempur Sealy’s contract with retailer Mattress Firm, explaining the shareholder had a credible basis to believe company leaders acted wrongfully while renegotiating the contract.

“Relationships like this don’t just end at the drop of a hat,” Sachar said. “Something smells. Something is off. And under Delaware law, that’s enough to get books and records.”

The plaintiff pointed to statements made by Tempur Sealy Chairman Scott L. Thompson in September 2016 in which he said Tempur Sealy was “wildly optimistic” about the future of its relationship with Mattress Firm, which had recently acquired the Sleepy’s retail chain in 2015 and itself had been acquired by Steinhoff International Holdings NV in August 2016.

The transition to new ownership and the rebranding of more than 1,000 newly acquired retail stores had impacted the business relationship between Mattress Firm and Tempur Sealy, Thompson said at the time, but he anticipated that dip would correct itself by early 2017.

In response to a back-and-forth discussion with Vice Chancellor Joseph R. Sights III, Sachar said the logical conclusion to draw from the fact that Mattress Firm killed the long-standing contract just a few months after Thompson’s glowing statements about the companies’ future together was that there was mismanagement.

He said Mattress Firm’s filing of a breach of contract suit in Texas state court against Tempur Sealy lends weight to his client’s credible basis for believing there was wrongdoing, but that the books and records demand filed under Section 220 of Delaware’s General Corporation Law didn’t set out any specific accusations.

“All we’re doing is investigating,” Sachar said. “We’re going to go wherever the documents take us.”

Before the investor filed the Section 220 action in May, Sachar said, Tempur Sealy had responded to letter demands by turning over limited documents the company asserts showed there was no wrongdoing. This doesn't cure its obligation to comply with the current suit's demands for a broader production of materials, he said, because it would mean a company could essentially serve as the judge of a case against itself.

Tempur Sealy attorney Jordan D. Hershman of Morgan Lewis & Bockius LLP said his clients did everything they could to avoid this litigation but that the shareholder went ahead and filed the action anyway.

He said the voluntary productions made by the company in response to repeated letter demands were aimed at showing the shareholder that the wrongdoing he believes occurred just never happened. Hershman further characterized the suit as an effort to litigate negotiation choices made by Tempur Sealy while trying to come to a new agreement with its largest customer, representing 21 percent of its sales.

"These are an attempt to investigate a business decision with which plaintiff may not agree," Hershman argued.

He said the suit's focus on Thompson's positive predictions doesn't meet even the extremely low standard of a credible basis to believe there was wrongdoing.

"It remains speculative," he said of the statements. "Even in 220 actions you need more than that. You need more than a divergence between forward-looking statements and eventual results."

He pointed to communications between Tempur Sealy and Mattress Firm executives in the fall and winter of 2016 that were planning nearly a dozen meetings at a Las Vegas trade convention scheduled for the beginning of 2017 where high-level leaders would discuss the companies' relationship. These communications showed, Hershman argued, that Tempur Sealy's management believed the relationship was still strong and that negotiations would be successful in extending their deal.

A week before the convention meetings, Hershman said, Mattress Firm killed the deal saying there were "philosophical and business model differences" between the parties.

"There is literally nothing, no evidence, submitted by the plaintiff that is contrary to this evidence submitted in plaintiff's own complaint," he said of the communications.

Vice Chancellor Slight said he would take the matter under advisement and endeavor to issue a ruling as soon as he could, but encouraged the parties to confer on whether a compromise could be reached where Tempur Sealy could provide a more narrowly focused amount of documents that would allay the shareholder's concerns of wrongdoing.

Shareholder David A. Hoeller is represented by Thomas A. Uebler of McCollom D'Emilio Smith Uebler LLC, Melinda A. Nicholson and Michael R. Robinson of Kahn Swick & Foti LLC and Roger Sachar of Newman Ferrara LLP.

Tempur Sealy is represented by Kenneth J. Nachbar and Sabrina M. Hendershot of Morris Nichols Arsht & Tunnell LLP, and Jordan D. Hershman and Michael D. Blanchard of Morgan Lewis & Bockius LLP.

The case is David A. Hoeller v. Tempur Sealy International Inc., case number 2018-0336, in the Court of Chancery of the State of Delaware.

--Editing by Aaron Pelc.

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