

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

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Select Comfort Corporation,

Court File No. \_\_\_\_\_

Plaintiff,

vs.

**COMPLAINT**

John Baxter; and

**JURY TRIAL DEMANDED**

Dires, LLC d/b/a Personal Touch Beds and  
Personal Comfort Beds;

Defendants.

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Plaintiff, Select Comfort Corporation (“Select Comfort”), for its Complaint against Defendants John Baxter and Dires, LLC (“Dires”) d/b/a Personal Touch Beds (“Personal Touch”), and Personal Comfort Beds (“Personal Comfort”) (collectively “Defendants”), states:

**NATURE OF THIS ACTION**

1. This is an action for damages and injunctive relief arising out of Defendants’ infringing, unauthorized, false and misleading use of several of Select Comfort’s trademarks, and false and deceptive statements made to Minnesota consumers on Defendants’ websites.

**PARTIES**

2. Select Comfort is a Minnesota corporation with its principal place of business in Minnesota.

3. Defendant John Baxter is a Florida resident and a director of Dires. On information and belief, John Baxter is a member of Dires.

4. Dires is a Delaware limited liability company with its principal place of business in Florida. Dires does business as Personal Touch and Personal Comfort, which are both registered in Florida as entities wholly owned by Dires.

### **JURISDICTION AND VENUE**

5. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1338 and supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367. Venue lies in this District under 28 U.S.C. § 1391(b) and (c).

6. This Court has personal jurisdiction over Defendants. Defendants have purposefully, continuously and systematically conducted business in Minnesota by, *inter alia*, advertising, promoting and selling their air bed mattress products in Minnesota. Defendants' advertising, promotion and selling is conducted primarily through highly interactive websites accessible at the domain names [personaltouchbed.com](http://personaltouchbed.com) and [personalcomfortbed.com](http://personalcomfortbed.com), through which Defendants offer for sale and sell products to Minnesota residents by making deceptive and misleading statements and by infringing Select Comfort's trademarks. Defendants thus transact business over the internet with Minnesota residents, enter into contracts with Minnesota residents via the internet, and collect payment for products from Minnesota residents via the internet. Defendants have willfully engaged in unauthorized, false and misleading uses of Select Comfort's trademarks, which has caused and continues to cause harm to Select Comfort, a Minnesota resident. Defendants continue to engage in unauthorized, false and misleading

use of Select Comfort's trademarks even after the nature of these uses have been brought to Defendants' attention by Select Comfort.

### **FACTS**

7. Select Comfort designs, manufactures and markets unique air bed products, many features of which are either proprietary or protected by the patent laws of the United States. Select Comfort's Sleep Number<sup>®</sup> bed uses uniquely designed air chambers to provide a gentle cushion of support which can be easily adjusted to an individual's preference, comfort and firmness. Studies show that the Sleep Number<sup>®</sup> bed relieves back pain and improves sleep quality.

8. Select Comfort is the owner of all rights in the trademark Sleep Number<sup>®</sup>, including United States Trademark Registration Nos. 2,753,633, 2,618,999 and 2,641,045 which registrations are incontestable. True and correct copies of these registrations are attached as Exhibit A.

9. Select Comfort is the owner of all rights in the trademark Select Comfort<sup>®</sup>, including United States Trademark Registration Nos. 1,581,562, 1,590,557 1,976,214, 2,702,763, 2,801,405, and 2,803,623, which registrations are incontestable. True and correct copies of these registrations are attached as Exhibit B.

10. Select Comfort is the owner of all rights in the trademark What's Your Sleep Number<sup>®</sup>, including United States Trademark Registration No. 2,702,762, which registration is incontestable. A true and correct copy of this registration is attached as Exhibit C.

11. The trademarks described above are collectively referred to as “Select Comfort’s Trademarks” or “the Trademarks-At-Issue.”

12. Select Comfort has an excellent reputation for both its unique product line and superior quality of its products and services. Select Comfort was ranked the number one bedding retailer in the United States by *Furniture/Today* for nine consecutive years.

13. Sleep Number<sup>®</sup> beds and accessories are available nationwide at Select Comfort retail stores in major shopping malls and other locations, through the company’s national direct marketing operations, as well as through Select Comfort’s website at [sleepnumber.com](http://sleepnumber.com).

14. Select Comfort markets its Sleep Number<sup>®</sup> beds and related goods through extensive advertising in, *inter alia*, newspapers, national circulation magazines, direct mailings, radio advertisements and television commercials and infomercials.

15. As a result of the innovation and quality of its products, together with the widespread advertising and promotion thereof, Select Comfort has acquired a reputation for quality, integrity and innovation, and it is well-known as the leading seller of premium air-supported sleep products.

16. As a result of widespread use in connection with the advertising and promotion of its Sleep Number<sup>®</sup> beds and related products, Select Comfort has developed substantial good will and national recognition in the Trademarks-At-Issue as a source of high-quality mattresses and bedding products.

17. Indeed, the Sleep Number<sup>®</sup> and Select Comfort<sup>®</sup> marks, as well as the What's Your Sleep Number<sup>®</sup> mark, are among the most widely recognized trademarks in the bedding industry.

### **DEFENDANTS**

18. On information and belief, Dires was incorporated to control and conduct business as Personal Touch and Personal Comfort.

19. On information and belief, at the time Dires was incorporated, Baxter intended to engage in the illegal, infringing, misleading, and deceptive acts alleged herein.

20. Baxter was formerly employed by Comfortaire Direct LLC and/or Comfortaire Corporation (collectively "Comfortaire").

21. Comfortaire manufactures and sells a line of adjustable airbeds that compete with Select Comfort's products.

22. When employed by Comfortaire, Baxter had responsibilities related to and developed Comfortaire's online advertising of its adjustable airbeds.

23. At Baxter's direction, Comfortaire's online advertising through internet search engines, such as Google, was nearly identical to the tactics now used by Defendants as described herein.

24. For example Comfortaire, at Baxter's direction, purchased Select Comfort's Trademarks as search terms in Google's Adwords program and paid to have an ad displayed when a consumer searched for "Sleep Number" that stated "Sleep 55% Off Number Bed."

25. Due to this, and other conduct, Select Comfort filed a lawsuit against Comfortaire in the United States District Court for the District of Minnesota, styled *Select Comfort Corporation v. Comfortaire Direct LLC and Comfortaire Corporation*, Court File No. 11-cv-00622 (DWF/JJK).

26. As set out in the complaints against Comfortaire, Comfortaire engaged in much of the same wrongful conduct that Defendants are now engaging in as described herein.

27. As a result of the complaints filed against it, Comfortaire agreed to cease its wrongful and infringing conduct.

28. On information and belief, Baxter's employment with Comfortaire ceased.

29. Baxter also formerly operated an entity named Zero Gravity that ran a website at [www.zerogravitybed.com](http://www.zerogravitybed.com). While operating this business, Baxter and Zero Gravity infringed on Select Comfort's Trademarks and engaged in other deceptive conduct identified in a February 13, 2008 cease and desist letter sent by Select Comfort and attached hereto as Exhibit D.

30. On or about August 1, 2012, Baxter and other directors and members of Dires, if any, formed and registered Dires, LLC.

31. On information and belief, Baxter and other directors and members of Dires, if any, formed Dires for the improper purpose of shielding themselves from personal liability arising from the illegal, infringing, misleading, and deceptive acts alleged herein.

32. On information and belief, Baxter was personally involved, controlled, directed, and directly participated in Defendants' infringing conduct alleged herein. On information and belief, Baxter supplied Dires with the infringing advertising alleged herein, and has the ultimate authority to direct the infringing conduct.

### **DEFENDANTS' ACTIVITIES**

33. Defendants operate domain names and websites at personalcomfortbed.com and personaltouchbed.com through which they sell air mattresses and related products to purchasers in all 50 states.

34. In connection with the sale and promotion of their air beds and related products, Defendants engage in unauthorized use of and infringe upon Select Comfort's Trademarks.

35. Defendants have no rights in any of Select Comfort's Trademarks.

36. Google Adwords is an advertising product offered by Google. Google Adwords allows entities or individuals to purchase advertising space and will display the advertiser's advertising text to consumers who search for terms purchased by the advertiser. A Google user can click on the purchased advertisement and will be directed to a website of the advertiser's choosing.

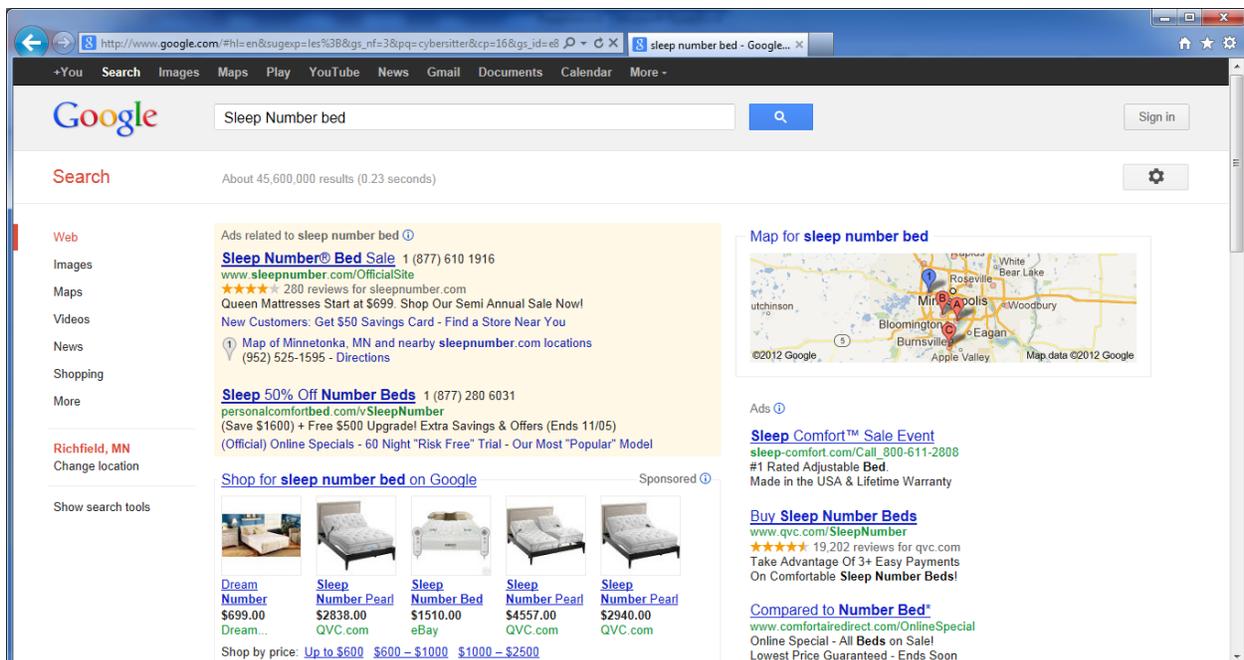
37. On information and belief, Defendants purchase Select Comfort's Select Comfort<sup>®</sup> Trademark, or a portion thereof, as a search term via Google's Adwords program, and other similar internet advertising platforms or shopping sites.

38. On information and belief, Defendants purchase Select Comfort’s Sleep Number<sup>®</sup> Trademark, or a portion thereof, as a search term via Google’s Adwords program, and other similar internet advertising platforms or shopping sites.

39. Defendants purchase search terms that include the words “Select Comfort” and “Sleep Number” to lure consumers, cause confusion, or divert customers seeking Select Comfort’s goods, services, or website.

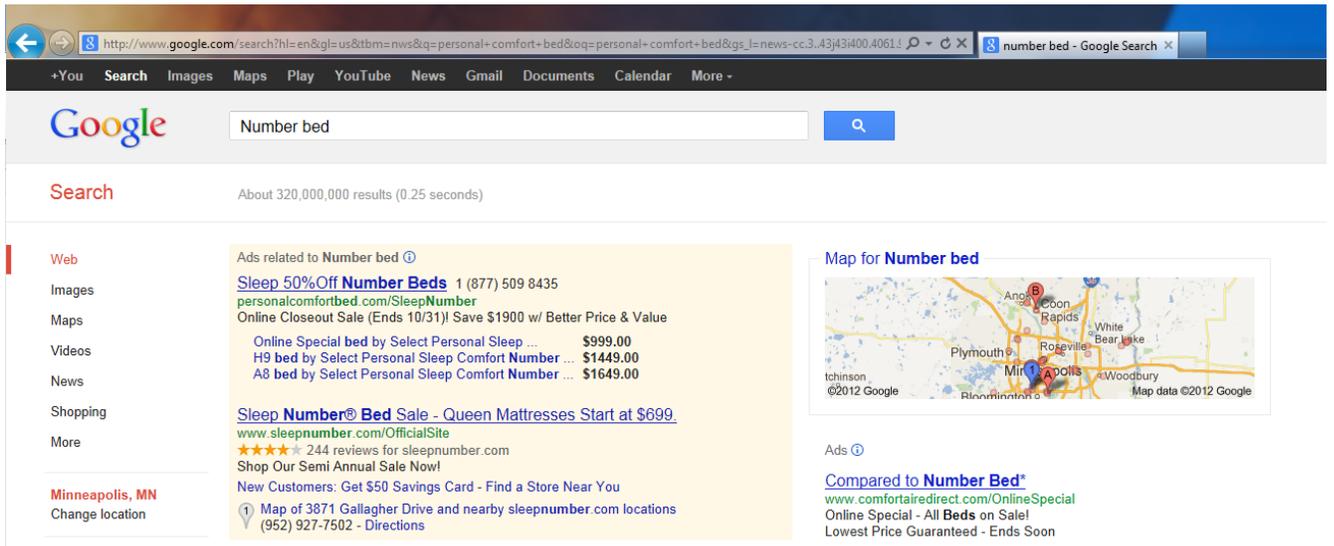
40. Defendants further attempt to deceive consumers, as well as Google’s search algorithm, through the use of confusing and infringing ad links displayed in the Google search results, such as by inserting the phrase “50% off” into Select Comfort’s trademarks.

41. For example, a user searching for Sleep Number<sup>®</sup> products by searching the term “Sleep Number bed” may be shown a link titled “**Sleep 50% Off Number Beds,**” as reflected below.

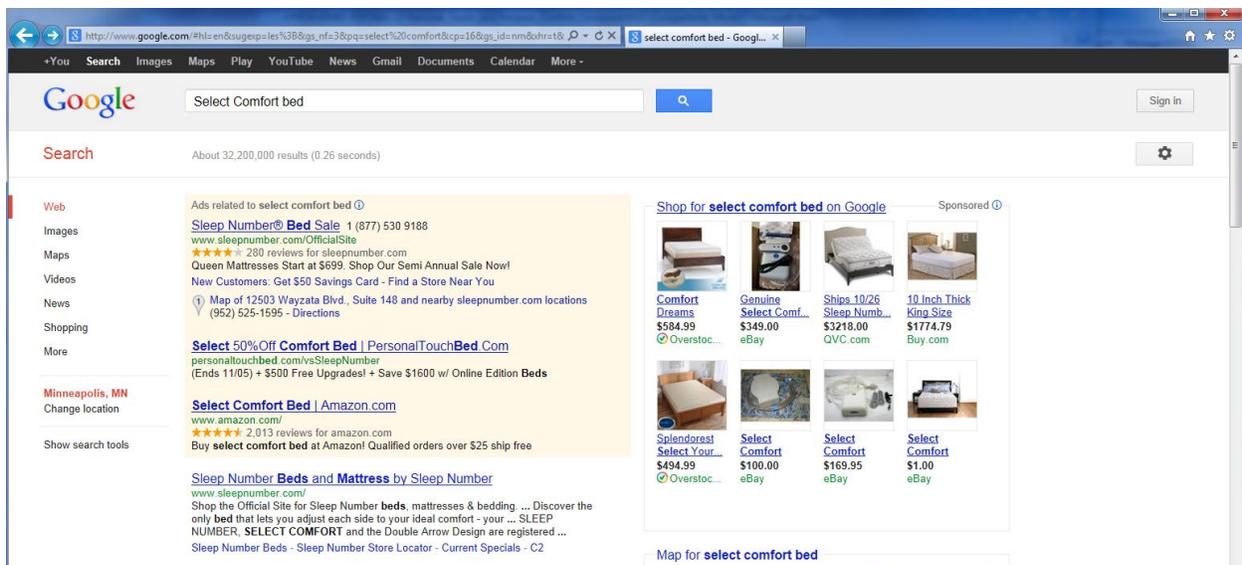


42. Defendants further the confusion by displaying a domain website address that uses Select Comfort’s Trademarks. Specifically, Defendants display the address [www.personalcomfortbed.com/vSleepNumber](http://www.personalcomfortbed.com/vSleepNumber). However, neither the link “**Sleep 50% Off Number Beds**” nor the address displayed lead to a website that sells genuine Sleep Number® products. Rather, they lead to Defendants’ website.

43. Similarly, a user searching for Sleep Number® products by searching the term “Number bed” may be shown a link titled “Sleep 50% Off **Number Beds**” and an address of [www.personalcomfortbed.com/SleepNumber](http://www.personalcomfortbed.com/SleepNumber), as reflected below. This link and address lead to Defendants’ website, not a website that sells genuine Sleep Number products.



44. Defendants use similar tactics when consumers search for “Select Comfort bed,” as reflected in the example below.



45. In addition, Defendants infringe Select Comfort’s Trademarks in attempt to confuse customers and divert sales from Select Comfort to Defendants through internet shopping sites.

46. For example, on Google’s shopping site a consumer searching for “Sleep Number bed” is presented with an advertisement for “A5 bed by Select Personal **Sleep Comfort Number Beds.**”

47. A similar advertisement is displayed when consumers search for “Number Bed.”

48. None of these links lead to a website that sells genuine Select Comfort products. Rather, the links lead to Defendants’ website.

49. In sum, as a result of the above-described search term purchases, users searching for Select Comfort products by inputting the search terms “Select Comfort Bed,” “Sleep Number Bed,” or “Number Bed” are presented misleading and infringing

links to Defendants' websites among the sponsored links prominently displayed near the top of the search results page or the homepage for the advertising website.

50. Defendants' purchase and/or use of the keywords including "Select Comfort," "Sleep Number," and "Number Bed" in Internet search engines and advertising sites, as referenced above, was made with knowledge of Select Comfort's rights in Select Comfort<sup>®</sup> and Sleep Number<sup>®</sup> marks.

51. Defendants' purchase and/or use of the keywords including "Select Comfort," "Sleep Number," and "Number Bed" in Internet search engines and advertising sites is intended as a means of advertising its products on the internet.

52. Defendants' purchase and/or use of the keywords including "Select Comfort," "Sleep Number," and "Number Bed" in Internet search engines, advertising sites, and shopping sites allows Defendants to use and trade off of Select Comfort's Trademarks in commerce to promote, sell, offer for sale or otherwise distribute Defendants' own products.

53. Defendants' purchase and/or use of the keywords including "Select Comfort," "Sleep Number," and "Number Bed" in Internet search engines, advertising sites, and shopping sites alone and in conjunction with its misleading and infringing headline links, domain names and website addresses that are presented to consumers, allows Defendants to mislead, misdirect, deceive, or confuse the public at large and consumers seeking Sleep Number<sup>®</sup> beds and Select Comfort's goods, services, or website on the Internet.

54. Defendants purchased and/or used of the keywords “Select Comfort” and “Sleep Number” in Internet search engines, advertising sites, and shopping sites and continue to do so, to mislead, deceive and lure consumers, cause confusion, or divert customers seeking Sleep Number® beds and Select Comforts’ goods, services, or website.

55. Defendants further attempt to deceive consumers, as well as Internet search engine algorithms, such as Google, by using Select Comfort’s Trademarks in the meta-information for its websites and domain names and through the use of confusing and infringing page headings displayed in the Internet search results page.

56. Furthermore, Defendants’ continue their attempt to confuse and mislead consumers through their websites by extensive and repeated uses of Select Comfort’s Trademarks, far beyond the minimal use necessary to identify Select Comfort’s products for comparison purposes, and in a manner likely to cause confusion among consumers.

57. Consumers who click on the infringing and deceptive links Defendants use on internet search engines, advertising websites, and shopping sites and are diverted to Defendants’ websites, or otherwise visit Defendants’ websites, are subjected to further deceptive and infringing uses of Select Comfort’s Trademarks.

58. For example, when on Defendants’ websites at [personalcomfortbed.com](http://personalcomfortbed.com) or [personaltouchbed.com](http://personaltouchbed.com), the tab in Microsoft Internet Explorer prominently displays the name “Sleep Number Bed,” as shown in the example below, despite Defendants not selling and having no rights to sell Sleep Number® Beds.

The screenshot shows the Personal Comfort website during a Black November Sale. The main banner features a woman in a suit standing next to a Sleep Number bed. The text on the banner includes "BLACK NOVEMBER SALE", "50% OFF ONLINE SPECIAL", "FREE 60 NIGHT TRIAL", "FREE SHIPPING, PILLOW, NO TAX", and "STARTS AT \$699". A large "\$500 FREE UPGRADE" offer is also prominently displayed, along with the phone number "888-694-4088" and the deadline "SALE ENDS NOV 23<sup>RD</sup>". The website header includes the Personal Comfort logo, navigation links (Home, Financing, About Us, Free Trial, Warranty, My Account, Cart), and contact information (888-694-4088, OPEN 7 DAYS A WEEK - CONTACT US). A sidebar on the left lists various bed series and their savings, such as "Elegance Series" and "Memory Foam Series".

59. In addition, consumers who visit the personalcomfortbed.com website are presented with advertising that states “Save up to 50% Off – Online Special Edition Bed,” suggesting that consumers who search for Sleep Number can get an “online edition” Sleep Number bed at 50% off. Personalcomfortbed.com employs a similar tactic, but states “Save up to 60% Off – Online Special Edition Bed.”

60. As reflected below, the advertisements on Defendants’ websites indicate that Defendant’s price for the online bed is lower than “S.N. Price” for the same bed.

**Mattress Of The Month:**

Save 50% Over Sleep Number Bed Mattress Instantly (See Below)

**SAVE 50%** over p5 Bed by Sleep Number®  
 \*Discount Available by Phone Only. As-Is No Sleep Trial

S.N. Price	Online Bed	You Save
Q: \$2,799	Q: \$1,399	Q: \$1,399
K: \$3,198	K: \$1,599	K: \$1,599

**CALL TODAY 888-694-4088**  
 \*Limited Time Only

**GET FREE**  
 Pillow Call Today

Personal Comfort™  
 Enhance Your Sleep Experience

2 Zone™  
 NEVER SAC™  
 Technology

[Click Here to View Online Special Bed - Save 50% Today](#)

**Save 60% Over Sleep Number Bed Mattress Instantly (See Below)**

**SAVE 60%** over Sleep Number® Silver Edition  
 \*Discount Available by Phone Only

Silver Bed	Online Bed (with foundation)	You Save
Q: \$3,499	Q: \$1,399	Q: \$2,100
K: \$4,374	K: \$1,749	K: \$2,625

**CALL TODAY 800-531-3098**  
 \*Limited Time Only

**GET FREE**  
 Foundation & Pillows

2 Zone™  
 NEVER SAC™  
 Technology

Personal Touch™  
 Adjust Your Sleep Experience

ONLINE  
 Special Edition

[CLICK HERE to view Online Special Bed - Save 60% Today](#)

61. On information and belief, Defendants use these advertisements to deceive consumers into believing they can get 50% - 60% off a Sleep Number® Bed online.
62. On information and belief, Defendants do not intend to sell any consumers a discounted “online edition bed” and created this advertising fiction for the purpose of

creating false and deceptive price comparisons and baiting consumers to contact Defendants to allow Defendants to sell consumers a different, more expensive bed.

63. The [personaltouchbed.com](http://personaltouchbed.com) and [personalcomfortbed.com](http://personalcomfortbed.com) websites include additional uses of or variations on Select Comfort's trademarks that are likely to cause confusion among consumers.

64. Defendants use the tag line "What Number Are You?" which infringes and is confusingly similar to Select Comfort's "What's Your Sleep Number?" Trademark.

65. Defendants have wrongfully and intentionally diverted sales from Select Comfort to Defendants.

66. Defendants have realized sales from customers who entered "Select Comfort Bed," "Sleep Number Bed" or "Number Bed" as search terms in Google and other Internet advertising websites.

67. Select Comfort has lost sales due to Defendants' illegal purchase and/or use of Select Comfort's Trademarks as keywords in internet search engines, advertising sites and shopping sites.

68. Consumers who have searched for "Sleep Number Bed," "Select Comfort Bed" or "Number Bed" using internet search engines, advertising sites, and shopping sites have been confused, deceived, and/or misled into believing that Defendants' links will direct them to Select Comfort's Sleep Number<sup>®</sup> website, a website affiliated with Select Comfort, and/or a website where they can purchase Sleep Number<sup>®</sup> beds and Select Comfort<sup>®</sup> products online.

69. Similarly, consumers who have searched for “Sleep Number Bed,” “Select Comfort Bed” or “Number Bed” using internet search engines, advertising sites, and shopping sites have been confused, deceived, and/or misled into believing that Defendants’ advertising statements displayed on its paid links and headlines apply to, are affiliated with, and/or are endorsed by Select Comfort and its Sleep Number<sup>®</sup> products.

70. As such, Defendants have misled, deceived, and/or confused the public at large and consumers seeking Sleep Number<sup>®</sup> beds and Select Comfort’s goods, services, or website.

71. Defendants began their uses of the Trademarks-At-Issue as described herein long after Select Comfort began using said marks.

72. The products which Defendants advertise and sell in connection with their unauthorized use of Select Comfort’s Trademarks are highly related to the products sold by Select Comfort in connection with Select Comfort’s use of the Trademarks-At-Issue.

73. The unauthorized use of Select Comfort’s Trademarks by Defendants in the manner described above enables Defendants to trade on and receive the benefit of good will in Select Comfort’s Trademarks which Select Comfort has built up at great labor and expense over many years. This unauthorized use by Defendants also enables Defendants to gain acceptance for their own goods, not solely on the merits of those goods, but on the reputation and good will of Select Comfort and its own trademarks.

74. The unauthorized use of Select Comfort’s Trademarks by Defendants in the manner described above is likely to cause confusion and/or deceive customers and potential customers of the parties, as to some affiliation, connection or association of

Defendants with Select Comfort, or as to the origin, sponsorship, or approval of the goods of Defendants by Select Comfort.

75. The unauthorized use of Select Comfort's Trademarks by Defendants in the manner described above falsely designates the origin of the goods of Defendants, and falsely and misleadingly describes and represents facts with respect to Defendants and the goods of Defendants.

76. The Sleep Number<sup>®</sup>, Select Comfort<sup>®</sup>, and What's Your Sleep Number<sup>®</sup> trademarks are famous marks as that term is defined in 15 U.S.C. 1125(c)(1).

77. The unauthorized use of the Sleep Number<sup>®</sup>, Select Comfort<sup>®</sup>, and What's Your Sleep Number<sup>®</sup> trademarks by Defendants in the manner described above is likely to dilute the distinctive quality of Select Comfort's Trademarks.

78. The unauthorized use of Select Comfort's Trademarks by Defendants in the manner described above unjustly enriches Defendants at Select Comfort's expense.

79. The unauthorized use of Select Comfort's Trademarks by Defendants in the manner described above removes from Select Comfort the ability to control the nature and quality of the products provided under those marks and places the valuable reputation and good will of Select Comfort in the hands of Defendants, and others, over whom Select Comfort has no control.

80. The unauthorized use of Select Comfort's Trademarks by Defendants in the manner described above is false and misleading.

81. Select Comfort has, on many occasions, provided notice to Defendants of the improper use of Select Comfort's Trademarks and demanded that Defendants cease

the unauthorized uses of the Trademarks. Defendants failed and refused to comply with Select Comfort's rightful requests and demands.

82. In addition, Defendants' make numerous false, deceptive, misleading and/or unsubstantiated claims or claims with no objective support to the consuming public. For example, Defendants have claimed that their beds are "preferred 6 to 1 over Sleep Number."

83. Defendants recently changed this claim to state "preferred 6 to 1 over leading national brand" and "preferred over Sleep Number."

84. However, Defendants have no independent substantiation or objective support to make these claims.

85. Defendants' claims that their beds are "preferred 6 to 1 leading national brand" or "preferred over Sleep Number" are false, deceptive, or misleading.

86. Defendants also include on their websites statements that purportedly compare Select Comfort's products to Defendants' products. Many of these "comparison" statements, however, are deceptive, false, misleading, and/or lack independent substantiation or objective support.

87. Defendants' use of such "comparison" statements is false, deceptive, or misleading.

88. In addition, Defendants market their air beds using a model lineup naming convention that mirrors the naming convention used by Select Comfort for its air bed model lineup in an effort to confuse and mislead consumers as to the difference between Defendants' air beds and genuine Sleep Number<sup>®</sup> air beds.

89. Defendants have also presented health-related testimonials on their websites and through social media such as Facebook that are deceptive because they lack independent substantiation or objective support. These testimonials, for example, imply that Defendants' products cure or relieve back pain.

90. Defendants' use of such testimonials is false, deceptive, or misleading.

91. Defendants expect that consumers will rely on Defendants' false, deceptive, or misleading representations in purchasing products from Defendants.

92. Consumers do rely, and have relied, on Defendants' false, deceptive, or misleading representations in purchasing products from Defendant and have therefore been misled and harmed by Defendants' tactics.

93. Defendants' acts as described above have violated or injured the public's and consumers' ability to make accurate and informed purchasing decisions free from false, misleading, deceptive, and unfair representations and trade practices.

94. Defendants' acts as described above have injured Select Comfort by, *inter alia*, diverting customers from Select Comfort.

95. Defendants' false, deceptive, or misleading representations and trade practices described herein are directed to, and injure, the public at large and Minnesota consumers.

96. Defendants' acts complained of herein were and continue to be committed willfully and intentionally.

97. Select Comfort has suffered and will continue to suffer monetary damages as a result of Defendants' wrongful acts.

98. Defendants' activities have caused irreparable injury to Select Comfort, Minnesota consumers, and the public at large and, unless enjoined by this Court, will continue to cause irreparable injury to Select Comfort, Minnesota consumers, and the public at large. There is no adequate remedy at law for this injury.

### **COUNT ONE**

#### **FEDERAL TRADEMARK INFRINGEMENT**

99. Select Comfort repeats the allegations above as if fully set forth herein.

100. The acts of Defendants complained of herein constitute infringement of Select Comfort's federally registered marks in violation of 15 U.S.C. § 1114(1).

101. Defendants' conduct has been willful and in bad faith making this an exceptional case within the meaning of 15 U.S.C. § 1117(a).

### **COUNT TWO**

#### **FEDERAL UNFAIR COMPETITION**

102. Select Comfort repeats the allegations above as if fully set forth herein.

103. The acts of Defendants complained of herein constitute trademark infringement, trade dress infringement, unfair competition, and false designation of origin in violation of 15 U.S.C. § 1125(a).

### **COUNT THREE**

#### **FEDERAL DILUTION OF TRADEMARK**

104. Select Comfort repeats the allegations above as if fully set forth herein.

105. The acts of Defendants complained of herein constitute trademark dilution in violation of 15 U.S.C. § 1125(c).

**COUNT FOUR**

**FALSE ADVERTISING – 15 U.S.C. § 1125(a)**

106. Select Comfort repeats the allegations above as if fully set forth herein.

107. The acts of Defendants complained of herein constitute the making of false representations, claims and statements in connection with goods distributed in interstate commerce in violation of 15 U.S.C. § 1125(a).

**COUNT FIVE**

**DECEPTIVE TRADE PRACTICES**

108. Select Comfort repeats the allegations above as if fully set forth herein.

109. The acts of Defendants complained of herein constitute deceptive trade practices in violation of the Minnesota Uniform Deceptive Trade Practices Act, Minn. Stat. § 325(D).44 *et seq.*

**COUNT SIX**

**UNLAWFUL TRADE PRACTICES**

110. Select Comfort repeats the allegations above as if fully set forth herein.

111. The acts of Defendants complained of herein constitute violations of the Minnesota Unlawful Trade Practices Act, Minn. Stat. § 325D.09 *et seq.*

**COUNT SEVEN**

**FALSE STATEMENTS IN ADVERTISING**

112. Select Comfort repeats the allegations above as if fully set forth herein.

113. The acts of Defendants complained of herein constitute false statements in advertising in violation of the Minnesota False Statement in Advertising Act, Minn. Stat. § 325F.67.

**COUNT EIGHT**

**CONSUMER FRAUD**

114. Select Comfort repeats the allegations above as if fully set forth herein.

115. The acts of Defendants complained of herein constitute consumer fraud in violation of the Minnesota Consumer Fraud Act, Minn. Stat. § 325F.69 *et seq.*

**COUNT NINE**

**UNJUST ENRICHMENT**

116. Select Comfort repeats the allegations above as if fully set forth herein.

117. The acts of Defendants complained of herein constitute unjust enrichment of Defendants at Select Comfort's expense.

**PRAYER FOR RELIEF**

WHEREFORE, Select Comfort prays for judgment as follows:

1. A permanent injunction enjoining and restraining Defendants and their agents, employees, officers, servants, representatives, successors and assigns and others in active concert or in participation with Defendants:

- a. from the use, in any manner whatsoever, including keyword purchasing, of the marks Sleep Number<sup>®</sup> or Select Comfort<sup>®</sup>, or combinations or variations thereof, including phonetic equivalents;

- b. from using any of the false and/or misleading advertising statements described above;
- c. to deliver up for destruction, or otherwise destroy all advertising and promotional materials containing any use of the Sleep Number<sup>®</sup> or Select Comfort<sup>®</sup> trademarks or any false or misleading statements; and
- d. with such injunction including a provision directing Defendants to file with the Court and serve on Select Comfort within thirty (30) days following the injunction a report in writing, and under oath, setting forth in detail the manner and form in which Defendants have complied with the injunction.

2. Requiring a payment of damages or an accounting of profits made by Defendants as a result of the acts complained of herein;

3. Awarding damages equal to three times the amount suffered as provided by 15 U.S.C. § 1117, together with attorneys' fees;

4. Awarding prejudgment interest; and

5. Awarding Select Comfort its costs, disbursements, and attorneys' fees, together with such other and further relief as this Court may deem just and equitable.

### **JURY DEMAND**

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Select Comfort requests a trial by jury on all claims and issues triable by jury.

Dated: November 16, 2012

**OPPENHEIMER WOLFF & DONNELLY LLP**

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