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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 EASTERN DIVISION

11 AMERICAN NATIONAL
MANUFACTURING INC., a
12 California corporation; and DIRES,
LLC d/b/a PERSONAL COMFORT
13 BED, a Delaware limited liability
company,

14 Plaintiffs,

15 vs.

16 SELECT COMFORT
CORPORATION, a Minnesota
17 corporation; and SELECT COMFORT
SC CORPORATION, a Minnesota
18 corporation,

19 Defendants.
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Case No. 5:16-CV-00582

**CIVIL ANTITRUST COMPLAINT
FOR DAMAGES AND
INJUNCTIVE RELIEF FOR
VIOLATIONS OF SECTION 2 OF
THE SHERMAN ACT**

[DEMAND FOR JURY TRIAL]

Blecher Collins
& Pepperman



1 Plaintiffs American National Manufacturing Inc. (“ANMI”) and Dires, LLC,
 2 d/b/a Personal Comfort Bed (“Dires”) file this Complaint against defendants Select
 3 Comfort Corporation and Select Comfort SC Corporation (collectively “Select
 4 Comfort”) to secure damages and injunctive relief, and demanding trial by jury,
 5 claim and allege as follows:

6 **I.**

7 **SUMMARY OF CASE**

8 1. This antitrust lawsuit centers on Select Comfort’s deliberate and
 9 continuing attempt to monopolize, and its actual monopolization of, the consumer
 10 adjustable firmness air mattress bed system market in the United States.¹ The
 11 antitrust laws set reasonable bounds on monopolistic behavior, and these bounds are
 12 not lifted simply because one is waving about its intellectual property rights. Select
 13 Comfort is engaged in an overall scheme to abuse its monopoly power to raise
 14 barriers to market entry by and through a pattern of predatory and abusive litigation,
 15 designed to suppress competition in the market and to injure competitors rather than
 16 to obtain legitimate judicial relief; litigation threats – based on exaggerated and
 17 baseless trademark claims – aimed at intimidating its competitors’ suppliers and to
 18 interfere with its competitors’ businesses; filing repeated and systematic oppositions
 19 to competitors’ trademark registrations beyond its lawful trademark rights;
 20 vexatious enforcement of ostensible patent rights; acquisition of its largest
 21 competitor to strengthen its monopoly; and leveraging exclusive supply agreements
 22 for certain necessary mattress components. Select Comfort’s synergistic
 23 anticompetitive actions constitute violations of the federal antitrust laws as
 24 enumerated herein.

25 2. Select Comfort conceived and implemented a multi-faceted
 26 anticompetitive scheme to exclude plaintiffs from this growing and lucrative market.

27 ¹ This distinct segment of the market is generally and commonly referred to as the
 28 “number bed” market.

1 Plaintiffs have developed, manufactured, and sold a line of competing and
2 significantly lower-priced adjustable firmness air mattress bed products. To thwart
3 plaintiffs' competition, Select Comfort has engaged in a focused campaign of
4 anticompetitive and monopolistic acts directed at maintaining its strangle hold over
5 the market.

6 3. As a consequence of defendants' conduct, competition in this product
7 market has been suppressed and virtually eliminated, and consumers in this market
8 have suffered a loss of choice and have been required to pay higher,
9 supracompetitive prices for consumer adjustable firmness air mattress beds to Select
10 Comfort than would otherwise be the case in a properly functioning and competitive
11 market. Plaintiffs, the competitive market, and consumers have suffered antitrust
12 injury by reason of Select Comfort's unlawful, exclusionary, and predatory conduct.

13 II.

14 JURISDICTION AND VENUE

15 4. This Complaint is filed and this action is instituted under Sections 4
16 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26) to recover the damages caused by,
17 and to secure injunctive relief against, Select Comfort for its past and continuing
18 violations of Section 2 of the Sherman Act (15 U.S.C. § 2), as alleged herein.

19 5. This Court has original and exclusive jurisdiction over the subject
20 matter of this civil action under 15 U.S.C. § 15 and 28 U.S.C. §§ 1331, 1332, and
21 1337. Select Comfort maintains stores and transacts business on a systematic and
22 continuous basis within this District and may be found here within the meaning of
23 15 U.S.C. §§ 15, 22 and 28 U.S.C. § 1391. Further, a significant portion of the
24 unlawful acts alleged herein were performed and occurred in material part within
25 this District. The amount in controversy exceeds the sum or value of \$75,000,
26 exclusive of interest and costs.

1 **III.**

2 **INTERSTATE COMMERCE**

3 6. The actions complained of herein have, and will, restrain and adversely
4 affect interstate commerce in that Select Comfort sells its products and services
5 across state lines. Further, Select Comfort purchases goods and supplies in
6 interstate commerce. Select Comfort's anticompetitive activities are within the flow
7 of and had a proximate, direct, substantial and reasonably foreseeable affect on
8 interstate commerce.

9 **IV.**

10 **PARTIES**

11 7. Plaintiff American National Manufacturing Inc., is a California
12 corporation with its principal place of business located in Corona, California.
13 ANMI manufactures several lines of adjustable firmness air mattress beds, some of
14 which are sold to consumers through retailers and which compete directly with
15 Select Comfort's products. ANMI also manufactures and sells other highly
16 specialized different products that are sold to medical customers pursuant to FDA
17 approval.

18 8. Plaintiff Dires, LLC, d/b/a Personal Comfort Bed is a Delaware limited
19 liability company, registered in Florida, with its principal place of business located
20 in Florida. Dires sells, in competition with Select Comfort's products, consumer
21 adjustable firmness air beds under the trade name "Personal Comfort Bed." Dires'
22 sales of these products which compete directly with Select Comfort's products, are
23 almost exclusively made online through its own website at personalcomfortbed.com
24 and on Amazon.com.

25 9. Defendant Select Comfort Corporation is a Minnesota corporation with
26 its principal place of business in Plymouth, Minnesota. Select Comfort was founded
27 in 1987. Currently, Select Comfort has approximately 480 retail stores in the U.S.
28 which are the exclusive distributors of its bedding products. Over 50 of these

1 vertically integrated stores are located in California. In 2015, Select Comfort's net
 2 sales exceeded \$1.4 billion. In its filings with the U.S. Securities and Exchange
 3 Commission, Select Comfort acknowledges that its "adjustable firmness air beds"
 4 compete directly with other similar product offerings "in the adjustable firmness air
 5 bed segment" of the market. Select Comfort also acknowledges that it "designs,
 6 manufactures and markets unique air bed products."

7 10. Defendant Select Comfort SC Corporation is a Minnesota corporation
 8 with its principal place of business in Minnesota. Select Comfort SC Corporation is
 9 a wholly-owned subsidiary of Select Comfort, and, consists of the business
 10 operations of Select Comfort's former competitor, Comfortaire Corporation
 11 ("Comfortaire"), which Select Comfort acquired in January 2013.

12 V.

13 **FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS**

14 A. **The History and Growth of the Consumer Adjustable Firmness Air
 15 Mattress Bed Market**

16 11. Consumer adjustable firmness mattress air beds are a separate and
 17 distinct line of commerce within the broader mattress industry. These beds are a
 18 unique and differentiated product and comprise a submarket in the broader bedding
 19 mattress industry. These beds consist of air-filled mattresses (no innersprings)
 20 containing internal-air chambers that may be adjusted for firmness by changing the
 21 numerical setting on a control. Although this unique and distinctive product is
 22 described by several generic names, such as "number bed," this category of
 23 consumer product is often referred to, and will be, referred shorthand to herein as
 24 "adjustable firmness air beds."

25 12. Consumer adjustable air beds enjoy a hard core and dedicated
 26 population of users. Select Comfort claims that 92% of bed owners would
 27 recommend Select Comfort air beds. The industry recognizes this specialized type
 28

1 of bed system as a distinct market, or submarket, and many retail outlets, including
2 Select Comfort, exclusively distribute and sell adjustable air beds.

3 13. The first manufactured adjustable firmness air beds began to appear in
4 the 1980's, with Comfortaire, an adjustable air bed manufacturer in South Carolina,
5 claiming to have manufactured the "original" adjustable air bed in 1981. At the
6 time, the words "air bed" evoked images of cheap, inflatable plastic sleeping pads
7 used at the beach or on camping trips.

8 14. Reportedly, Comfortaire spent several years refining air technology,
9 improving mattress performance, lowering supply and production costs, and
10 investing in marketing before it was able to economically produce high-quality
11 mattresses. Comfortaire's parent company, Park Place, reportedly backed
12 Comfortaire financially during this initial period.

13 15. Craig Miller, Sr. as President of American National Watermattress
14 Corporation, introduced the first adjustable firmness air beds with number settings
15 on a remote control to the market in 1987. Today, Craig Miller, Jr. is the President
16 of plaintiff ANMI (name was changed in 1993).

17 16. Plaintiff ANMI produces the consumer adjustable firmness air mattress
18 beds that Dires sells through online channels. Among other things, ANMI also
19 manufactures highly specialized adjustable firmness air beds that are sold to
20 hospitals and other medical facilities, containing additional technology and other
21 features specific to a medical setting which require approval from the FDA to
22 manufacture and sell beds in these settings.

23 **B. Adjustable Firmness Air Mattress Bed's Unique Product Features**
24 **and Customer Preferences**

25 17. Consumer adjustable firmness air mattress bed systems constitute a
26 relevant product market, or submarket, for antitrust purposes. Adjustable firmness
27 air beds are distinguished from other types of beds in the broader mattress market by
28 strong customer preference, primarily driven by the adjustability of mattress

1 firmness by number, a key product attribute. A resting user can easily adjust the
2 firmness of an adjustable air bed by changing a numerical setting on a remote
3 control. This product feature makes adjustable firmness air beds uniquely attractive
4 to certain customers, for whom an adjustable air bed is the only realistic and
5 preferred choice.

6 18. Adjustable firmness air beds utilize air chambers as the main support
7 within the mattress rather than metal springs or foam. Due to their component
8 structure, adjustable air beds are lightweight in construction and can be readily
9 shipped disassembled to a residence and are relatively easy to assemble.

10 19. Conventional mattresses do not contain replaceable parts and must be
11 discarded when worn or damaged. The zippered covers on adjustable air beds allow
12 an owner to gain access to the air chamber and foam filling material in the mattress
13 top, facilitating a replacement of the air chamber or a change of certain foam
14 material over time should it become worn or compressed. The air bed is in essence
15 renewable by simply replacing the worn-out portion, while a conventional mattress
16 would need to be replaced in its entirety. Further, this renewability feature allows a
17 user to upgrade some of the foam layers in an air bed rather than be required to
18 replace the whole mattress if they want to experience some of the newly-introduced
19 high technology foams, such as the cooling gel infused visco elastic foam filler
20 products.

21 20. There is no reasonable and economically viable alternative or substitute
22 for a consumer adjustable firmness air mattress bed, nor to using a numerical value
23 to describe the desired pressure setting of the air chamber in an adjustable firmness
24 air bed. This unique and functional feature has resulted in common usage of the
25 phrase “number bed” to describe adjustable firmness air beds. The firmness level of
26 traditional innerspring or foam mattresses is stationary and cannot be adjusted. The
27 firmness of an adjustable air bed can be adjusted at any time according to the user’s
28

1 current preference. This function is not possible on a conventional innerspring or
2 foam mattress.

3 21. For some queen and king size adjustable air beds, the firmness of the
4 mattress can be adjusted differently on either side of the mattress at any time. For
5 example, one sleeper could be at a “firm” setting and the second sleeper could be set
6 at a “soft” setting. The firmness control system also has memory settings for each
7 side of the bed to memorize a sleeper’s favorite settings and make it easier to change
8 a setting and then to return to a preferred setting. Traditional mattresses do not have
9 these features.

10 22. Select Comfort advertises the “unique” features of consumer adjustable
11 firmness air mattress beds, including that they can be easily adjusted to an
12 individual’s preference, comfort, and firmness. Select Comfort frequently claims
13 that studies have shown that adjustable firmness air beds relieve back pain and
14 improve sleep quality. Select Comfort also publicly claims that its consumer air
15 beds deliver “an unparalleled sleep experience” and last “twice as long as an
16 innerspring mattress.”

17 23. Consumer preferences for adjustable firmness air mattress beds would
18 sustain product sales in the face of a small but significant non-transitory increase in
19 price. Adjustable firmness air beds are generally sold at a higher price point than
20 traditional innerspring beds, indicating that customer preference supports higher
21 prices for adjustable air mattresses as compared to traditional innerspring
22 mattresses. Some of Select Comfort’s adjustable firmness air mattress bed systems
23 are offered for sale at close to \$10,000. Select Comfort also characterizes its air bed
24 products as “luxury items.”

25 24. Select Comfort’s adjustable firmness air beds are sold exclusively
26 through its own network of retail stores/outlets across the United States. No non-air
27 beds are displayed or sold at Select Comfort’s stores.
28

1 25. Trade journals and other publications categorize mattresses by the
2 materials from which they are constructed; beds with air-filled adjustable firmness
3 mattresses are viewed as separate and distinct products from one another in these
4 publications.

5 **C. Barriers to Market Entry and Expansion**

6 26. Significant entry and expansion barriers exist in the consumer
7 adjustable air mattress bed market. Entry requires substantial investment in
8 resources and time to build manufacturing facilities or contract for manufacturing
9 services, hire and train employees, and establish national marketing and sales
10 strategies and procedures.

11 27. The manufacture of adjustable air beds is also subject to governmental
12 regulation including federal and state consumer protection laws as well as federal
13 fire retardant standards developed by the U.S. Consumer Product Safety
14 Commission.

15 28. A firm wishing to enter and meaningfully compete in the consumer
16 adjustable firmness air mattress bed market must make substantial investments in
17 developing the technology necessary to economically produce an adjustable air bed.
18 The firm must procure or produce electric air pumps, internal-air chambers, mattress
19 materials, and other product components, and then assemble them in a factory.

20 29. The air chambers for adjustable firmness air mattress beds are
21 manufactured in either a vulcanized rubber material or a thermoplastic material.
22 The thermoplastic type air chambers use a unique manufacturing process, called
23 radio-frequency welding, a process by which electro-magnetic energy is used to
24 permanently bond thermoplastic materials together. This manufacturing process is
25 unique to adjustable firmness air beds in the mattress and bed industry and requires
26 significant investment in equipment, supplies, and personnel training before a firm
27 may successfully introduce an air mattress bed product into the market. The
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1 vulcanized rubber air chambers use hand glued seals, is very labor intensive and
2 only produced by a few companies in the world.

3 30. A would-be market entrant must also have one or more retail channels.
4 A growing segment of adjustable air mattress bed sales – reflecting broader
5 economic trends – comes from online sales. Select Comfort’s entrenched position
6 as a monopolist with purported intellectual property rights also acts as a barrier.

7 31. In January 2013, Tempur-Pedic International, Inc. introduced an
8 adjustable air bed utilizing a non-numerical adjustment system, called “Tempur-
9 Choice.” The Tempur-Choice product experienced significantly lower sales than
10 expected because consumers were confused by and reluctant to purchase an
11 adjustable air bed with a non-numerical adjustment system. Consequently, Tempur-
12 Pedic exited the adjustable firmness air bed market.

13 **D. Select Comfort’s Dominance Over the Consumer Adjustable**
14 **Firmness Air Mattress Bed Market**

15 32. Select Comfort began selling adjustable firmness air mattress beds in
16 1988. Select Comfort exclusively sells adjustable firmness air beds through its own
17 retail stores and online to purchasers throughout the United States under the trade
18 name “Sleep Number®.” Select Comfort has federal trademark registrations for
19 “Sleep Number®,” “Select Comfort®,” and “What’s Your Sleep Number?®.”

20 33. Select Comfort dominates and controls the consumer adjustable
21 firmness air bed market. It is, by far, the largest manufacturer and seller of
22 adjustable firmness air beds, accounting for more than 90% of the sales in the U.S.
23 of adjustable firmness air beds.

24 34. Select Comfort has never attempted to register the term “number bed”
25 as a trademark. Select Comfort has never used the term “number bed,” standing
26 alone, in its marketing and sale of its number beds. The only time the term “number
27 bed” appears in Select Comfort’s marketing is when “bed” is used as a generic term
28

1 following Select Comfort's trademark, "Sleep Number®." For example, "the Sleep
2 Number® bed."

3 35. Select Comfort has no patent or other protectable right that allows it to
4 prevent competitors from selling beds that can be adjusted by changing the number
5 setting on a remote control.

6 36. Because the consumer adjustable firmness air mattress bed market is
7 almost entirely occupied by Select Comfort, its dominance creates significant
8 barriers for new and small market entrants, requiring significant time and monetary
9 investments to establish relationships with key suppliers and develop marketing and
10 promotional channels and activity to effectively reach consumers.

11 37. Select Comfort has not been approved by the FDA to manufacture or
12 sell beds for use in hospitals.

13 38. Select Comfort has the power to control prices or exclude competition
14 in the market, or submarket, for consumer adjustable firmness air beds and has
15 exercised that power. Select Comfort exercises price leadership control over the
16 adjustable air bed market.

17 **E. Select Comfort's Efforts To Monopolize And Exclude Competitors**
18 **From The Consumer Adjustable Firmness Air Mattress Bed**
Market

19 39. Select Comfort has engaged in an overall coordinated scheme to
20 monopolize the market for consumer adjustable firmness air mattress beds through a
21 variety of anticompetitive and exclusionary acts, including without limitation,
22 predatory enforcement of its purported intellectual property rights (trademark and
23 patent) designed to prevent lawful competition and harm competitors.

24 40. Despite the fact that the percentage of sales within the broader mattress
25 market that are attributable to adjustable firmness air beds has increased steadily
26 since 2004, Select Comfort has doggedly prevented market entry through its
27 predatory behavior. A June 2006 article in BedTimes listed six firms, in addition to
28 Select Comfort, as players in the adjustable firmness air bed market: Comfortaire,



1 Foamco Industries, Boyd Specialty Sleep, American National Manufacturing,
2 InnoMax, and Natura. Select Comfort has either sued or threatened to sue each of
3 these competing adjustable firmness air bed producers identified in this 2006 article.

4 41. Select Comfort has attempted to achieve, and has actually achieved, a
5 monopoly by and through the following predatory and exclusionary acts:

6 (a) initiated and maintained a pattern of exaggerated and baseless and
7 repetitive claims regarding its trademark rights to scare essential suppliers and
8 vendors away from doing business with competitors in an effort to raise barriers to
9 market entry and increase its competitors' costs;

10 (b) initiated a pattern of abusive and expensive litigation designed to injure
11 and financially drain competitors rather than for the legitimate purpose of obtaining
12 judicial relief, illustrated by the litigation conduct described herein;

13 (c) initiated and maintained bad faith patent infringement suits on the basis of
14 patents, during the examination of which, material prior art was withheld from U.S.
15 Patent Office Examiners, and which Select Comfort and its attorneys knew and
16 know to be invalid and unenforceable;

17 (d) although Select Comfort has no right to use "number" exclusively, it seeks
18 to prevent any competitor from registering a federal trademark incorporating the
19 word "number" or using "number" in any way in the sale of adjustable firmness air
20 beds despite the fact that "number" describes and suggests the key product
21 characteristic;

22 (e) purchased/acquired its largest competitor, Comfortaire, following the
23 settlement of a trademark lawsuit instituted by Select Comfort to strengthen its
24 monopoly and, for the stated purpose of gaining a competitive advantage through
25 the "convergence of intellectual property;" and

26 (f) obtained exclusive supply agreements for certain components necessary to
27 producing adjustable firmness air beds, thereby, raising the barriers to market entry
28 by depriving competitors of necessary inputs.

42. Because Select Comfort has engaged in an overall scheme to monopolize the market for consumer adjustable firmness air mattress beds and to otherwise foreclose competition and harm competitors, its conduct should be viewed as a whole rather than considering each aspect in isolation.² Accordingly, this Court need not analyze whether each facet of this scheme constitutes a separate antitrust violation or parse each wrongful act into its component parts to determine if Select Comfort's actions are immune from antitrust liability.

F. Select Comforts' Pattern of Exaggerated and Baseless Litigation Threats

43. Over the last two decades, Select Comfort has sued or threatened to sue nearly every participant in the adjustable firmness air bed market. Over the last 5-7 years, Select Comfort has actually filed trademark infringement, patent infringement, and/or false advertising lawsuits against at least 59 companies and sent cease-and-desist letters to at least 129 companies over that same time period.

44. Select Comfort aggressively threatens litigation against competitors and their third-party vendors and suppliers based on alleged trademark infringement founded in the false and objectively baseless claim that all of its trademarks meet the rigorous standard for fame under the Lanham Act, 15 U.S.C. § 1051, *et seq.*, including its trademarks, "Sleep Number," "Select Comfort," and "What's Your Sleep Number?" Select Comfort began making such claims at least as early as November 2006.

45. Select Comfort's false and baseless claim that all its marks are famous ostensibly supports its objectively baseless assertion that competitors are diluting its trademark rights through lawful competition. Among other things, Select Comfort claims that competitors' lawful use of such generic terms as "number" or "comfort" in connection with the sale of adjustable firmness air beds, use of arrow symbols in

² *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99 (1962).

1 logos, keyword advertising through online search engines, and overall website
2 design dilutes Select Comfort's purported trademark rights. Through these and
3 other baseless claims, Select Comfort seeks to extend its trademarks rights beyond
4 their legitimate scope.

5 46. On November 7, 2006, counsel for Select Comfort sent a letter to
6 Denver Mattress Company, in which Select Comfort claimed that Denver Mattress
7 Company's "use of the mark 'Selectek' is likely to cause the dilution of Select
8 Comfort's famous and distinctive SELECT COMFORT mark." Select Comfort's
9 letter threatened to oppose registration of the "Selectek" mark and further legal
10 action if Denver Mattress Company did not expressly abandon its trademark
11 application and cease-and-desist use of the "Selectek" mark.

12 47. Select Comfort's claim that the mark "Select Comfort" was famous and
13 protected from dilution under the Lanham Act such as to prevent a competitor from
14 using the term "Selectek" in the sale of adjustable firmness air beds was objectively
15 baseless and subjectively motivated by the bad faith intent of injuring a competitor.

16 48. On November 20, 2006, counsel for Select Comfort sent a letter to
17 Factory Direct, Inc., in which Select Comfort claimed that Factory Direct, Inc.'s
18 "use of the mark 'Life Number' is likely to cause the dilution of Select Comfort's
19 famous and distinctive SLEEP NUMBER mark." Select Comfort's letter threatened
20 to oppose registration of the "Life Number" mark and further litigation action if
21 Factory Direct, Inc. did not expressly abandon its trademark application and cease-
22 and-desist using the mark.

23 49. Select Comfort's claim that the mark "Select Comfort" was famous and
24 protected from dilution under the Lanham Act such as to prevent a competitor from
25 using the term "Life Number" in the sale of adjustable firmness air beds was
26 objectively baseless and subjectively motivated by the bad faith intent of injuring a
27 competitor.

28



1 50. On June 28, 2008, the Vice President and Associate General Counsel
2 for Select Comfort sent a letter to Leggett and Platt, in which Select Comfort
3 claimed that Leggett and Platt's "use of the mark 'Position Number' infringes on
4 Select Comfort's rights under the federal Lanham Act and under state laws," and
5 that Select Comfort had "been successful in preventing other companies from using
6 the marks with the word 'Number' in connection with mattresses, foundations and
7 other bedding products."

8 51. Select Comfort's claim that Leggett and Platt's use of the term
9 "Position Number" infringes on Select Comfort's trademark rights and that Select
10 Comfort's trademark rights prevented other companies from using the word
11 "Number" in connection with mattresses, foundations and other bedding products
12 was objectively baseless and subjectively motivated by the bad faith intent of
13 injuring a competitor.

14 52. On October 14, 2010, a compliance and legal services manager for
15 Select Comfort sent a letter to Simply Rest, LLC, in which Select Comfort claimed
16 that Simply Rest, LLC's use of the term "Number Bed" in internet paid advertising
17 infringed upon Select Comfort's trademark rights, stating that "your use of the mark
18 'Number Bed' dilutes Select Comfort's famous and distinctive Sleep Number
19 mark" Select Comfort also asserted that it had "successfully prevented
20 registration and use of other "Number" marks for beds, adjustable beds and the
21 like," and demanded "that Simply Rest immediately cease and desist from further
22 use in any medium of the term 'Number Bed' or any similar term"

23 53. Select Comfort's claim that the Simply Rest, LLC's use of the term
24 "Number Bed" infringes upon Select Comfort's trademark rights, that it's trademark
25 rights prevented registration and use of other "Number" marks for beds, adjustable
26 beds, and the like, and its demand that Simply Rest, LLC cease-and-desist use of the
27 term "Number Bed" in reference to adjustable beds and mattresses was objectively
28 baseless and subjectively motivated by the bad faith intent of injuring a competitor.



1 54. On June 12, 2012, counsel for Select Comfort sent a letter to Custom
2 Comfort Beds LLC, in which Select Comfort claimed that Custom Comfort Beds
3 LLC's "use of certain terms including, 'Air Number' and a logo [] is confusingly
4 similar to the SELECT COMFORT logo," and demanding Custom Comfort Beds
5 LLC cease-and-desist "any and all use of 'Air Number' or 'Number' in reference to
6 adjustable beds and mattresses," among other things.

7 55. Select Comfort's claim that Custom Comfort Bed LLC's use of the
8 term "Air Number" infringes upon Select Comfort's trademark rights and its
9 demand that Custom Comfort Bed LLC cease-and-desist use of the term "Number"
10 in reference to adjustable beds and mattresses was objectively baseless and
11 subjectively motivated by the bad faith intent of injuring a competitor.

12 56. Select Comfort threatened litigation against InnoMax, a mattress
13 manufacturer that makes and sells adjustable firmness air beds. Among other
14 things, Select Comfort demanded that InnoMax not compare its own products to
15 Select Comfort's products in its advertising, not use the word "number bed" to
16 describe its products, and change photographic depictions of its wired remote
17 control to clearly show the wire that connects the remote. Select Comfort has no
18 legitimate trademark rights that would prevent competitors from engaging in these
19 advertising activities and making these types of statements.

20 57. Select Comfort has directed similar threats to plaintiffs' third-party
21 suppliers and vendors.

22 58. For example, plaintiff Dires has contracts with online search engines
23 such as Google and Yahoo/Bing for keyword advertising. Select Comfort was at all
24 relevant times aware of these contracts.

25 59. Select Comfort intentionally procured the breach of Dires' contracts
26 with these search providers by misrepresenting and exaggerating its purported
27 trademark rights to Google and Yahoo/Bing.

28



1 60. For example, *inter alia*, Select Comfort falsely represented to Google
2 and/or Yahoo/Bing that it had trademark rights in the term “number bed” and argued
3 therefore that Dires’ use of “number bed” in Dires’ keyword advertising infringed
4 Select Comfort’s purported mark.

5 61. Such claim was objectively baseless, as Select Comfort has no
6 trademark rights in “number bed,” and was made with the specific intent to induce
7 online search providers to stop Dires’ keyword advertisements for which Dires
8 contracted, and thus directly interfere with Dires’ business relationships.

9 62. Based on Select Comfort’s misrepresentations, Google and/or
10 Yahoo/Bing for a period of time in 2015 stopped the keyword advertisements for
11 which Dires contracted.

12 63. Select Comfort’s interference was without justification because its
13 representations to online search providers, particularly that it had trademark rights in
14 “number bed,” were objectively baseless.

15 64. Dires lost sales of adjustable firmness air beds as a result of the
16 stoppage of its keyword advertisements caused by Select Comfort’s intentional
17 interference.

18 65. Select Comfort has also directed similar threats to competitors,
19 including plaintiffs.

20 66. Select Comfort routinely makes objectively baseless claims in cease-
21 and-desist letters and lawsuits against competitors with the intent of interfering and
22 damaging the competitors’ businesses.

23 67. For example, Select Comfort sends cease-and-desist letters to
24 competitors threatening litigation if the competitors do not agree to cease purchasing
25 Select Comfort’s trademarks as keywords in online search engine advertising
26 programs such as Google and Yahoo/Bing.

27 68. Select Comfort does so despite the fact that it engages in this precise
28 practice and has admitted in other litigation that the practice is entirely lawful, thus



1 making its threats objectively baseless and made solely with the specific intent of
2 directly interfering with its competitors' businesses.

3 69. Select Comfort also sends cease-and-desist letters to competitors
4 threatening litigation if the competitors do not agree to cease use of any slogan that
5 contains the words "sleep" and "number" anywhere, in any order, with any other
6 combination of words, as well as any and all use of the single word "number" in
7 reference to adjustable beds and retail or online sales of beds and mattresses.

8 70. Select Comfort does so despite the fact that in its trademark application
9 it disclaimed use of "sleep" apart from its "Sleep Number" mark as a whole, and
10 that it has no right to use "sleep" or "number" exclusively.

11 71. In fact, the United States Patent and Trademark Office ("USPTO") has
12 published for opposition and allowed registration of marks in the adjustable-air bed
13 industry containing "sleep" and/or "number."

14 72. Thus, Select Comfort's claims are objectively baseless and made solely
15 with the specific intent of directly interfering with and disrupting its competitors'
16 businesses.

17 73. Select Comfort also threatens litigation if competitors do not agree to
18 cease using "Sleep Number" fairly to describe the competitors' own products, such
19 as "Sleep Number Bed Style Mattress."

20 74. Such threats are objectively baseless and made solely with the specific
21 intent to directly interfere with and disrupt competitors' businesses.

22 75. In sum, in flagrant disregard of established trademark law principles,
23 Select Comfort has a systematic practice of intimidating its smaller and less
24 financially capable competitors by accusing them of, and suing them for purported
25 intellectual property violations Select Comfort knows do not exist.

26 76. Because Select Comfort engages in the same practices, such claims are
27 baseless and brought with the specific intent to directly interfere with and disrupt
28 competitors' businesses.



G. Select Comfort's Initiation and Maintenance of a Pattern of Abusive and Predatory Litigation

77. If its competitors do not succumb to Select Comfort's threats and demands, it initiates suit against them alleging trademark infringement and dilution, false advertising, cyberpiracy, and other claims. Many of Select Comfort's lawsuits have resulted in the competitor subsequently going out of business and exiting the market.

78. Select Comfort's trademark infringement lawsuits are founded in the false and objectively baseless claim that all of its trademarks meet the rigorous standard for fame under the Lanham Act and are, therefore, and therefore have been initiated and maintained in bad faith because they attempt to extend its trademarks rights beyond their legitimate scope.

79. In at least one case, Select Comfort dropped its dilution claim with respect to Select Comfort® and Comfortaire® marks without argument in the late stages of the litigation.

80. Select Comfort has also brought objectively baseless claims against competitors for federal cyberpiracy, as well as state consumer protection claims purportedly on behalf of consumers.

81. In at least one case, Select Comfort dropped such claims well into the litigation without argument.

82. In at least one case against a competitor, Select Comfort claimed that it had trademark rights in the term "number bed" despite never seeking to register the term or using it alone in commerce.

83. These claims are objectively baseless and brought in bad faith with the specific intent of directly interfering with and disrupting competitors' business activities.

1 84. Select Comfort's litigation against a now-defunct competitor, The
2 Sleep Better Store, provides an example of Select Comfort's predatory litigation
3 tactics.

4 85. The Sleep Better Store was a competitor to Select Comfort in the
5 market for consumer adjustable firmness air beds. The Sleep Better Store operated a
6 website at sleepnumbercomparison.com and sleepbetterstore.com, through which it
7 sold adjustable firmness air beds and related products.

8 86. On March 10, 2011, Select Comfort filed a lawsuit against The Sleep
9 Better Store alleging ten causes of action, including federal claims for trademark
10 infringement, unfair competition, dilution, cyberpiracy, and false advertising; state-
11 law claims for false advertising, consumer fraud, deceptive and unlawful trade
12 practices; and a common law claim for unjust enrichment. The case was filed in the
13 District of Minnesota and was captioned *Select Comfort Corporation v. The Sleep*
14 *Better Store, LLC*, No. 11-cv-621 (JNE/JSM).

15 87. Among other things, Select Comfort claimed in its Complaint that its
16 trademark rights precluded The Sleep Better store from using the unprotected and
17 generic term "number bed" in its marketing.

18 88. Select Comfort has directed predatory litigation tactics against
19 plaintiffs similar to those it directed at The Sleep Better Store, illustrating how
20 Select Comfort's approach to litigation fits within its overall scheme to monopolize
21 the market for consumer adjustable firmness air beds.

22 89. On November 16, 2012, Select Comfort filed a federal lawsuit against
23 Dires and other defendants, in Minnesota district court, alleging among other things,
24 trademark infringement, dilution, and false advertising.

25 90. Among other things, Select Comfort falsely claimed again in that
26 litigation that it had trademark rights in the generic term "number bed." Select
27 Comfort also asserted, but after substantial litigation voluntarily dismissed a claim
28 for federal cyberpiracy and three claims under Minnesota's private attorney general



1 statute purportedly on behalf of consumers. Select Comfort also claimed trademark
2 infringement based on plaintiff's mere purchase of Select Comfort's trademarks for
3 keyword advertising, but abandoned this and other baseless claims in response to
4 plaintiff's motion for summary judgment.

5 91. On January 13, 2016, the district court granted summary judgment in
6 Dires' favor and against Select Comfort on its claim for "unjust enrichment."

7 92. These claims were, and are, objectively baseless and brought in bad
8 faith with the specific intent of directly interfering with and disrupting Dires'
9 business relationships. The lawsuit is a key component in Select Comfort's overall
10 exclusionary scheme to use a pattern of abusive litigation as a weapon to drive its
11 competitors and other participants out of the market and deter entry by others.

12 93. On October 16, 2015, almost three years after initiating its trademark
13 infringement action against plaintiffs, Select Comfort instituted legal proceedings in
14 the International Trade Commission ("ITC") against plaintiffs, based on alleged
15 infringement of two patents (described below) one of which was subject to
16 reexamination in 2012. Plaintiffs are currently defending against this action and
17 allege that Select Comfort's assertion that plaintiffs' adjustable firmness air beds
18 infringe upon these patents, and/or that these patents are valid and enforceable, are
19 objectively baseless claims asserted in bad faith with the specific intent to directly
20 interfere with plaintiffs' business relationships. Additionally, the infringement
21 positions taken by Select Comfort are objectively baseless as demonstrated by their
22 own supporting documentation to the ITC complaint.

23 94. The ITC action threatens to cause disruption in plaintiffs' import of
24 components necessary in the production of its adjustable firmness air beds, which
25 would result in substantial harm to plaintiffs' business and property, including
26 without limitation, interference with plaintiffs' contracts and prospective contractual
27 relationships with its suppliers and vendors.

28



1 95. In connection with these ITC proceedings, Select Comfort claimed that
 2 it could supply ANMI's customers in the hospital industry with adjustable firmness
 3 air beds if ANMI was unable to do so due to the stoppage in its supply chain. This
 4 material representation was false and objectively baseless because Select Comfort is
 5 not approved by the FDA to manufacture and sell adjustable firmness air beds to
 6 hospitals.

7 96. There are two patents asserted against the plaintiffs in the ITC
 8 investigation. The first patent, U.S. Patent No. 5,904,172 C1, (the "'172 Patent") is
 9 directed to a Valve Enclosure Assembly, with Messrs. Gifft and Mahoney listed as
 10 inventors. This patent was filed on July 28, 1997. In the examination of the '172
 11 Patent, Select Comfort disclosed U.S. Patent No. 5,509,154 to Shafer ("Shafer
 12 Parent Patent") as prior art, and reproduced Figure 10 of the Shafer Parent Patent as
 13 prior art. Before the issuance of the Shafer Parent Patent, Select Comfort filed a
 14 continuation-in-part patent application (adds new matter to the previous
 15 application), which resulted in U.S. Patent No. 5,652,484 ("Undisclosed Shafer
 16 Patent"), which was not disclosed in the prosecution of the '172 Patent. The
 17 inventors of the Undisclosed Shafer Patent, Messrs. Shafer and Duval, are
 18 completely different from the inventors of the '172 Patent, and the issue date of the
 19 Undisclosed Shafer Patent is July 29, 1997, one day after the filing date of the '172
 20 Patent asserted in the ITC Investigation.

21 97. The one day filing difference between the '172 Patent and the
 22 Undisclosed Schafer Patent was intentional. Patent applicants and their attorneys
 23 (here Select Comfort and the attorneys of Patterson & Keough, P.A. of Minneapolis,
 24 Minnesota: John F. Thuent, Kimberly K. Baxter,) know when their patents will
 25 issue, which is always on Tuesdays, and by filing the Application for the '172 Patent
 26 one day before the issuance of the Undisclosed Shafer Patent, Select Comfort and its
 27 attorneys kept the Undisclosed Shafer Patent from being prior art under 35 U.S.C.
 28 §§ 102(a) and 102(b), which in and of its self is not an indication of wrong doing.



1 However, because there are different inventors of the two patents, the Undisclosed
 2 Shafer Patent was prior art under 35 U.S.C. § 102(e). There was an exception at the
 3 time of filing the application for the '172 Patent for commonly owned patents,
 4 which would keep a commonly owned patent from being prior art to a subsequent
 5 commonly owned patent, but this exception did not apply to § 102(e).
 6 Consequently, the Undisclosed Shafer Patent was invalidating prior art to at least
 7 several claims of the '172 Patent under §§ 102(e) and 103 .

8 98. The Undisclosed Shafer Patent added new material to the Shafer Parent
 9 Patent. As shown in Figure 18b and discussed at Col. 10, lines 44-49, some of the
 10 new matter was a series of snap-fit portions, including “solenoid retaining resilient
 11 fingers 331 and snap fit portions 332 [sic].” These features were used to hold,
 12 guide, and stop the solenoids in place inside the housing. In the '172 Patent, as
 13 shown in Figure 4, described at Col. 5, lines 34-41, and claims 2 and 12 (asserted in
 14 the ITC investigation), it describes guides and stops for laterally positioning and
 15 limiting the travel of the solenoids, which is the exact same functional feature as the
 16 resilient fingers and snap fit portions of the Undisclosed Shafer Patent. Clearly the
 17 newly added material in the Undisclosed Shafer Patent was material to the '172
 18 Patent claims, and as explained further below, it would have precluded the patent
 19 Examiner from issuing claims 2 and 12 of the '172 Patent; thus, the Undisclosed
 20 Shafer Patent was material and should have been disclosed in the prosecution of the
 21 '172 Patent.

22 99. Mr. John F. Thuente of Patterson & Keough, P.A. of Minneapolis,
 23 Minnesota was the prosecuting patent attorney for the '172 Patent, and was involved
 24 with the prosecution of the Undisclosed Shafer Patent. The '172 Patent, the Shafer
 25 Parent Patent, and the Undisclosed Shafer Patent were all prosecuted by the
 26 Patterson & Keough, P.A. law firm.

27 100. Select Comfort and its attorneys were aware of the significance of the
 28 Undisclosed Shafer Patent to the '172 Patent as evidenced by the clearly intentional



1 behavior of shielding it from being prior art under certain subparts of 35 U.S.C. §
 2 102 by filing the '172 Patent the day before issuance of the Undisclosed Shafer
 3 Patent. It was well known at the time that the common ownership exception did not
 4 apply to prior art under 35 U.S.C. § 102(e), and thus, Select Comfort and its
 5 attorneys intentionally shielded it from the scrutiny of the Examiner under 35 U.S.C.
 6 § 102(a) and 102 (b), and then intentionally withheld it even though it clearly
 7 qualified as prior art under 35 U.S.C. § 102(e). Accordingly, applicant Select
 8 Comfort and its attorneys deliberately and intentionally defrauded the USPTO, and
 9 the '172 Patent is, therefore, unenforceable.

10 101. The egregiousness of their intentionally fraudulent behavior was
 11 exacerbated during the reexamination of the '172 Patent during which Select
 12 Comfort and its attorney (Adam P. Kiedrowski of Schwegman, Lundber &
 13 Woessner, P.A.) specifically cited to the guides and stops as a distinguishing feature
 14 over the prior art. (See '172 Patent File History, July 24, 2013 response, pages 20-
 15 24) At the time of this response, inventors Gifft and Mahoney where aware of the
 16 Undisclosed Shafer Patent. Clearly, the '172 Patent is unenforceable in its entirety
 17 and has been, and is being, used by Select Comfort competitive scheme to prosecute
 18 and maintain vexatious bad faith patent litigation against multiple parties, including
 19 The Sleep Better Store, Tempur-Sealy, and plaintiffs herein.

20 102. More subtly but equally telling is the selection of Figure 10 from the
 21 Shafer Parent Patent as representative prior art Figure 1 in the '172 Patent. Though
 22 the Shafer Parent Patent was disclosed in an Information Disclosure Statement
 23 submitted to the USPTO, using Figure 10 thereof as the representative figure is
 24 affirmatively misleading as to the scope and nature of the Shafer Parent Patent.
 25 Figure 10 illustrates the enclosed valves from their end view and does not show that
 26 the entirety of the valves are enclosed within the valve enclosure as clearly
 27 illustrated in Figures 17 and 18 of the Shafer Parent Patent. Thus, further
 28 demonstrating Select Comfort's and its attorney's bad faith in prosecuting the '172

1 Patent, they select a figure from the prior art Shafer Parent Patent having the least
 2 relevance to and most limited illustration of the significant features of the prior art
 3 as it applies to the '172 Patent and its claims. The selection of Figure 10 alone as
 4 prior art Figure 1 would perhaps not arise to a level illustrating intentional
 5 misconduct, but when combined with the clearly selective filing date of the '172
 6 Patent, the withholding of a clearly relevant and material prior art reference, and
 7 arguing the exact new features of the omitted prior art reference in reexamination, it
 8 fills in another step in a systematic and intentional plot of Select Comfort to defraud
 9 the USPTO and utilize the fraudulently obtained patent against competitors.
 10 Therefore, it is unreasonable to infer that this conduct constituted anything other
 11 than a lack of candor with deceptive intent, and the single most reasonable inference
 12 able to be drawn from these facts is a specific intent to deceive.

13 103. Still another step demonstrating the vexatious and baseless nature of
 14 Select Comfort's sham litigation tactics is illustrated by the expiration date of the
 15 '172 Patent, July 28, 2017. Select Comfort has sued plaintiffs in the ITC where the
 16 only remedy available is injunctive in nature; no damages may be awarded by the
 17 ITC. By the time any form of injunctive type relief is granted, likely early 2017,
 18 such an Order would only be effective for a period of months. Thus, Select Comfort
 19 is spending and forcing plaintiffs to potentially spend in excess of \$1 million on
 20 legal fees and costs defending a patent infringement action where the only result, if
 21 successful, can be an injunctive type Order having a few months of life. When
 22 litigation behavior defies common business sense and normal business incentives, it
 23 demonstrates the anticompetitive intent to bring baseless and vexatious litigation.

24 104. Further, the '172 Patent is now in its third suit, has been through an ex
 25 parte reexamination, a request for an inter partes review, and has been issued for
 26 about 17 years. Select Comfort has had more than enough opportunity to "discover"
 27 the failure to disclose a clearly relevant prior art reference under 35 U.S.C. § 102(e).
 28 Indeed the Undisclosed Shafer Patent is listed on patent rights notices in the same



1 list as the '172 Patent. Therefore, Select Comfort is knowingly initiating and
2 maintaining patent enforcement actions on the basis of a patent it knows to have
3 been procured by fraud and, thus, knows of its unenforceability.

4 105. The second patent asserted against plaintiffs in the ITC Investigation is
5 U.S. Patent No. 7,389,554 (the "'554 Patent"), which names as its sole inventor Mr.
6 Eric S. Rose and is directed to an Air Sleep System with Dual Elevating Air
7 Posturizing Sleep Surfaces. The Application for the '554 Patent was filed July 1,
8 2005 and is a continuation-in-part application of a now abandoned application
9 ("Shell Application") filed October 18, 2004, which was a continuation application
10 of issued U.S. Patent No. 6,804,848 (the "'848 Patent"). The abandoned Shell
11 Application was exactly that; it used claims nearly identical to the '848 Patent
12 claims, so that it was subject to a statutory type double patenting rejection under 35
13 U.S.C. § 101. The Shell Application was filed only to maintain a pending
14 application, so that the '554 Patent could claim priority back to the '848 Patent.
15 Generally, the new subject matter of the '554 Patent was a split top mattress having
16 separately elevatable head portions of the mattress with a joined foot section. The
17 two issued patents and the Shell Application were all prosecuted by the McNair Law
18 Firm PA of Greenville, South Carolina.

19 106. Select Comfort refers to the inventions of the '848 Patent and the '554
20 Patent as the "air at the top invention," and these Patents are owned by defendant
21 Select Comfort SC a subsidiary of Select Comfort and formally named Comfortaire.
22 In the early 1980's the term Comfortaire was a registered trademark, and in
23 obtaining the registration for Comfortaire, its then owner submitted a specimen of
24 use, which was an advertisement ("Undisclosed Advertisement") showing an air
25 based mattress, with only a thin layer between the air mattress and the top sleep
26 surface, and the air mattress was shown supported on a foundation of a box spring.
27 This Undisclosed Advertisement was submitted to the USPTO in 1982, and is thus,
28 prior art under 35 U.S.C. § 102(a). Mr. Cort Flint who was responsible for

1 prosecuting the patent applications was also responsible at pertinent times for the
2 maintenance and care of the Comfortaire trademark file and is aware of its contents.
3 Mr. David Karr of Comfortaire and now of Select Comfort SC was and is aware of
4 both the Comfortaire Trademark file and its contents and the '554 and '848 Patents
5 and their applications.

6 107. Because the Undisclosed Advertisement, which is an advertising flyer,
7 shows an upper air sleep surface supported by a foundation base box spring layer,
8 patent claims of the '554 and '848 Patents would not have issued if the Examiner
9 had been made aware of the public disclosure in the Undisclosed Advertisement and
10 the commercial activity that the Undisclosed Advertisement suggests took place.
11 Further, because of the overlapping knowledge of two individuals Messrs. Karr and
12 Flint, and the advertisement clearly demonstrates air at the top of an air mattress, it
13 is unreasonable to infer that this conduct constituted anything other than a lack of
14 candor with deceptive intent, and the single most reasonable inference able to be
15 drawn from these facts is a specific intent to deceive.

16 108. In 2001, a gentleman by the name of Dan Wall had a company named
17 Custom Comfort, and Mr. Wall conceived of a split top air chamber mattress ("the
18 Dan Wall Split Top"). That is a mattress having a joined foot section and a split
19 head section, so that the two sides of the head of the mattress could be separately
20 elevated; this mattress had side by side air chambers to form an upper air sleep
21 surface. The concept of the Dan Wall Split Top mattress was disclosed to the
22 inventor of the two patents, Mr. Eric S. Rose of Comfortaire at the time, and Mr.
23 Rose indicated to Mr. Wall that it couldn't be done; however, a third party
24 manufacturer of zipper mattress cases, Supreme Quilting a Canadian based
25 manufacturer indicated they could manufacture the split top mattress case. These
26 split top mattress referred to by Comfortaire as Dan Wall Split Tops were
27 manufactured and commercialized as early as 2002, and thus, the Dan Wall Split
28 Tops qualify as prior art to at least the '554 Patent under 35 U.S.C. § 102(a).



1 109. Because Mr. Wall had conceived of the Dan Wall Split Top mattress,
2 Mr. Wall and Comfortaire had an exclusivity understanding that Comfortaire would
3 at the least need to seek Mr. Wall's permission before selling the Dan Wall Split top
4 to other retailers.

5 110. The Dan Wall Split Tops, if they had been disclosed to the Examiner,
6 would have precluded the issuance of many claims of the '554 Patent. Because the
7 activities are clearly prior art and were known to Mr. Rose, and likely Mr. Karr, it is
8 unreasonable to infer that this conduct constituted anything other than a lack of
9 candor with deceptive intent, and the single most reasonable inference able to be
10 drawn from these facts is a specific intent to deceive the USPTO.

11 111. Additionally, at least some claims of the '554 Patent should properly
12 list Mr. Wall as the inventor, and indeed Mr. Wall should be the sole inventor of at
13 least some claims of the '554 Patent. However, to keep ownership of the technology
14 with Comfortaire and not with Mr. Wall's company Custom Comfort, Mr. Rose
15 took credit for the invention and defrauded the USPTO into issuing the '554 Patent
16 to Comfortaire. Thus, the '554 Patent is invalid under 35 U.S.C. §102(f), and at
17 least Mr. Rose, and likely Mr. Karr, know of its invalidity. Therefore, Select
18 Comfort is knowingly initiating and maintaining a patent enforcement action on the
19 basis of a patent it knows to have been procured by fraud for failure to disclose prior
20 art and for fraudulently asserting inventorship, and thus, Select Comfort knows of its
21 unenforceability. These facts demonstrate Select Comfort's anticompetitive intent
22 behind bringing baseless and vexatious litigation against plaintiffs and others in the
23 consumer air bed industry.

24 **H. Select Comfort's Vexatious Trademark Oppositions**

25 112. Select Comfort has also engaged in a strategy of attempting to prevent
26 any adjustable firmness air bed seller from registering any trademark containing the
27 generic word "number."
28



1 113. Select Comfort threatens competitors with litigation if they do not
2 withdraw trademark applications containing the word “number.”

3 114. On multiple occasions, the USPTO has concluded that proposed
4 trademarks of adjustable firmness air bed sellers containing the word “number” are
5 not likely to cause confusion with Select Comfort’s existing mark, “Sleep Number,”
6 and thus published the proposed marks for opposition.

7 115. Select Comfort opposes registration of all or substantially all adjustable
8 air bed sellers’ proposed trademarks containing the generic word “number” with the
9 intent of driving up the cost of competitors’ business, increasing barriers to entry to
10 the market, and preventing competitors from accurately describing or suggesting
11 their competitive products through their trademark.

12 116. On multiple occasions, competitors have given up their trademark
13 applications, settled privately with Select Comfort, or gone out of business
14 altogether.

15 117. Select Comfort also claims in cease-and-desist letters to competitors
16 using the generic word “number” in any fashion that it has successfully prevented
17 registration of or use of the word “number” by competitors.

18 118. In many cases, Select Comfort’s trademark oppositions are objectively
19 baseless and brought with the sole intent of blocking competitors’ entrance into the
20 market and/or harming competitors’ business by preventing any competitor from
21 describing or suggesting its product with the generic word “number,” which
22 identifies the key characteristic of an adjustable firmness air bed.

23 119. Select Comfort’s pattern of trademark oppositions are part of its overall
24 anticompetitive scheme to monopolize the market in violation of antitrust laws and
25 are part of its pattern of repetitive claims designed to abuse the administrative
26 process and injure competition and competitors, which also causes harm to
27 consumers.

28

I. Select Comfort's Unlawful Acquisition of Its Competitor Comfortaire

120. On March 10, 2011, Select Comfort filed a lawsuit against Comfortaire, alleging nine causes of action, including federal claims for trademark infringement, unfair competition, dilution, and false advertising; state-law claims for false advertising, consumer fraud, deceptive and unlawful trade practices; and a common-law claim for unjust enrichment.

121. Among other things, Select Comfort alleged that Comfortaire's mere purchase of keyword advertising constituted trademark infringement and claimed that its trademarks "Sleep Number" and "Select Comfort" satisfied the Lanham Act's rigorous test for fame. These claims were false and objectively baseless.

122. Select Comfort also claimed that assertions Comfortaire made in its marketing materials were false and deceptive, including that the products are "Made in the USA" and other claims that Select Comfort also makes in its own marketing materials. Because Select Comfort engages in the same marketing practices, such claims are baseless and brought with the intent to directly interfere with and disrupt competitors' business. This settlement was also anticompetitive.

123. Select Comfort and Comfortaire settled the lawsuit, on information and belief, those terms required Comfortaire refrain from using the generic term "number bed" in its advertising, from claiming its beds were "Made in the USA," and contained other provisions restricting Comfortaire from lawfully competing with Select Comfort.

124. As a result of the restrictions imposed by the settlement with Select Comfort, Comfortaire's sales were significantly reduced and the value of its business was diminished.

125. Select Comfort (the largest manufacturer and supplier of adjustable air beds) acquired Comfortaire (the second largest), for \$15.5 million on January 17, 2013, shortly following the settlement of the lawsuit.



1 126. Select Comfort's President and Chief Executive Officer, Shelly Ibach,
2 said in a press statement shortly after the settlement and acquisition:

3 ... We also are pleased that the second largest adjustable
4 airbed company – with its experienced team and shared
5 commitment to quality, innovation and individualization –
6 is now part of Select Comfort.

7 127. On January 24, 2013, in a Business Wire, Select Comfort also stated:

8 Select Comfort also announced the purchase of the
9 business and assets of Comfortaire Corporation and an
10 additional strategic investment to support innovation and
11 further strengthen the company's competitive advantages.

12 128. From the date it settled its claims against Comfortaire until the end of
13 its fiscal year 2014, Select Comfort operated Comfortaire through an independent
14 subsidiary, and has not consolidated manufacturing operations after the acquisition.

15 129. Select Comfort has used its control over Comfortaire to restrict
16 production output in the consumer adjustable air bed market and reduce consumer
17 choice.

18 130. Select Comfort's acquisition of Comfortaire was not submitted to the
19 Federal Trade Commission for pre-merger review under regulations promulgated
20 under the Hart-Scott-Rodino Act because the acquisition price was below the
21 federal-merger-disclosure threshold.

22 131. As Select Comfort acknowledged in its January 2013 press release,
23 Comfortaire was the second largest adjustable firmness air bed company at the time
24 it purchased Comfortaire in January 2013, and Select Comfort was, and remains, the
25 largest competitor in that market. The market is highly concentrated.

26 132. Select Comfort's post-acquisition market share is in excess of 90% in a
27 highly concentrated market leaving only approximately 10% or less of the market to
28 be contested by its rivals, including plaintiffs. Select Comfort's acquisition of
Comfortaire had the effect of substantially lessening competition in the consumer
adjustable air bed market and tending to allow Select Comfort to maintain and

1 extend its monopoly power to the detriment of its smaller rivals and consumers and
2 also violates Section 7 of the Clayton Act (15 U.S.C. § 18).

3 133. The previous competition between Select Comfort and Comfortaire
4 limited the ability of each company to raise prices for consumer adjustable air beds.
5 This previous head-to-head competition also forced each company to offer better
6 products and service to consumers. The acquisition has now completely dissipated
7 and eliminated the competitive restraints each firm imposed on the other.

8 134. Since the acquisition, no new significant competitors have successfully
9 entered or penetrated the relevant market and such entry is unlikely in the
10 foreseeable future.

11 135. District courts are empowered with large discretion to create equitable
12 remedies effective to redress antitrust violations and to restore competition in a
13 relevant market. Divestiture is a common form of relief from unlawful
14 acquisitions/mergers. An antitrust violator may be required to do more than return
15 the market to the status quo ante. A district court may not only order divestiture but
16 may also order relief designed to give the divested entity an opportunity to re-
17 establish its competitive position in the market.

18 136. Plaintiffs seek an Order requiring that Select Comfort's acquisition of
19 Comfortaire be unwound. The requested divestiture will be of Comfortaire's assets,
20 technology, and/or intellectual property and/or for an Order directing the creation or
21 reconstitution of an unaffiliated competitive entity in the adjustable air bed market
22 to restore or equalize competition.

23 **J. Select Comfort Has Leveraged an Exclusive Supply Contract to**
24 **Foreclose Competition**

25 137. At the core of an adjustable firmness air bed is an air chamber, the most
26 durable and high quality being made from vulcanized rubber. Vulcanized rubber is
27 not manufactured in the United States because of the United States' strict pollution
28 control regulations. All, or substantially all, vulcanized rubber used in the



1 construction of air chambers for adjustable firmness air beds is manufactured in
2 China or the Czech Republic.

3 138. Access to high quality air chambers constructed from vulcanized rubber
4 is essential to producing adjustable firmness air beds at an economical price.

5 139. There are significant and high barriers to the relevant market entry that
6 prevent other manufacturers from meaningfully entering or expanding in the
7 relevant market, including reasonable and competitive access to the materials and
8 components necessary to manufacture quality adjustable firmness air beds.

9 140. In February 2013, Craig Miller, Jr. learned that his preferred supplier of
10 vulcanized rubber air chambers, East Rock, Ltd., located in Beijing, China, had
11 signed an exclusive supply agreement with Select Comfort and could no longer
12 supply plaintiffs with air chambers constructed of vulcanized rubber to produce their
13 products.

14 141. Select Comfort used its market power to coerce East Rock, Ltd. into
15 agreeing to an exclusive supply arrangement.

16 142. Select Comfort's exclusive supply agreement with East Rock, Ltd. is an
17 improper and exclusionary means of maintaining Select Comfort's monopoly in the
18 adjustable firmness air bed market. East Rock has advised plaintiffs that it cannot
19 do business with them by reason of its exclusive supply contract with Select
20 Comfort.

21 143. Select Comfort's anticompetitive and exclusionary conduct described
22 herein is not motivated or driven by technological or efficiency interests and has no
23 valid or legitimate business justification. Rather, its purpose and effect is to ensure
24 that plaintiffs and other competitive rivals in the relevant market cannot successfully
25 invade or erode Select Comfort's dominant and entrenched market position.

26 144. Select Comfort's exclusive supply requirement for East Rock, Ltd. has
27 harmed plaintiffs in their business and property by foreclosing plaintiffs' access to a
28

1 high quality producer of vulcanized rubber air chambers and increasing plaintiffs'
2 supply costs.

3 145. Select Comfort's exclusionary supply agreement, arrangement, or
4 contract have caused antitrust injury to plaintiffs, the industry, and to consumers.
5 Conduct that restricts consumer choice and/or makes the market unresponsive to
6 consumer preference harms consumers and results in antitrust injury. When an
7 agreement detrimentally changes the market makeup and limits consumers' choice
8 to one source of output, this causes cognizable antitrust injury of preventing its
9 victims from making free and unhindered choices between market alternatives.

10 VI.

11 CLAIMS FOR RELIEF

12 FIRST CLAIM FOR RELIEF

13 (Actual Monopolization in Violation of Section 2 14 of the Sherman Act (15 U.S.C. § 2))

15 146. Plaintiffs hereby allege and incorporate by reference each allegation set
16 forth in Paragraphs 1 through 145 of this Complaint, as if set forth in full herein.

17 147. The antitrust laws are concerned with protecting the economic freedom
18 of participants in the relevant market. The aims and objectives of the antitrust laws
19 are aimed at encouraging innovation, industry, and competition. The central
20 purpose of the antitrust laws is to preserve competition and it is that interaction of
21 competitive forces that benefits consumers.

22 148. Section 2 of the Sherman Act (15 U.S.C. §2) prohibits, *inter alia*, the
23 willful monopolization of any part of the trade or commerce among the States.

RELEVANT MARKET

149. The relevant market (or submarket³) for antitrust purposes in this case is no broader than consumer adjustable firmness air mattress bed systems. The relevant geographic market for antitrust purposes is the United States.

150. The definition of a relevant market is a fact-intensive inquiry for the jury.⁴

MONOPOLY POWER

151. Throughout the relevant time period, Select Comfort possessed monopoly power in the market for adjustable firmness air mattress beds in the United States as evidenced by its ability to control prices and/or exclude competition.⁵

152. Select Comfort is an entrenched player in the consumer adjustable firmness air bed market in the United States, possessing a market share greater than 90%.

153. Monopoly power determination is a fact-intensive issue reserved for the fact-finder.⁶

BARRIERS TO MARKET ENTRY AND EXPANSION

154. There are significant and high barriers to market entry and expansion that prevent other consumer adjustable air mattress bed manufacturers from rapidly

³ See *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1983) (The boundaries or parameters of “a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.”). See also *ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495, 507 (9th Cir. 2009).

⁴ See *Newcal Industries, Inc. v. IKON Office Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008).

⁵ See *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1475 (9th Cir. 1997).

⁶ See *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1437-38 (9th Cir. 1995).

1 and meaningfully entering and/or expanding in this relevant market, which include,
2 but are not limited to, the following:

3 (a) Select Comfort's dominant market position as a monopolist of
4 adjustable air bed products with a history of engaging in exclusionary and
5 anticompetitive conduct to eliminate competition;

6 (b) purported trademarks and other intellectual property rights
7 relating to adjustable firmness air bed products;

8 (c) substantial up-front capital investment required to penetrate and
9 enter the relevant market;

10 (d) significant lead time to design adjustable air bed products and
11 develop a reputation such that the products can be successfully marketed and sold to
12 buyers;

13 (e) access to advertising channels; and

14 (f) requirement of access to a nationwide sales and distribution
15 network.

16 **SELECT COMFORT'S PREDATORY AND EXCLUSIONARY CONDUCT**

17 155. Select Comfort has willfully acquired and/or maintained its monopoly
18 power in the market for consumer adjustable firmness air mattress beds by engaging
19 in an overall scheme, illustrated by the actions alleged herein, to force competitors
20 from the market and to raise barriers to market entry. Select Comfort has acted with
21 an intent to illegally acquire and/or maintain its monopoly, and its anticompetitive
22 conduct has enabled it to do so, in violation of Section 2 of the Sherman Act.

23 156. Conduct is anticompetitive when it improperly excludes or handicaps
24 competitors in order to gain or maintain a monopoly. Anticompetitive or
25 exclusionary practices are acts designed to deter potential rivals from entering the
26 market, intervening or preventing access to customers, or preventing existing rivals
27 from increasing their output. Anticompetitive acts are not fair competition on the
28 merits of price, quality or other factors, but instead acts that have the effect of



1 preventing or excluding competition or frustrating the efforts of other companies to
2 compete for customers within the relevant market. Conduct by a monopolist that
3 constitutes a deliberate effort to discourage and thwart customers from doing
4 business with its rivals is anticompetitive.

5 157. Any and all of Select Comfort's exclusionary acts to monopolize the
6 market for adjustable firmness air beds that may have been litigation-related or
7 reasonably attendant upon effective litigation were either comprised of falsehoods or
8 stemmed from objectively baseless claims and were motivated not to obtain judicial
9 relief but rather to injure competitors and, as such, consisted of sham petitioning and
10 are not immune from antitrust liability.

11 158. While the patent system serves to encourage innovation, the patent
12 system is subject to misuse. Meanwhile, the antitrust laws serve to foster
13 competition. Consequently, the statutory rights afforded by patent or trademark law
14 do not support the impermissible broadening of the physical or temporal scope
15 beyond that explicitly articulated in the claims, nor do intellectual property laws
16 confer upon the patent/trademark owner immunity or a privilege to violate antitrust
17 laws.

18 159. Select Comfort's monopoly position in the relevant market has been
19 acquired and maintained through clearly intentional exclusionary conduct and
20 trademark and patent misuse, as opposed to business acumen, historic accident, or
21 by virtue of offering a superior product or service, greater efficiency, or lower
22 prices.

23 160. A purported trademark holder violates the antitrust laws by bringing or
24 maintaining an objectively baseless lawsuit or administrative proceedings to enforce
25 trademark rights with knowledge that such rights do not exist or that the purported
26 rights do not extend beyond the scope of the trademark, such that the litigation is
27
28

1 conducted solely, or at least primarily, to suppress competition.⁷ Select Comfort
2 initiated, prosecuted and maintained objectively baseless trademark infringement
3 and related claims in bad faith against plaintiffs.

4 161. Select Comfort's sham litigation against plaintiffs, was initiated and
5 maintained with the intent to deter other would-be market entrants and to force
6 plaintiffs out of the relevant market. Select Comfort's litigation was undertaken
7 solely to interfere with free and open competition and without a reasonable or
8 legitimate expectation that such litigation efforts would in fact induce or result in
9 proper lawful relief from a legal tribunal. Select Comfort's litigation against
10 plaintiffs was objectively baseless because CAC could not realistically or reasonably
11 expect to ultimately succeed on all of its claims on the merits. Select Comfort also
12 specifically intended through its sham litigation to directly interfere with plaintiffs'
13 business relationship, and did so, interfere with plaintiffs' customers and
14 distributors.

15 162. Select Comfort's litigation was initiated and pursued with the intent to
16 monopolize the relevant market without regard for its smaller rival or the degree,
17 nature, or amount of the alleged infringement.

18 163. A single sham lawsuit can violate the antitrust laws.⁸ The question of
19 whether a legal proceeding is a sham is a question of fact for the jury.⁹ A
20 reasonable finder of fact could conclude that Select Comfort is not entitled to
21 antitrust immunity for its conduct.

22 164. Select Comfort's pattern or series of lawsuits and administrative
23 proceedings initiated and maintained against plaintiffs, their customers, distributors,

24 _____
25 ⁷ See *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986 (9th Cir. 1979).

26 ⁸ See *Rickards v. Canine Eye Registration*, 783 F.2d 1329, 1334 (9th Cir. 1986);
Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240,
1257 (9th Cir. 1982).

27 ⁹ See *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d
28 1240, 1253 (9th Cir. 1982).

1 and/or competitors also cannot be afforded immunity from the antitrust laws. These
2 lawsuits and proceedings were primarily brought with the intent and purpose of
3 squeezing out plaintiffs' customers and outlets for sales and to drive the remaining
4 competitors from the relevant market.

5 165. It is well-recognized that the filing of a series of lawsuits and other
6 legal proceedings without regard to the merits or outcome has far more serious
7 implications than filing a single action, and can serve a very effective restraint of
8 trade.¹⁰ Such litigation is invariably costly, distracting, time-consuming, and can
9 inflict a crushing burden on smaller rivals and customers in the market. The
10 antitrust laws protect competitors from monopolists who initiate legal proceedings
11 without regard to the merits and for the purpose of injuring a market rival.¹¹

12 166. There is no legitimate business justification for Select Comfort's
13 conduct, and any purported legitimate business justifications are merely pretextual.
14 Select Comfort's acquisition or maintenance of its power is not the result of superior
15 product, business acumen, or historic accident.

16 167. Select Comfort's conduct has facilitated its monopolization and caused
17 injury to the relevant market.

18 **PLAINTIFFS' ANTITRUST STANDING**

19 168. Plaintiffs have the requisite standing under Section 4 of the Clayton Act
20 to assert antitrust claims against Select Comfort and to seek injunctive relief and
21 damages because they are participants and competitors in the relevant market and
22 have suffered injury as a direct result of Select Comfort's anticompetitive actions.¹²
23

24 _____
25 ¹⁰ See *USS-POSCO Industries v. Contra Costa County Bldg. & Construction Trades*
Council AFL-CIO, 31 F.3d 800, 811 (9th Cir. 1994).

26 ¹¹ See *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056, 1060 (9th Cir. 1998);
Freeman v. Lasky, Haas & Cohler, 410 F.3d 1180, 1184 (9th Cir. 2005).

27 ¹² See *American Ad Management, Inc. v. General Telephone Co. of California*, 190
28 F.3d 1051, 1057 (9th Cir. 1999).

ANTITRUST INJURY

169. Select Comfort's past and present attempts to extend its purported trademark and other rights beyond their legitimate scope has resulted in other producers of adjustable firmness air beds being unable to describe, suggest or advertise their products using generic terms, such as "number bed," "number," or "sleep." This has caused restriction of consumer choice because consumers cannot readily locate competitive alternatives through online channels. Some have been forced out of existence and/or having their market share greatly reduced. Consumers in this market have had fewer alternative sources for adjustable firmness air beds, have paid supracompetitive prices to Select Comfort for adjustable firmness air beds.

170. Select Comfort's various anticompetitive and exclusionary acts have produced antitrust injury, and unless enjoined by this Court, will continue to produce at least the following anticompetitive, exclusionary and injurious effects upon competition in interstate commerce:

(a) competition in the design, development, distribution, and sale of consumer adjustable firmness air mattress bed products has been substantially and unreasonably restricted, lessened, foreclosed, and eliminated;

(b) barriers to entry into the relevant market have been raised;

(c) consumer choice has been, and will continue to be, significantly limited and constrained as to selection, price and quality of adjustable firmness air bed products;

(d) consumer access to plaintiffs' competitive adjustable firmness air bed products will be artificially restricted and reduced, and plaintiffs' products will continue to be excluded from the market;

(e) the market for development, distribution, and sale of adjustable firmness air bed products will continue to be artificially restrained or monopolized; and

(f) Select Comfort will continue to charge supracompetitive prices for these products to the detriment of consumers.

171. The attorneys' fees/costs incurred by plaintiffs in defending against Select Comfort's pattern of sham legal proceeding constitutes antitrust injury and forms the basis of a portion of its damages recoverable under Section 4 of the Clayton Act.¹³

172. Antitrust injury is a fact question for the jury.¹⁴

DAMAGES

173. As a direct and proximate result of Select Comfort's violations of the Sherman Act, plaintiffs have been substantially injured in their business and property. Among other things, plaintiffs have faced higher barriers to entry and increased business costs directly and proximately resulting from Select Comfort's actions, including without limitation higher product costs due to the exclusive agreements Select Comfort has reached with key suppliers, such as vulcanized rubber air chambers; higher advertising costs because of Select Comfort's predatory trademark enforcement; potentially having product seized by customs in response to a sham petitioning to the International Trade Commission; loss of sales and profits; impaired ability to attract investment or investors; impaired ability for growth; loss of market share growth; reduction in the value of their business; cost of diverted executive time; and loss of business reputation. Plaintiffs have also incurred significant attorneys' fees and litigation costs defending against Select Comfort's predatory litigation and other sham petitioning. Plaintiffs estimate that their actual damages, before mandatory trebling, exceed \$8 million.

¹³ See *Rickards v. Canine Eye Registration Foundation*, 783 F.2d 1329, 1334-35 (9th Cir. 1986).

¹⁴ See *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1295-96 (9th Cir. 1984).

SECOND CLAIM FOR RELIEF

**(Attempted Monopolization in Violation of Section 2
of the Sherman Act (15 U.S.C. § 2))**

174. Plaintiffs hereby allege and incorporate by reference each allegation set forth in Paragraphs 1 through 173 of this Complaint, as if set forth in full herein.

175. Section 2 of the Sherman Act (15 U.S.C. § 2) prohibits, *inter alia*, attempts to monopolize any part of the trade or commerce among the States.

RELEVANT MARKET

176. The relevant product market (or submarket) for antitrust purposes in this case is defined as consumer adjustable firmness air mattress bed system products. There are no reasonable substitutes for adjustable firmness air beds and consumers do not consider these distinctive beds to be reasonably interchangeable with other types of mattresses. The cross-elasticity of demand between adjustable firmness air beds and other types of mattresses is extremely low. The relevant geographic market for antitrust purposes is the United States.

MONOPOLY POWER

177. Select Comfort is an entrenched player in the consumer adjustable firmness air bed market in the United States, possessing a market share greater than 90%. Select Comfort has the power to control prices and/or exclude competition in the relevant market.

BARRIERS TO MARKET ENTRY AND EXPANSION

178. As described in Paragraph 154, significant and high barriers to market entry and expansion exist that preclude or discourage new manufacturers from entering the relevant market. Significant barriers to expansion also exist, which is evidenced by the fact that only a small number of competitors have managed to marginally penetrate this market, many have exited the market, and none have managed to capture more than a nominal market share.

SELECT COMFORT'S PREDATORY AND EXCLUSIONARY CONDUCT

179. Select Comfort's conduct and practices are anticompetitive and exclusionary. Select Comfort's overall unlawful scheme is described in Paragraphs 39-145 above.

180. Select Comfort's anticompetitive acts affect a substantial amount of interstate commerce in the relevant market and constitute attempted monopolization in violation of Section 2 of the Sherman Act. Select Comfort's conduct is not motivated by technological or efficiency concerns and has no valid or legitimate business justification, and any purported business justifications are merely pretextual. Instead, its purpose and effect is to preserve and promote its monopoly position and market stranglehold, to the detriment of consumer welfare, plaintiffs, and to Select Comfort's other competitive rivals in the relevant market.

SPECIFIC INTENT TO MONOPOLIZE

181. Select Comfort has undertaken its clearly anticompetitive and exclusionary conduct with the purpose of monopolizing, and with the deliberate and specific intent to monopolize the market for consumer adjustable air mattress bed products in the United States. Select Comfort specifically intends to eliminate, destroy or foreclose meaningful competition in the relevant market through the tactics described above. Select Comfort's conduct discourages and/or precludes buyers/distributors of adjustable air bed products from dealing with or buying from competing manufacturers, such as plaintiffs. Select Comfort's scheme is designed to exclude and thwart competition while allowing it to charge supracompetitive prices for its adjustable air bed products.

DANGEROUS PROBABILITY OF SUCCESSFUL MONOPOLIZATION

182. Absent action by this Court to enjoin and preclude Select Comfort from continuing its anticompetitive and exclusionary conduct, there is a dangerous probability that Select Comfort will succeed in obtaining a monopoly in the relevant

1 market for adjustable air bed products (or continue to monopolize), including the
2 power to set prices, reduce output, or exclude competition in the market.

3 **PLAINTIFFS' ANTITRUST STANDING**

4 183. Plaintiffs have the requisite standing under Section 4 of the Clayton Act
5 to assert antitrust claims against Select Comfort because they are participants and
6 competitors in the relevant market and have suffered injury as a direct result of
7 Select Comfort's anticompetitive actions.

8 **ANTITRUST INJURY**

9 184. As described in Paragraphs 169-172 above, Select Comfort's conduct
10 has produced antitrust injury, and unless enjoined by this Court, will continue to
11 produce anticompetitive, exclusionary, and injurious effects upon competition in
12 interstate commerce. Select Comfort's exclusionary conduct has caused antitrust
13 injury to plaintiffs, the industry, and consumers.

14 185. Select Comfort's anticompetitive and exclusionary acts have caused
15 substantial economic injury to plaintiffs and have also injured competition in the
16 relevant market by, *inter alia*, foreclosing, lessening, and eliminating competition
17 and depriving buyers/distributors from securing lower-cost or higher quality
18 alternatives for adjustable air bed products.

19 **DAMAGES**

20 186. As a direct and proximate result of Select Comfort's violations of the
21 Sherman Act, plaintiffs have been substantially injured in their business and
22 property. Among other things, plaintiffs have faced higher barriers to entry and
23 increased business costs directly and proximately resulting from Select Comfort's
24 actions, including without limitation higher product costs due to the exclusive
25 agreements Select Comfort has reached with key suppliers, such as vulcanized
26 rubber air chambers; higher advertising costs because of Select Comfort's predatory
27 trademark enforcement; potentially having product seized by customs in response to
28 a sham petitioning to the International Trade Commission; loss of sales and profits;

1 impaired ability to attract investment or investors; impaired ability for growth; loss
 2 of market share growth; reduction in the value of their business; cost of diverted
 3 executive time; and loss of business reputation. Plaintiffs have also incurred
 4 significant attorneys' fees and litigation costs defending against Select Comfort's
 5 predatory litigation and other sham petitioning. Plaintiffs estimate that their actual
 6 damages, before mandatory trebling, exceed \$8 million.

7 **PRAYER FOR RELIEF**

8 WHEREFORE, plaintiffs pray for judgment in their favor and against Select
 9 Comfort as follows:

10 1. That the conduct alleged in the First Claim for Relief herein be
 11 adjudged to be unlawful monopolization in violation of Section 2 of the Sherman
 12 Act (15 U.S.C. § 2);

13 2. That the conduct alleged in the Second Claim for Relief herein be
 14 adjudged to be an unlawful attempt to monopolize in violation of Section 2 of the
 15 Sherman Act (15 U.S.C. § 2);

16 3. That, pursuant to Section 4 of the Clayton Act (15 U.S.C. § 15),
 17 plaintiff recover treble the amount of its actual damages sustained by reason of those
 18 federal antitrust violations;

19 4. That, pursuant to Section 16 of the Clayton Act (15 U.S.C. § 26), the
 20 anticompetitive, predatory and/or exclusionary conduct of defendant Select Comfort
 21 be permanently enjoined, including divestiture of Comfortaire; and

22 5. For such other and further relief as the Court deems just and proper.
 23
 24
 25
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 27
 28

1 Dated: March 30, 2016

BLECHER COLLINS & PEPPERMAN, P.C.
MAXWELL M. BLECHER
DONALD R. PEPPERMAN

5 By: /s/ Maxwell M. Blecher
6 Maxwell M. Blecher
7 Attorneys for Plaintiffs

8 81304.11



DEMAND FOR JURY TRIAL

Plaintiffs hereby demand trial by jury pursuant to Rule 38(b) of the Federal Rules of Civil Procedure and Local Rule 38-1.

Dated: March 30, 2016

BLECHER COLLINS & PEPPERMAN, P.C.
MAXWELL M. BLECHER
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