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1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MINNESOTA

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4 Select Comfort Corporation and) File No. 12-CV-2899
4 Select Comfort SC Corporation,) (DWF/SER)
5)
5 Plaintiffs/Counter-Defendants,)
6 vs.) St. Paul, Minnesota
6) September 29, 2017
7 John Baxter; Dires, LLC d/b/a) 9:00 a.m.
7 Personal Touch Beds and Personal)
8 Comfort Beds; Digi Craft Agency,)
8 LLC; Direct Commerce, LLC d/b/a)
9 Personal Touch Beds; Scott)
9 Stenzel; and Craig Miller,)
10)
10 Defendants/Counter-Claimants.)
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14 BEFORE THE HONORABLE DONOVAN W. FRANK and a Jury
15 UNITED STATES DISTRICT COURT JUDGE

16 (TRIAL - VOLUME VI)

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24 Proceedings recorded by mechanical stenography;
25 transcript produced by computer.

1200

1 PROCEEDINGS
2 IN OPEN COURT

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4 THE CLERK: All rise. The United States District
5 Court for the District of Minnesota is now in session. The
6 Honorable Donovan Frank presiding.

7 THE COURT: You may all be seated. Thank you.
8 Mr. Karr, if you want to re-take the stand. And I
9 won't re-administer the oath. You remain under oath since
10 yesterday.

11 THE WITNESS: Understood.

12 THE COURT: All right. As soon as he's ready you
13 may inquire, counsel.

14 MR. MADEL: Thank you, Your Honor. And good
15 morning. Good morning, ladies and gentlemen of the jury.

16 CROSS-EXAMINATION
17 BY MR. MADEL: (continued)

18 Q. Good morning, Mr. Karr. When we left off yesterday we
19 were talking about the Select Comfort versus Comfortaire
20 lawsuit, right?
21 A. Yes.
22 Q. And that was filed in March of 2011?
23 A. That's correct.
24 Q. And I think the last question I just asked you was that
25 they made trademark infringement allegations against

1199

1 APPEARANCES

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1 Comfortaire in that lawsuit and you denied them -- I mean
2 your company denied them, right?
3 A. At the time of our response.
4 Q. Yes. And they also made federal dilution of trademark
5 allegations against you, right?
6 A. Yes.
7 Q. And you denied those?
8 A. At the time of the response, yes.
9 Q. And they made false advertising allegations against you,
10 right?
11 A. Yes.
12 Q. And those were denied?
13 A. At the time of the response, yes.
14 Q. Select Comfort made deceptive trade practices claims
15 against Comfortaire, right?
16 A. Yes.
17 Q. Those were denied?
18 A. At the time, yes, at the time of the filing.
19 Q. They made unlawful trade practices claims against
20 Comfortaire, right?
21 A. Yes.
22 Q. Those were denied?
23 A. Yes.
24 Q. And they made federal unfair competition claims against

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1 **REDIRECT EXAMINATION**

2 BY MR. DENNIS HANSEN:

3 **Q.** Good morning again, Mr. Karr.

4 **A.** Good morning.

5 **Q.** I'm going to have Dorian call up on the screen

6 Defendants' Exhibit 199. Do you have it there with you?

7 **A.** I believe I do.

8 **Q.** This is an e-mail between you and Jimmy Orders on

9 December 4, 2012?

10 **A.** Yes.

11 **Q.** What did you take Mr. Orders to mean when he said,

12 "Maybe we need to go ahead and sue John"?

13 **A.** Well, you have to remember that John had what we

14 believed breached an agreement. He had actually started up

15 another website company while he was employed by Park Place

16 and that was what Jimmy was talking about at this point.

17 **Q.** And if we go to Plaintiffs' 620, what did -- I'll let

18 you get there.

19 **A.** Thank you.

20 **Q.** What did Mr. Baxter say to you, how did he respond when

21 you challenged him for being involved in Personal Touch?

22 **A.** He denied it.

23 **Q.** You were asked about an advertisement from 2009 in the

24 Lincoln Star Journal.

25 **A.** Yes.

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1 **Q.** Who controls and runs the advertising by third-party

2 retailers?

3 **A.** The third-party retailer.

4 **Q.** You were asked about the timing of Comfortaire's lawsuit

5 against the defendants. When did you first see the

6 Comfortaire bed on sale on an advertisement that the

7 defendants run?

8 **A.** To the best of my recollection, it was in the fall of

9 2013.

10 **Q.** And was that before or after the acquisition by Select

11 Comfort?

12 **A.** That was after the acquisition.

13 **Q.** If we go to Defense 198, which you were asked about, you

14 see you say, "This gives us exclusive use of SCSS trademarks

15 for now." Do you see that?

16 **A.** I do.

17 **Q.** What did you mean when you said that?

18 **A.** Well, we had a settlement agreement whereby Select

19 Comfort had allowed us to use "compare to Select Comfort"

20 and "compare to Sleep Number" in our Google ads and that's

21 what I was referring to there, that we had exclusive use to

22 that.

23 **Q.** And was there any secret deal with Select Comfort?

24 **A.** No.

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1 settlement agreement, which is Disclaimer on Comparative

2 Advertising.

3 **A.** Correct.

4 **Q.** At the time that you were required to use this

5 disclaimer, were you still running the advertisements that

6 Mr. Baxter had described as misleading and deceptive?

7 **A.** We were not.

8 **Q.** No further questions, Mr. Karr. Thank you.

9 MR. MADEL: Nothing, Your Honor.

10 THE COURT: You may step down, sir.

11 THE WITNESS: Thank you, sir.

12 THE COURT: You may call your next witness.

13 MS. MERRICK: Your Honor, in the meantime may I

14 approach to get the exhibits off there?

15 THE COURT: I was just going to suggest that, yes.

16 I didn't think the witness, whoever it is, will...

17 MR. DENNIS HANSEN: Your Honor, the plaintiffs

18 call Craig Miller.

19 THE COURT: Mr. Miller, if you want to step

20 forward, sir. Before you step up, if you would please raise

21 your right hand.

22 (Witness sworn)

23 THE COURT: And there are a couple steps up there.

24 And then as you may have heard me say to a couple of the

25 other -- or really every witness, you can move the chair

1285

1 where it's comfortable for you and then the microphone base

2 moves as well, but you have to stay and speak fairly close

3 into the mike.

4 If you would please state your full name and spell

5 your last name.

6 THE WITNESS: Craig Salvatore Miller, Jr.

7 M-i-l-l-e-r.

8 THE COURT: You may inquire, Counsel.

9 **(Craig Miller, Jr.)**

10 **CROSS EXAMINATION**

11 BY MR. DENNIS HANSEN:

12 **Q.** Good morning, Mr. Miller.

13 **A.** Good morning.

14 **Q.** We've obviously met before, correct?

15 **A.** Correct.

16 **Q.** You are the head of Dires, correct?

17 **A.** Correct.

18 **Q.** Dires sells Personal Comfort beds to consumers?

19 **A.** Yes.

20 **Q.** And by head of Dires, you're the principal manager,

21 correct?

22 **A.** Yes.

23 **Q.** And everybody reports up to you within Dires?

24 **A.** Yes.

1286

1 to enter into contracts with third parties, correct?

2 A. Correct.

3 Q. And you have the power to veto decisions made by

4 Mr. Baxter and Mr. Stenzel?

5 A. That's correct.

6 Q. And for all intents and purposes the buck stops with you

7 at Dires, right?

8 A. Yes.

9 Q. Let's first talk about the phrase "number bed." The

10 medical beds sold by American National adjust with a numeric

11 setting, correct?

12 A. Some do with numeric settings. Some without numeric

13 settings.

14 Q. And the ones that do adjust with numeric settings aren't

15 called number beds?

16 A. That's correct.

17 Q. Do the medical beds have medical-grade foam?

18 A. Well, they have -- when you say, "medical-grade foam,"

19 if it's foam used in a medical bed, is that a medical-grade

20 foam or are you talking about foam that would go into a

21 wound bed or something of that nature?

22 Q. I'm just asking your understanding.

23 A. Ask the question again.

24 Q. Do the medical beds have medical-grade foam?

25 A. I suppose we call it medical-grade foam because of the

1287

1 standard of the foam that we use, I suppose.

2 Q. Generally in internal communications between American

3 National and Sizewise, the consumer beds that American

4 National sells are not referred to as number beds?

5 A. That's correct.

6 Q. In 2006 American National was not marketing its consumer

7 air beds as number beds, right?

8 A. Correct.

9 Q. In fact, American National has never marketed its

10 consumer air beds as number beds?

11 A. That's right.

12 Q. The only time that you've been associated with a company

13 using the phrase "number bed" is when Dires was formed and

14 started selling the Personal Comfort line of beds?

15 A. Correct.

16 Q. And that's the time that you went into business with

17 Mr. Stenzel, correct?

18 A. Yes.

19 Q. And Mr. Baxter?

20 A. Yes.

21 Q. You have not done any studies with respect to the phrase

22 "number bed" and what consumers take it to mean?

23 A. No.

24 Q. You don't know whether it's fair for Personal Comfort to

1288

1 fact, view "number bed" as something associated with one

2 source?

3 A. I disagree with that.

4 Q. You had your deposition taken in this case, correct,

5 Mr. Miller?

6 A. Right.

7 Q. You had it taken three times?

8 A. Yes, I did, three times.

9 Q. Once was on behalf of yourself personally, correct?

10 A. Yes.

11 Q. And in that deposition you were -- at the time you were

12 the head of Dires, right?

13 A. That's right.

14 Q. And there was a time where you were deposed as the

15 30(b)(6) representative of Personal Comfort or Dires,

16 correct?

17 A. Correct.

18 Q. And so your dispute with me is that you don't believe

19 consumers could ever associate "number bed" with one source?

20 A. I don't believe so, no.

21 Q. But you haven't done any studies on that?

22 A. No, I have never done a study.

23 Q. Let's call up on the screen Plaintiff 124. Do I have

24 binders for you there, Mr. Miller?

25 A. No.

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1 MR. DENNIS HANSEN: May I approach, Your Honor?

2 THE COURT: You may.

3 MR. DENNIS HANSEN: Would Your Honor like binders?

4 THE COURT: All right.

5 (Binders handed to the Court)

6 BY MR. DENNIS HANSEN:

7 Q. The first binder there should be Plaintiffs' 124.

8 A. I was looking for 231. Sorry.

9 Q. Sorry if I said the wrong number.

10 A. Okay.

11 Q. Plaintiffs' 124 is a printout of multiple pages from

12 American National's website at

13 americannationalmanufacturing.com?

14 A. Yes.

15 Q. On the About Us page on the front of the exhibit, in the

16 second paragraph, the last sentence, it says, "American

17 National produced its first air mattress in 1986," right?

18 A. Yes.

19 Q. American National did not use the name Number Bed?

20 A. We did not.

21 Q. And you didn't do so because it wasn't the product

22 category?

23 A. Say that again.

24 Q. You didn't use "number bed" here because it wasn't the

1290

1 A. Correct. We were selling them in the water bed
 2 industry.
 3 Q. And in 1986 you would refer to this type of product as a
 4 computerized air bed?
 5 A. That's correct.
 6 Q. That was a bed that was adjustable by a firmness numeric
 7 indicator, correct?
 8 A. Yeah, it had a number on the remote control that
 9 continually maintained the pressure at a constant set
 10 pressure.
 11 Q. Okay. If you flip in your binder to Defendants' 420.
 12 MR. DENNIS HANSEN: And Dorian, don't put it up on
 13 the screen yet, please.
 14 BY MR. DENNIS HANSEN:
 15 Q. I think it's in the binder labeled 2 of 2.
 16 A. 420?
 17 Q. 420, defendants' 420. It will be at the very back of
 18 that binder.
 19 A. Yes.
 20 Q. Defendants' Exhibit 420 is a series of photographs of
 21 American National's computerized air bed, correct?
 22 A. Actually, the first image is not American National's.
 23 That one is a product called Sommaire. If you go to the
 24 back of that page, it does say, "Sommaire" on it. And then
 25 you have another page with a female sitting on a blue

1291

1 mattress next to our remote control with the numbers on it.
 2 That is the product I am speaking of.
 3 Q. Okay.
 4 MR. DENNIS HANSEN: Move to admit 420.
 5 MR. MADEL: No objection.
 6 THE COURT: Received.
 7 BY MR. DENNIS HANSEN:
 8 Q. If you go to the third page, this is the American
 9 National computerized air mattress?
 10 A. That's correct.
 11 Q. And it was adjustable by a firmness setting?
 12 A. Yes.
 13 Q. And you weren't calling it a number bed?
 14 A. Correct.
 15 Q. So you concede that in 1986 or thereabouts number bed
 16 was not the category name?
 17 A. That's right.
 18 Q. And you can't say or don't know exactly when it became a
 19 category?
 20 A. Correct.
 21 Q. You didn't start using "number bed" until September 2012
 22 when Personal Comfort opened?
 23 A. Correct, when we became forward consumer facing.
 24 Q. And you would concede that in between 1986 and 2012

1292

1 A. At what dates, did you say?
 2 Q. In between 1986 and 2012.
 3 A. Yes.
 4 Q. And they launched it in 2001, right?
 5 A. That's when they -- yes, correct.
 6 Q. And that was right in the middle of 1986 to 2012, right?
 7 A. Yes.
 8 Q. And that brand became the dominant brand in the
 9 adjustable air bed market?
 10 A. Yes.
 11 Q. In fact, you agree that Sleep Number is the most
 12 well-known brand in the adjustable air bed market?
 13 A. Correct.
 14 Q. And you concede that Number Bed only came into existence
 15 as more efforts were put forward to educate the public about
 16 mattresses that have an indicator of firmness which caused
 17 the consumer to become more aware?
 18 MR. MADEL: Objection, compound.
 19 THE COURT: It's a compound question, but did you
 20 understand it?
 21 THE WITNESS: Can you break it up into smaller
 22 pieces?
 23 THE COURT: If we can just break it down a bit.
 24 BY MR. DENNIS HANSEN:
 25 Q. Do you remember talking about this in your deposition?

1293

1 A. I do.
 2 Q. Okay. And do you remember indicating that Number Bed
 3 came into existence as more efforts were put forward to
 4 educate the public about mattresses that have an indicator
 5 of firmness?
 6 A. Yes.
 7 Q. And do you remember indicating that that caused the
 8 consumer to become more aware?
 9 A. Yes.
 10 Q. Okay. And you've heard the testimony that Select
 11 Comfort spent over a billion dollars in advertising since
 12 2001, right?
 13 A. Yes.
 14 Q. And that's to educate the consumer about the Sleep
 15 Number bed?
 16 A. Correct.
 17 Q. You have no reason to doubt that amount of money and
 18 effort was put forward by Select Comfort to make the
 19 consumer aware about the Sleep Number bed?
 20 A. No.
 21 Q. You don't know any other bed brand -- air bed brand that
 22 put that amount of money behind advertising?
 23 A. Correct.
 24 Q. And no other brand really even comes close, does it?

1294

1 Q. If we turn back to Plaintiffs' 124. Sorry for the
 2 binder logjam you have up there.
 3 A. I'll figure it out. Okay.
 4 Q. Let's go to page 11 of the document. You'll see there's
 5 numbers at the very bottom of the page, Mr. Miller. If you
 6 flip from pages 11 through 15, these are images and
 7 information about the Instant Comfort line of beds sold by
 8 American National, correct?
 9 A. Correct.
 10 Q. If we look at page 11 in particular, the heading is Air
 11 Beds, right?
 12 A. That's right.
 13 Q. It doesn't say "number beds"?
 14 A. No.
 15 Q. And all of these beds are adjustable by a numeric
 16 setting, right?
 17 A. That's correct.
 18 Q. And do you see at the very bottom of the page there's a
 19 date of when this was printed?
 20 A. Yes.
 21 Q. It's March 4, 2014, right?
 22 A. That's right.
 23 Q. It says, "Air Beds - American National Manufacturing"?
 24 A. Yes.
 25 Q. If we go to page 12, there's two beds listed here,

1295

1 correct?
 2 A. That's 12 you have there?
 3 Q. If you look at the very bottom, there's page numbers,
 4 Plaintiff #124 - p. 12?
 5 A. Page 12.
 6 Q. See where I am at?
 7 A. Yes.
 8 Q. So there's two beds there and those are both Instant
 9 Comfort beds?
 10 A. Yes, they are.
 11 Q. And they're both called air mattresses in the
 12 advertisement, right?
 13 A. That's correct.
 14 Q. And if we look at the next page, page 13, it's another
 15 Instant Comfort bed and it's advertised as a premium air
 16 mattress?
 17 A. Yes.
 18 Q. If we go through all of these beds from page 11 to 15,
 19 they're all called an air mattress, right?
 20 A. Yes.
 21 Q. None of them are called number beds?
 22 A. Correct.
 23 Q. And if you look at page 16, these are the -- this is a
 24 hybrid bed?

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1 Q. That was going to be sold?
 2 A. Correct.
 3 Q. And if you look at the bottom of the page, the Instant
 4 Comfort 10k3, it says, "Simply the Best Air Mattress
 5 Available," right?
 6 A. Yes.
 7 Q. And that was another one that was adjustable by a
 8 number?
 9 A. Correct. That one actually had multiple zones of
 10 adjustability.
 11 Q. And it wasn't called a number bed?
 12 A. No.
 13 Q. Go to Plaintiffs' Exhibit -- sorry, Defendants'
 14 Exhibit 175, so we are switching binders again. Sorry about
 15 that, Mr. Miller. Are you with me on 175?
 16 A. Yes.
 17 Q. 175 is the Owner's Manual for beds made by American
 18 National Manufacturing, correct?
 19 A. That's correct.
 20 Q. And these are called air mattress systems, right?
 21 A. Yes.
 22 Q. Not number beds?
 23 A. Correct.
 24 Q. And all of these do have a numeric firmness setting,
 25 correct?

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1 A. Yes.
 2 Q. Hopefully it's the last time I am going to ask you to do
 3 it in a while, but switch binders again to Plaintiff 128.
 4 Plaintiffs' Exhibit 128 is a printout of the website at
 5 shopcorona.com, right?
 6 A. That's correct.
 7 Q. And American National advertised through shopcorona.com?
 8 MR. MADEL: Your Honor, may we approach?
 9 THE COURT: You may.
 10 MR. MADEL: Take that off the screen, please.
 11 **(At sidebar)**
 12 MR. MADEL: A nonstipulated exhibit that has been
 13 displayed to the jury and it's hearsay.
 14 MR. DENNIS HANSEN: I believe -- I have to check
 15 my records. I think there was admissibility agreed on the
 16 initial exhibit list.
 17 MR. MADEL: I have got the list right in front of
 18 me and Ms. Robbins has confirmed it.
 19 MS. BERENS: I agree it's hearsay.
 20 MR. DENNIS HANSEN: Then I will lay foundation
 21 that it's their advertising.
 22 THE COURT: All right. Before we do that, he has
 23 to look a copy of it before we put it back up on the screen.
 24 MR. DENNIS HANSEN: Yeah.

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