No. _____

In the Supreme Court of the United States

DIRES, LLC,
SCOTT STENZEL, AND CRAIG MILLER,
Petitioners,

vs.

SELECT COMFORT CORPORATION AND
SELECT COMFORT SC CORPORATION,
Respondents.

On Petition for a Writ of Certiorari
to the United States Circuit Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Trademark infringement claims are intended to ensure consumers are not confused as to the source of goods; indeed, the consumers' best interests lie at the heart of the policy underpinning trademark law. Two decades ago, as courts grappled with the application of trademark law to the new Internet context, a minority of federal courts of appeals adopted a doctrine known as "initial interest confusion." Pre-sale, initial interest confusion as adopted here could impose liability for trademark infringement that occurs when a consumer first sees a mark online, even if the consumer does not ultimately make a purchase while confused as to source. For example, liability may be imposed based simply on results returned by a search engine where no purchase is made and where no sale is lost—i.e., there is no concrete harm. In the intervening years since its initial adoption, this doctrine has fallen out of favor and been sharply criticized as out of touch with how consumers use search engines. It assumes that a consumer's search for a trademarked name means that trademark owner's website is the only result of interest to the consumer—an assumption that is both outdated and inaccurate. Nonetheless, the Eighth Circuit adopted this doctrine for the first time—despite that it has been rejected by the First, Fourth, and Eleventh Circuits and narrowed by every Circuit that recognizes it—holding that a defendant may be liable for a likelihood of consumer confusion outside the mark's full context in a consumer's purchasing decision.

The question presented is: whether courts can impose liability for a likelihood of consumer confusion in a trademark infringement action based on a

consumer's initial interest in a mark, even where that consumer is not confused as to source at the time the consumer executes a purchase.

PARTIES TO THE PROCEEDING

Petitioners are Dires, LLC (doing business as Personal Comfort Bed), Scott Stenzel, and Craig Miller. They were defendants in the District Court and defendants/cross-appellants in the Court of Appeals.

Respondents are Select Comfort Corporation and Select Comfort SC Corporation. Respondents were plaintiffs in the District Court and plaintiffs/appellants in the Court of Appeals.

John Baxter was a defendant in the District Court and defendant/cross-appellant in the Court of Appeals.

Digi Craft Agency, LLC and Direct Commerce, LLC (doing business as Personal Touch Bed), were defendants in the District Court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Dires, LLC, discloses that Number Bed Holdings, LLC, is its parent corporation. No publicly held corporation owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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Relying on decades-old case law, the U.S. Court of Appeals for the Eighth Circuit, for the first time, adopted pre-sale "initial interest confusion," a formulation of trademark infringement that could vastly increase potential liability for online marketing regardless of any actual concrete harm. The decision conflicts with precedent from other Courts of Appeals in Lanham Act cases; it revives a doctrine that has otherwise fallen out of favor around the country as Internet searches have become increasingly ubiquitous; it increases the chances for forum-shopping; and it undermines this Court's requirement that a plaintiff demonstrate concrete harm. The Court should grant review to clarify requirements for liability in Lanham Act cases in the context of online advertising—one of the most critical activities for many businesses today—and to ensure correct application of Article III standing principles.

Initial interest confusion under the Lanham Act relates to *when* potential consumer confusion between two marks is actionable. The district court in this case concluded that plaintiff needed to show that consumers were confused about the source of the goods at issue—expensive, air adjustable beds, sometimes called "number beds"—at the time they made a purchase from defendant, having experienced the full context of the mark. Practically speaking, this meant plaintiff would need to show confusion as to source at the time a consumer executed a purchase of a mattress from defendant either online or over the phone.

In reversing, the Eighth Circuit made displayed search engine results, with no further step taken by the consumer (such as purchasing a product),

potentially actionable. Instead of adducing liability in the complete context of trademark usage—including its appearance in search results, followed by a consumer's decision to click on defendant's advertising, and the actual website that the link brought the consumer to—the Eighth Circuit held that liability could potentially be found for pre-sale confusion based on search engine results alone.

This decision eschews decades of learning about the application of initial interest confusion in Internet marketing. In recent years, courts have been criticized for expanding this form of pre-sale confusion into Internet cases, where the potential so-called harm to a consumer is as slight as clicking a "back" button on a browser. Indeed, the only cases cited by the Eighth Circuit supporting its recognition of initial interest confusion date back twenty years or more. A-9–10; A-16. Internet marketing practices—and consumers' level of sophistication in that context—have changed dramatically from that time when the majority of Americans did not have the Internet, dial-up connections (or "DSL") were considered "high-speed,"[1] and online shopping was new, required a modem (which had to be explained to people), and it was "assumed that advertising would ruin everything."[2] Further, the Eighth Circuit ignores the reality of consumers' interaction with brands online; while consumers may use a search engine to search for a

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[1] FCC News Release, *High-Speed Connections to the Internet Increased 63% During the Second Half of 2000 for a Total of 7.1 Million Lines in Service* (Aug. 9, 2001), https://transition.fcc.gov/Bureaus/Common_Carrier/News_Releases/2001/nrcc0133.html.

[2] Brad Tuttle, *8 Amazing Things People Said When Online Shopping Was Born 20 Years Ago*, MONEY (Aug. 15, 2014), https://money.com/online-shopping-history-anniversary.

brand name (*e.g.*, Winnebago), they might be interested in or satisfied with results relating to any brand (*e.g.,* other recreational vehicles). In recognition of this reality, brands commonly purchase competitors' trademarks in connection with search engine advertising; indeed, Select Comfort admitted at trial that it does the same. Inasmuch as consumers benefit from a bevy of results from many brands—and the attendant competition—the Eighth Circuit's decision here confounds consumers' best interests.

Recognizing these issues with pre-sale, initial interest confusion in the context of the Internet, the First, Fourth, and Eleventh Circuits have outright declined to adopt the doctrine. While other Circuits do recognize some form of initial interest confusion, none—including the Ninth Circuit, where it originated—recognize a formulation as broad as the Eighth Circuit has adopted here.

Given the potential for plaintiffs to weaponize this decision to attack common Internet advertising practices even when they cannot show concrete harm, the inconsistency between the Circuits, and the likelihood of forum shopping, Petitioners respectfully request that the Court grant this Petition.

OPINIONS BELOW

The Eighth Circuit's opinion is reported at 996 F.3d 925 and reproduced at A-1. The opinion of the district court is reported at 156 F.Supp.3d 971 and reproduced at A-34.

JURISDICTION

The Eighth Circuit entered judgment on May 11, 2021, and issued its order denying rehearing en

banc on June 16, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, §§ 1-2 of the United States Constitution is reproduced at A-125. Relevant portions of the Lanham Act, 15 U.S.C. § 1125 *et seq.*, are reproduced at A-126.

STATEMENT OF THE CASE

In its effort to take down one of its only remaining competitors in the air adjustable bed market, Select Comfort Corporation and Select Comfort SC Corporation (collectively, "Select Comfort") brought this lawsuit in 2012. It targeted Dires, LLC ("Dires"), known commercially as Personal Comfort Bed, and two of its owners, Craig Miller and Scott Stenzel. It also sued former owner John Baxter, as well as Direct Commerce, LLC (doing business as Personal Touch Bed) and Digi Craft Agency, LLC (not represented by the undersigned counsel). Select Comfort claimed, among other things, that Dires' online advertising of its beds that compete directly with Select Comfort's through search engines, including Google and Bing, infringed Select Comfort's trademarks because of the appearance of those trademarks in search engine results.

On summary judgment, the district court determined that, in the context of Dires' online advertising, "Plaintiffs' trademark infringement claim will require Plaintiffs to establish a likelihood of actual confusion at the time of purchase." A-62.

At trial, the testimony showed that when Dires' ads appeared in search engine results, consumers

could click on those ads (at a cost to Dires) and be taken to the Personal Comfort Bed website. The Personal Comfort Bed website extensively compares its products with Select Comfort's. From that website, consumers were presented with the phone number to place a phone call to a salesperson or a page where they could place an online order for a bed. A-95. Select Comfort admitted it presented exactly the same evidence as it would have had the district court not made its ruling regarding initial interest confusion. A-91, A-95. Indeed, when asked at oral argument before the Eighth Circuit, counsel for Select Comfort could not identify one piece of evidence Select Comfort was prevented from introducing. Further, Petitioners have consistently argued that Select Comfort failed to prove any injury caused by Petitioner's activities. Dist.Ct.Dkt.678 at 18–20; Dist.Ct.Dkt.646 at 14–21; App.Ct.Second.Br. at 6–9; 32–34.

Following a three-week trial, the jury agreed with Dires and found no infringement. Nonetheless, the Eighth Circuit reversed, adopting an outdated standard that other circuits have declined to adopt at all, determining for the first time that (1) the Eighth Circuit recognizes initial interest confusion and (2) initial interest confusion could apply in this Internet marketing case. A-16–21. As relevant here, it reversed and remanded for a new trial on Select Comfort's claim of trademark infringement. *Id*. Dires filed a petition for rehearing en banc, which the Eighth Circuit denied on June 16, 2021.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's decision below adopts, for the first time, a dying doctrine and revives a split between the Circuits with respect to trademark infringement in online marketing. Three Circuits have declined entirely to adopt initial interest confusion (the First, Fourth, and Eleventh). And even among those that have adopted it, all now recognize a narrower version of initial interest confusion than the broad formulation adopted by the Eighth Circuit, which may make mere attraction of consumers' attention, even in the absence of any purchase or other concrete harm, actionable.

Moreover, the Circuits that *have* recognized initial interest confusion online did so decades ago. Indeed, all the cases cited by the Eighth Circuit in support of its adoption are more than twenty years old. The doctrine has been increasingly criticized over the last two decades, even among those Circuits that have adopted it. Good policy reasons support revisiting this doctrine and resolving this split among Circuits under application of the Lanham Act and in concert with this Court's Article III standing requirements in the context of today's Internet marketing and its increasing ubiquity. Failure to do so by the Court will result in broadened liability for standard online marketing beyond any concrete harm to consumers or other online companies and is likely to result in forum-shopping. This Court should grant review as to the single question presented.

I. The Court Should Grant Review To Resolve The Split Between The Circuits Regarding Recognition Of Initial Interest Confusion In Online Advertising.

Prior to this decision, pre-sale, initial interest confusion "[had] never been adopted by the Eighth Circuit[.]" *Sensient Techs. Corp. v. SensoryEffects Flavor Co.*, 613 F.3d 754, 764 & 766 (8th Cir. 2010) (declining to adopt initial interest confusion). The *Sensient* court held that it did not apply where consumer sophistication and degree of purchasing care are both high. *Id*. Several Circuits have refused to adopt initial interest confusion altogether.

The First Circuit has not recognized initial interest confusion as actionable. *See Smartling, Inc. v. Skawa Innovation Ltd.*, 358 F. Supp. 3d 124, 141 n. 9 (D. Mass. 2019) ("the First Circuit has yet to adopt this concept.") (quoting *Concordia Partners, LLC v. Pick*, No. 2:14-CV-009-GZS, 2015 WL 4065243, at *9 n.7 (D. Me. July 2, 2015)); (citing *Moving & Storage, Inc. v. Panayotov*, No. CIV.A. 12-12262-GAO, 2014 WL 949830, at *4 (D. Mass. Mar. 12, 2014) ("However, even if [the initial interest] doctrine were recognized in this Circuit, which it has not been, mere diversion, without any hint of confusion, is not enough"); *Hearts on Fire Co., LLC v. Blue Nile, Inc.*, 603 F.Supp.2d 274, 283 (D. Mass. 2009) (noting that initial interest confusion has "not been fully explored or addressed by the First Circuit")).

The Fourth Circuit, too, declined to adopt initial interest confusion in *Lamparello v. Falwell*, 420 F.3d 309, 316 (4th Cir. 2005). It did so again last year in a case strikingly similar to this one, where plaintiff

"urg[ed] [the court] to *only* consider the appearance of [defendant]'s advertisement on the search results page[.]" *Passport Health, LLC v. Avance Health Sys., Inc.*, 823 F. App'x 141, 150 (4th Cir. 2020), *as amended* (Aug. 17, 2020) (emphasis added). The court in *Passport Health* noted that "[Plaintiff] focuses on whether the use of its marks will lure consumers to its competitor's website, regardless of whether the content of the website will dispel the consumers' confusion." *Id*. It reasoned:

> [W]e have never adopted the initial interest confusion theory; rather, we have followed a very different mode of analysis, requiring courts to determine whether a likelihood of confusion exists by examining the allegedly infringing use *in the context in which it is seen by the ordinary consumer*.

Id. (internal quotations omitted) (emphasis in original). The court declined to adopt the doctrine and considered "[defendant's] advertisement in conjunction with the website to which it links." *Id*.

Similarly, the Eleventh Circuit has not adopted initial interest confusion. *See Suntree Techs., Inc. v. Ecosense Int'l, Inc.*, 693 F.3d 1338, 1347 (11th Cir. 2012) (declining to address whether initial interest confusion is actionable in the Eleventh Circuit); *USA Nutraceuticals Grp., Inc. v. BPI Sports, LLC*, 165 F. Supp. 3d 1256, 1265–66 (S.D. Fla. 2016) ("The Court declines to adopt, at this early juncture, a yet-to-be-recognized legal theory…"); *Vital Pharm., Inc. v. Am. Body Bldg. Products, LLC*, 511 F. Supp. 2d 1303, 1318 (S.D. Fla. 2007) ("The Eleventh Circuit has not

embraced this principle, and I find it unpersuasive. When the bottom line is sales of a particular product, initial confusion prior to and concluding before the point of purchase does not seem dispositive in a likelihood of confusion analysis.").

The First, Fourth, and Eleventh Circuits' analyses do what the Eighth Circuit's decision arguably does not—they require more than mere visibility on a results page or a click to a different website to establish concrete harm for a potential violation of the Lanham Act.

II. The Court Should Grant Review To Consider The Breadth Of The Formulation Of Initial Interest Confusion Adopted By The Eighth Circuit.

Among those Circuits that do recognize some form of initial interest confusion, all have now adopted a more narrowed doctrine than the Eighth Circuit did here. Indeed, the Ninth Circuit, where the doctrine originated, has criticized its original formulation of the doctrine from *Brookfield Commc'ns, Inc. v. W. Coast Ent. Corp.,* 174 F.3d 1036 (9th Cir. 1999), the very formulation adopted by Eighth Circuit here. That case, as cited by McCarthy, made actionable "confusion that creates initial customer interest, even though no actual sale is finally completed as a result of the confusion." A-3. *Brookfield* has been "roundly criticized by courts and commentators." *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 466 (E.D.N.Y. 2011) (citing Michael Grynberg, *Trademark Litig. as Consumer Conflict,* 86 N.Y.U.L.REV. 60, 86 (2008) (citations omitted) (noting that "*Brookfield* and its progeny have been heavily criticized for expanding

initial interest confusion doctrine into Internet cases in which the case for any consumer harm is doubtful); Eric Goldman, *Eighth Circuit Embraces the Initial Interest Confusion Doctrine. What??? UGH. No. Why??? – Select Comfort v. Baxter*, TECHNOLOGY & MARKETING LAW BLOG https://blog.ericgoldman.org/archives/2021/05/eighth-circuit-embraces-the-initial-interest-confusion-doctrine-what-ugh-no-why-select-comfort-v-baxter.htm (May 13, 2021) ("The opinion creates avoidable doctrinal trouble, and other judges on the Eighth Circuit should demand a tighter opinion with fresher citations (if not a completely different result).")

In *Playboy Enters. v. Netscape Commc'ns Corp.,* 354 F.3d 1020, 1034–35 (9th Cir. 2004) (Berzon, J., concurring), one judge called *Brookfield* "wrongly decided," stating, "I do not think it is reasonable to find initial interest confusion when a consumer is never confused as to source or affiliation, but instead knows, or should know, from the outset that a product or web link is not related to that of the trademark holder because the list produced by the search engine so informs him." Judge Berzon concluded that the doctrine's common analogy to misleading customers with a billboard that causes them to visit one store instead of another "has been widely criticized as inapplicable to the Internet situation, given both the fact that customers were not misdirected and the minimal inconvenience in directing one's web browser back to the original list of search results." *Id*. at 1036.

Thereafter, the Ninth Circuit reversed a grant of a preliminary injunction based on the *Brookfield* formulation in *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.,* 638 F.3d 1137, 1148 (9th Cir. 2011), a case strikingly similar to this matter, which

considered "whether the use of another's trademark as a search engine keyword to trigger one's own product advertisement violates the Lanham Act." In discussing the application of *Brookfield*, the Ninth Circuit stated:

> While the district court analyzed each of the *Sleekcraft* [likelihood of confusion] factors, it identified the three most important factors as (1) the similarity of the marks, (2) the relatedness of the goods or services, and (3) the simultaneous use of the Web as a marketing channel, for any case addressing trademark infringement on the Internet…However, we did not intend *Brookfield* to be read so expansively as to forever enshrine these three factors—now often referred to as the "Internet trinity" or "Internet troika"—as the test for trademark infringement on the Internet. *Brookfield* was the first to present a claim of initial interest confusion on the Internet; we recognized at the time it would not be the last, and so emphasized flexibility over rigidity. Depending on the facts of each specific case arising on the Internet, other factors may emerge as more illuminating on the question of consumer confusion.

Id. The *Network Automation* court specifically noted the importance of the degree of consumer care in the Internet context, stating that (even more than a decade ago), "[w]e have recently acknowledged that the default degree of consumer care is becoming more heightened as the novelty of the Internet evaporates

and online commerce becomes commonplace." *Id.* at 1152 (citing *Toyota Motor Sales v. Tabari*, 610 F.3d 1171 (9th Cir. 2010)). Moreover, the court stated it "expect[s] consumers searching for expensive products online to be even more sophisticated." *Network Automation, Inc.*, 638 F.3d at 1153. The *Network Automation* court held that the district court erred by concluding that the "type of purchaser and degree of care" factor in the context of Internet marketing weighed in favor of a finding of infringement and reversed. *Id*. Recent opinions in the Ninth Circuit confirm this narrowing. *See, e.g., Moore v. Doe*, No. CV 20-6569-DMG (SPX), 2020 WL 6804508, at *3 (C.D. Cal. Oct. 13, 2020) ("courts have since narrowed *Brookfield* to not apply where the displayed search result is not likely to confuse the consumer as to its source") (internal citations omitted).

The Second Circuit's formulation of initial-interest confusion also conflicts with the Eighth Circuit's decision. The court in *Savin Corp. v. Savin Grp.* clarified that, "[b]ecause consumers diverted on the Internet can more readily get back on track than those in actual space, thus minimizing the harm to the owner of the searched-for site from consumers becoming trapped in a competing site, Internet initial interest confusion requires a showing of intentional deception." 391 F.3d 439, 462 (2d Cir. 2004). The court affirmed dismissal of the trademark infringement claim on summary judgment. *Id*. Here, the Eighth Circuit did not require any showing of intentional deception.

Although the Sixth Circuit recognizes initial-interest confusion, it too "has been reluctant to extend initial-interest confusion as an actionable theory under the Lanham Act outside the narrow context of

disputes over Internet domain names." *Ducks Unlimited, Inc. v. Boondux, LLC*, No. 214CV02885SHMTMP, 2017 WL 3579215, at *28 n. 14 (W.D. Tenn. Aug. 18, 2017) (citing *Gibson Guitar Corp. v. Paul Reed Smith Guitars, LP*, 423 F.3d 539, 551 (6th Cir. 2005)).

While the Tenth Circuit recognized initial-interest confusion in *Australian Gold v. Hatfield*, 436 F.3d 1228 (10th Cir. 2006), it did so in the context of passing off; there, the defendants improperly obtained plaintiffs' tanning lotions and resold them on their own website; such passing off did not occur here. *Id*. at 1232–33. Further, the tanning lotion was inexpensive, so "the degree of care likely to be exercised in purchasing Products weighed in favor of Plaintiffs because Plaintiffs' low-cost products were subject to impulse purchases." *Id*. at 1240. Thereafter, the Tenth Circuit cast doubt on the viability of the doctrine going forward in *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1242 (10th Cir. 2013). In that case—again, quite similarly to the instant matter—the district court ruled that mere use of Google Keywords, "divorced from the text of the resulting ads," could not result in any likelihood of confusion. *Id*. Because Google users view only the results of searches and cannot tell which keywords advertisers purchase, a consumer who searches for "1-800 Contacts" and then sees an ad from Lens.com cannot know whether Lens.com purchased 1-800's mark as a keyword, or simply the term "contacts." *Id.* The Tenth Circuit then opined:

> Perhaps in the abstract, one who searches for a particular business with a strong mark and sees an entry on the results page will naturally infer that

> the entry is for that business. But that inference is an unnatural one when the entry is clearly labeled as an advertisement and clearly identifies the source, which has a name quite different from the business being searched for.

Id. at 1245. This passage has drawn the doctrine into serious question in the Tenth Circuit, although ultimately, the court did not issue the formal death knell, concluding that because the plaintiff failed to introduce sufficient evidence of initial interest confusion, it need not reach the question. *Id*. at 1243.

Notably, these decisions criticizing a formulation like the Eighth Circuit's here even predated the Court's recent decision on Article III standing in *Transunion v. Ramirez*, in which as the Court succinctly put it: "No concrete harm, no standing." 141 S. Ct. 2190, 2200 (2021). The Eighth Circuit's formulation of initial interest confusion could allow liability to be imposed even without a showing of concrete harm, a proposition directly contrary to *Transunion* and Article III of the Constitution.

III. Consumers' Interest In Useful Online Advertising Requires Reconsideration Of The Doctrine Of Initial Interest Confusion.

Simply put, presale, initial interest confusion in the context of Internet search results is inappropriate.

If "the purpose of the search [truly is to look only for Plaintiffs' goods], the shoppers will be attentive to click on those results that will connect them with sites relating to [plaintiff]." *1-800 Contacts,* 722 F.3d at 1245. The consumer can distinguish between products, and if the consumer selects the lower-cost product, that does not mean that the consumer was "confused about the alternatives presented to her." *Hearts on Fire*, 603 F. Supp. 2d at 285 (citations omitted). Initial interest confusion is particularly inapplicable here because, to constitute actionable infringement, the "confusion must be *more than momentary* and … must be truly *costly to the consumer*." *Id.* at 287–88 (emphases added) (citation omitted). Online,

> [R]easonable, prudent and experienced Internet consumers … skip from site to site, ready to hit the back button whenever they're not satisfied with a site's contents. They fully expect to find some sites that aren't what they imagine based on a glance at the domain name or search engine summary.… This is sensible agnosticism, not consumer confusion.

Tabari, 610 F.3d at 1179 (citation omitted). Thus, placement on a search engine's results list is "irrelevant" when the website itself is non-confusing. *Ascentive*, 842 F. Supp. 2d at 468–69.

Policy considerations caution against overbroad application of the initial interest doctrine. "Emerging trademark law doctrines have allowed trademark owners to excise socially beneficial content and to take unprecedented control over their channels of

distribution. Without limits, trademark law has the capacity to counterproductively destroy the Internet's utility for everyone." Eric Goldman, *Deregulating Relevancy in Internet Trademark Law*, 54 EMORY L. J. 507, 509 (2005), http://digitalcommons.law.scu.edu/facpubs/68. Goldman notes:

> In all cases—even when the searcher has been "tricked" into viewing a website through unscrupulous practices—a searcher's costs to change an Internet search is trivial. The searcher need only hit the back button, type a new web address into the address bar, or select a new bookmark…The costs to switch a web search compare very favorably to other offline searches, such as using the Yellow Pages (which require extra time to dial, reach a live person and get questions answered) or driving around town looking for a particular item (where, if a store does not have what the searcher wants, the searcher must get back into the car and drive to the next vendor).

Id. at 520–21. Goldman critiques initial interest confusion as incorrectly "assum[ing] that a searcher using a trademarked keyword is looking for the trademarked owner." *Id*. at 566. But "[s]earchers' objectives cannot be inferred from the keywords they employ." *Id*. He goes on to criticize *Brookfield*, concluding that "[b]ecause [initial interest confusion] lacks a rigorous definition, defendants are virtually powerless to combat it—especially under *Brookfield*'s framework of treating any efforts to capture initial consumer attention as goodwill misappropriation." *Id*.

at 573. Goldman concludes that "[p]ushing the infringement determination later in the search process"—as the district court did—"will inhibit the speculation that can lead courts astray." *Id.* at 584.

Further, the degree of consumer care is high for the expensive beds at issue in this case. "There is always less likelihood of confusion where goods are expensive and purchased after careful consideration." *Kemp v. Bumble Bee Seafoods, Inc.*, 398 F.3d 1049, 1055 (8th Cir. 2005) (quotations omitted); *Network Automation*, 638 F.3d at 1153 ("[W]e expect consumers searching for expensive products online to be even more sophisticated.") (internal quotations omitted). Mattresses are not an impulse purchase susceptible to confusion. *See, e.g. NSM Res. Corp. v. Target Corp.*, 636 F. Supp. 2d 857, 868 (D. Minn. 2008) ("Shoes are not, generally, an impulse item that consumers take off the shelf without thought."). Rather, they are an important purchase that greatly impacts a purchaser's quality of life; even in 1957, when mattresses were both less expensive and less technologically advanced, the U.S. Court of Customs and Patent Appeals concluded "that the average purchaser will exercise such care in the selection of a mattress as to minimize the possibility of confusion as to the origin of the goods." *Sleepmaster Prods. Co. v. Am. Auto-Felt Corp.*, 241 F.2d 738, 741 (C.C.P.A. 1957) Liability for initial interest confusion in Internet marketing ignores how consumers use search engines and the lack of harm caused to consumers, and it has the potential to stifle competition in online marketing. It is outdated and illogical, and this Court should revisit its adoption.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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