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13 SEIRUS INNOVATIVE ACCESSORIES, INC.

14 UNITED STATES DISTRICT COURT
15 SOUTHERN DISTRICT OF CALIFORNIA

16 SEIRUS INNOVATIVE ACCESSORIES,
17 INC., a Utah corporation,

18 Plaintiff,

19 v.

20 GORDINI U.S.A., INC., a Vermont
corporation; GORDINI CANADA, INC.,
21 a Canadian corporation,

22 Defendants.
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Case No. . 09-CV-2212 L (POR)

FIRST AMENDED COMPLAINT FOR:

1. PATENT INFRINGEMENT
2. INDUCING PATENT INFRINGEMENT
3. FEDERAL TRADE DRESS INFRINGEMENT [15 U.S.C. § 1125(a)]
4. FALSE DESIGNATION OF ORIGIN [15 U.S.C. §1125(a)]
5. FEDERAL UNFAIR COMPETITION [15 U.S.C. § 1125(a)]
6. STATE UNFAIR COMPETITION [Cal. Bus. & Prof. Code § 17200 *et seq.*]
7. UNJUST ENRICHMENT

DEMAND FOR JURY TRIAL

1 For its claims against defendants GORDINI U.S.A., INC. and GORDINI CANADA,
2 INC. (“DEFENDANTS”), plaintiff SEIRUS INNOVATIVE ACCESSORIES, INC.
3 (“SEIRUS”), hereby alleges as follows:

4 **PARTIES**

5 1. SEIRUS is a Utah corporation with its principal place of business at 13975
6 Danielson Street, Poway, California 92064. SEIRUS is engaged in the business of selling men’s,
7 women’s, and children’s action and outdoor apparel and accessories, including face masks.

8 2. Upon information and belief, GORDINI U.S.A., INC. (“GORDINI U.S.A.”) is a
9 Vermont corporation with a principal place of business at 67 Allen Martin Drive, Essex Junction,
10 Vermont, 05452. Upon information and belief, GORDINI U.S.A. is engaged in the business of
11 selling men’s, women’s, and children’s outdoor apparel and accessories, including cold weather
12 head gear and face masks.

13 3. Upon information and belief, GORDINI CANADA, INC. (“GORDINI
14 CANADA”) is a Canadian corporation with a principal place of business at 5711 Ferrier Street,
15 Montreal, Quebec, Canada. Upon information and belief, GORDINI CANADA is engaged in
16 the business of selling men’s, women’s, and children’s outdoor apparel and accessories,
17 including cold weather head gear and face masks.

18 **JURISDICTION AND VENUE**

19 4. This civil action for infringement and unfair competition arises under the patent
20 laws of the United States, 35 U.S.C. §§ 271, *et seq.*, under the Lanham Act, 15 U.S.C. §§ 1051 *et*
21 *seq.*, and under California state law governing unjust enrichment and unfair competition,
22 specifically California Business and Professions Code §§ 17200 *et seq.*

23 5. This Court has subject matter jurisdiction over this action pursuant to 15 U.S.C.
24 § 1121(a) and 28 U.S.C. §§ 1331 and 1338(a) and (b), and supplemental jurisdiction pursuant to
25 28 U.S.C. § 1367.

26 6. Upon information and belief, DEFENDANTS have either directly or through their
27 agents transacted business in the State of California and within this judicial district, and expected
28 or reasonably should have expected their acts to have consequence in the State of California and

1 within this judicial district, thus subjecting DEFENDANTS to the personal jurisdiction of this
2 Court.

3 7. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391 and 1400(b) as
4 DEFENDANTS are doing business in this judicial district and therefore may be found in this
5 district, and/or a substantial part of the events giving rise to the claims alleged herein occurred
6 within this district.

7 **FACTS COMMON TO ALL CLAIMS**

8 **(A) DEFENDANTS' INFRINGEMENT OF SEIRUS' PATENTS**

9 8. SEIRUS is the owner of United States Letters Patent No. 5,214,804 (the "'804
10 PATENT") which issued on June 1, 1993 and is titled "PROTECTIVE MASK WITH SCARF,"
11 and United States Letters Patent No. 6,272,690 (the "'690 PATENT") which issued on August
12 14, 2001 and is titled "HEAD COVERING."

13 9. DEFENDANTS are offering for sale and, upon information and belief, have sold
14 in this judicial district and elsewhere throughout the United States, the following products that
15 fall within the scope of at least one claim of the '804 PATENT: LAVAWOOL CONVERTIBLE
16 FACE MASK, LAVAWOOL FULL FACE BALACLAVA ("'804 PATENT ACCUSED
17 PRODUCTS").

18 10. DEFENDANTS are also offering for sale and, upon information belief, have sold
19 in this judicial district and elsewhere throughout the United States, the following products that
20 fall within the scope of at least one claim of the '690 PATENT: LAVAWOOL FULL FACE
21 BALACLAVA ("'690 PATENT ACCUSED PRODUCTS").

22 **(B) DEFENDANTS' INFRINGEMENT OF SEIRUS' TRADE DRESS IN PRODUCTS**
23 **AND PACKAGING**

24 **(i) SEIRUS' PRODUCT TRADE DRESS**

25 11. By virtue of the extensive use, sale and advertising by SEIRUS and others on
26 behalf of SEIRUS, the shape, form and appearance of SEIRUS products (hereinafter the
27 "SEIRUS PRODUCT TRADE DRESS"), are inherently distinctive and have acquired

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1 distinctiveness and secondary meaning to signify SEIRUS as the manufacturer and the source of
2 these goods.

3 (ii) **SEIRUS' PACKAGING TRADE DRESS**

4 12. By virtue of the extensive use, sale and advertising by SEIRUS and others on
5 behalf of SEIRUS, the shape, form and appearance in use of the packaging of SEIRUS products
6 (hereinafter the "SEIRUS PACKAGING TRADE DRESS"), has acquired secondary meaning in
7 the market for cold-weather headgear.

8 13. DEFENDANTS are offering for sale and, upon information and belief, have sold
9 in this judicial district and elsewhere throughout the United States, the following products, that
10 copy, imitate, palm off as, and pass off their products as members of the family of products that
11 contain the SEIRUS PRODUCT TRADE DRESS and SEIRUS PACKAGING TRADE DRESS:
12 LAVAWOOL CONVERTIBLE FACE MASK, LAVAWOOL FULL FACE BALACLAVA (the
13 "ACCUSED TRADE DRESS PRODUCTS").

14 **CLAIMS FOR RELIEF**

15 **FIRST CLAIM FOR RELIEF**
16 **(Patent Infringement)**

17 14. SEIRUS refers to, re-alleges, and incorporates herein by this reference, each and
18 every allegation in the foregoing paragraphs, as though fully set forth herein.

19 15. As alleged herein, DEFENDANTS are infringing at least one claim of the '804
20 and/or '690 PATENTS literally and/or under the doctrine of equivalents.

21 16. As a direct and proximate result of DEFENDANTS' infringement of the '804
22 and/or '690 PATENTS, SEIRUS has been damaged in an amount to be proved at trial, but in an
23 amount not less than a reasonable royalty, and includes lost sales, and/or lost profits.

24 17. Based upon their prior knowledge of SEIRUS' patent rights, and other facts to be
25 proved at trial, DEFENDANTS know and have known of their infringement of the '804 and/or
26 '690 PATENTS. Based on these facts and those to be proved at trial, DEFENDANTS'
27 infringement is willful and done with intentional disregard of SEIRUS' rights in the '804 and/or
28 '690 PATENTS, so as to render this case exceptional within the purview of 35 U.S.C. §§ 284,

1 and 285, such that SEIRUS is entitled to enhanced damages, costs, and an award of attorneys’
2 fees.

3 18. SEIRUS has been and continues to be damaged by the unlawful infringing
4 activities of DEFENDANTS and will be irreparably harmed unless the unlawful infringing
5 activities are preliminarily and permanently enjoined by this Court as provided by 35 U.S.C. §
6 283.

7 **SECOND CLAIM FOR RELIEF**
8 **(Inducing Patent Infringement)**

9 19. SEIRUS refers to, re-alleges, and incorporates herein by this reference, each and
10 every allegation in the foregoing paragraphs, as though fully set forth herein.

11 20. Upon information and belief, DEFENDANTS have been and are now unlawfully
12 inducing others to infringe and/or contributorily infringe, literally or under the doctrine of
13 equivalents, the claim of the ‘804 and/or ‘690 PATENTS by using, offering to sell, advertising
14 for sale and selling DEFENDANTS’ products in this judicial district and throughout the United
15 States as follows: LAVAWOOL CONVERTIBLE FACE MASK, LAVAWOOL FULL FACE
16 BALACLAVA.

17 21. SEIRUS is marking its products that fall within the scope of the ‘804 and ‘690
18 PATENTS as required by 35 U.S.C. § 287; DEFENDANTS have otherwise had knowledge and
19 notice of the ‘804 and/or ‘690 PATENTS and their activities constitute knowing and willful
20 patent infringement. SEIRUS has been and continues to be damaged by the unlawful infringing
21 activities of DEFENDANTS and will be irreparably harmed unless the unlawful infringing
22 activities are preliminarily and permanently enjoined by this Court as provided by 35 U.S.C. §
23 271(b).

24 22. Upon information and belief, SEIRUS has suffered and continues to suffer lost
25 sales and in turn damages as a direct result of the unlawful infringement of the ‘804 and/or ‘690
26 PATENTS by DEFENDANTS. Under 35 U.S.C. § 284, SEIRUS is entitled to damages to be
27 established at trial or upon an accounting adequate to compensate for the infringement, including
28 lost profits, but not less than a reasonable royalty.

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1 **FOURTH CLAIM FOR RELIEF**
2 **False Designation of Origin**
3 **[15 U.S.C. § 1125(a)]**

4 29. SEIRUS refers to, re-alleges, and incorporates herein by this reference, each and
5 every allegation in the foregoing paragraphs, as though fully set forth herein.

6 30. DEFENDANTS' actions in connection with the sale, offering for sale, distribution
7 or advertising of the ACCUSED TRADE DRESS PRODUCTS in interstate commerce, without
8 SEIRUS' consent, is a false designation of origin, and have caused and continue to cause a
9 likelihood of confusion, mistake, and deception as to source, sponsorship, affiliation, and/or
10 connection in the minds of the public.

11 31. DEFENDANTS' false designation of origin is in violation of §43(a) of the
12 Lanham Act, 15 U.S.C. §1125(a)(1).

13 32. By reason of the foregoing, SEIRUS has been injured in an amount not yet fully
14 determined, but believed to be in excess of \$75,000. In addition, as a result of DEFENDANTS'
15 acts of infringement, SEIRUS has suffered and will continue to suffer irreparable harm, and
16 SEIRUS has no adequate remedy at law with respect to this injury. Unless DEFENDANTS' acts
17 of infringement are further enjoined by this Court, SEIRUS will continue to suffer a risk of
18 irreparable harm.

19 33. DEFENDANTS' actions have been knowing, intentional, wanton, and willful,
20 entitling SEIRUS to damages, treble damages, profits, attorney's fees, and the costs of this action
21 pursuant to 15 U.S.C. § 1117 in this Court's discretion.

22 **FIFTH CLAIM FOR RELIEF**
23 **(Unfair Competition)**
24 **[15 U.S.C. § 1125(a)(1)]**

25 34. SEIRUS refers to, re-alleges, and incorporates herein by this reference, each and
26 every allegation in the foregoing paragraphs, as though fully set forth herein.

27 35. SEIRUS manufactures and sells products and lines of products, and by virtue of
28 the extensive, use, sale and advertising by SEIRUS, the associated SEIRUS PRODUCT TRADE
DRESS and SEIRUS PACKAGING TRADE DRESS have become inherently distinctive and
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1 have acquired distinctiveness, secondary meaning, and sufficient fame to signify SEIRUS as the
2 manufacturer and source of said products and lines of products.

3 36. Upon information and belief, DEFENDANTS have unlawfully and without
4 license or right, copied, imitated, and otherwise created a collection of products and lines of
5 products including the ACCUSED TRADE DRESS PRODUCTS, all of which emulate, imitate,
6 palm off as, pass off as and copy the SEIRUS PRODUCT TRADE DRESS and SEIRUS
7 PACKAGING TRADE DRESS to thereby emulate, imitate, palm off as, and pass off their
8 products as SEIRUS products.

9 37. The activities of DEFENDANTS in advertising, selling and offering to sell each
10 of the ACCUSED TRADE DRESS PRODUCTS, separately and together, is likely to cause
11 confusion, mistake, and deception as to the source and origin thereof so that purchasers thereof
12 and others will likely be confused and believe the ACCUSED TRADE DRESS PRODUCTS
13 emanate from SEIRUS. In turn, DEFENDANTS are unfairly competing and misrepresenting
14 their products to be those of SEIRUS in violation of 15 U.S.C. § 1125(a).

15 38. The activities of DEFENDANTS in advertising for sale, offering for sale, and
16 selling the ACCUSED TRADE DRESS PRODUCTS constitute unlawful and tortious unfair
17 competition, palming off and passing off, and misrepresentation as to the source of goods in
18 violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1).

19 39. SEIRUS believes it has suffered and continues to suffer lost sales and, in turn,
20 damages as a direct result of the unlawful and unfair competition of DEFENDANTS. Under 15
21 U.S.C. § 1117, SEIRUS is entitled to damages, including lost profits and the costs of this action,
22 to be shown at trial or upon an accounting.

23 40. On information and belief, DEFENDANTS' unfair competition in violation of 15
24 U.S.C. § 1125(a)(1) is willful and done with an intent to harm SEIRUS or in reckless disregard
25 for the rights of SEIRUS such that SEIRUS is entitled to triple damages under 15 U.S.C. §
26 1117(b).

27 41. Under 15 U.S.C. § 1117(b), this is an exceptional case and SEIRUS is entitled to
28 recover its attorneys' fees.

1 practices, in that, *inter alia*, said acts are likely to confuse the public as to the origin of the
2 products.

3 48. DEFENDANTS' acts of infringement as alleged above constitute unfair
4 competition actionable under the laws of the State of California as deceptive and false
5 advertising, in that, *inter alia*, said acts are likely to cause confusion, mistake, and deception.

6 49. Such acts and omissions described above are unlawful, unfair, fraudulent,
7 deceptive, misleading, and untrue and constitute a violation of Business & Professions Code
8 §17200 *et seq.* SEIRUS reserves the right to identify additional violations by DEFENDANTS as
9 may be established through discovery.

10 50. As a result of DEFENDANTS' said acts of unfair competition, SEIRUS has
11 suffered and will continue to suffer irreparable harm, and SEIRUS has no adequate remedy at
12 law with respect to this injury. Unless the acts of unfair competition are enjoined by this Court,
13 SEIRUS will continue to suffer irreparable harm.

14 51. As a direct and legal result of DEFENDANTS' unlawful, unfair, and fraudulent
15 conduct described above, DEFENDANTS have been and will continue to be unjustly enriched
16 with ill-gotten gains.

17 **SEVENTH CLAIM FOR RELIEF**
18 **Unjust Enrichment**

19 52. SEIRUS refers to, re-alleges, and incorporates herein by this reference, each and
20 every allegation in the foregoing paragraphs, as though fully set forth herein.

21 53. DEFENDANTS' acts of misappropriation and illegal use of SEIRUS' respective
22 intellectual property rights and valuable goodwill associated with the rights have resulted in
23 DEFENDANTS being unjustly enriched at SEIRUS' expense.

24 54. SEIRUS has invested heavily in the advertisement, promotion and building of
25 goodwill related to the aforementioned intellectual property.

26 55. SEIRUS is therefore entitled to restitution of all ill-gotten profits related to the
27 aforementioned intellectual property rights that have been retained by DEFENDANTS.

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1 **WHEREFORE**, SEIRUS requests that this Court enter judgment in its favor, and against
2 DEFENDANTS as follows:

3 1. For judgment that DEFENDANTS have infringed, contributorily infringed and/or
4 induced the infringement of, at least one claim of the ‘804 PATENT and/or ‘690 PATENT;

5 2. That SEIRUS recover damages against DEFENDANTS under 35 U.S.C.
6 § 284 in an amount to be determined at trial or by accounting for the lost profits, but no less than
7 a reasonable royalty, on all sales of each of the infringing products alleged above and any others
8 that are subsequently discovered in the course of this proceeding, plus pre-judgment and post-
9 judgment interest;

10 3. That the damages awarded pursuant to the preceding paragraph be increased to
11 three times the amount awarded because this is an exceptional case under 35 U.S.C. § 284;

12 4. That the Court declare this is an exceptional case and SEIRUS be awarded all of
13 its attorneys’ fees in connection with this matter under 35 U.S.C. § 285;

14 5. That the Court preliminarily and/or permanently enjoin and restrain
15 DEFENDANTS, their officers, agents, servants, employees and those persons in active concert
16 or participation with DEFENDANTS, from further acts of infringement for the remaining life of
17 the ‘804 PATENT and ‘690 PATENT under 35 U.S.C. § 283;

18 6. That the Court preliminarily and permanently enjoin DEFENDANTS and their
19 employees, servants, agents, affiliates, distributors, dealers, attorneys, successors and/or assigns,
20 and all persons in active concert or participation with DEFENDANTS, from manufacturing,
21 using, selling, offering to sell, importing for sale, advertising, displaying, or using any of the
22 ACCUSED TRADE DRESS PRODUCTS, or any products likely to cause confusion, mistake,
23 and deception, or to misappropriate SEIRUS’ intellectual property;

24 7. That the Court award SEIRUS damages for lost profits, loss of goodwill or other
25 damages as appropriate;

26 8. For restitution of all ill-gotten profits related to the intellectual property rights at
27 issue herein that have been retained by DEFENDANTS.

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9. For judgment that SEIRUS be awarded damages under U.S.C. § 1117 for all of its lost profits, the profits of DEFENDANTS, and the costs of this action;

10. That the damages awarded under the preceding paragraph are to be increased to three times the amount awarded under 15 U.S.C. § 1117(b);

11. That DEFENDANTS, their officers, agents, servants, employees and those persons in active concert of participation with any of them, be permanently enjoined from further acts of unfair competition in violation of 15 U.S.C. § 1125(a)(1);

12. That the Court direct the destruction of DEFENDANTS' current advertising, promotional and related materials and products, as they relate to such activity in the United States, that bear the SEIRUS PRODUCT TRADE DRESS and/or SEIRUS PACKAGING TRADE DRESS and/or any other confusingly similar trade dress, and DEFENDANTS' current inventory of products pursuant to 15 U.S.C. § 1118 and other applicable laws;

13. That the Court award punitive damages for intentional and willful acts;

14. That the Court award SEIRUS its costs, expenses, and attorneys' fees in this action pursuant to 15 U.S.C. § 1117, 35 U.S.C. § 235, and other applicable laws; and

15. For such other and further relief as the Court deems proper.

Dated: February 4, 2010

GORDON & REES LLP

By: /s/ Matthew D. Murphey
Matthew D. Murphey
Kimberly D. Howatt
Lindsay J. Hulley
Marc A. Holmquist
Attorneys for Plaintiff
SEIRUS INNOVATIVE ACCESSORIES, INC.

1 **Demand for Jury Trial**

2 Plaintiff SEIRUS hereby demands a jury trial on all issues as to which a jury is available,
3 as provided by Rule 38 the Federal Rules of Civil Procedure.

4
5 Dated: February 4, 2010

GORDON & REES LLP

6
7 By: /s/ Matthew D. Murphey

8 Matthew D. Murphey

9 Kimberly D. Howatt

Lindsay J. Hulley

Marc A. Holmquist

Attorneys for Plaintiff

SEIRUS INNOVATIVE ACCESSORIES, INC.

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