

Gordon & Rees LLP  
4675 MacArthur Court, Suite 800  
Newport Beach, CA 92660

1 MATTHEW D. MURPHEY (SBN: 194111)  
2 LINDSAY J. HULLEY (SBN: 184924)  
3 GORDON & REES LLP  
4 4675 MacArthur Court, Suite 800  
5 Newport Beach, California 92660  
6 Telephone: (949) 255-6950  
7 Facsimile: (949) 474-2060  
8 E-mail: [mmurphey@gordonrees.com](mailto:mmurphey@gordonrees.com)  
9 [lhulley@gordonrees.com](mailto:lhulley@gordonrees.com)

7 KIMBERLY D. HOWATT (SBN: 196921)  
8 GORDON & REES LLP  
9 101 West Broadway, Suite 1600  
10 San Diego, California 92101  
11 Telephone: (619) 696-6700  
12 Facsimile: (619) 696-7124  
13 E-mail: [khowatt@gordonrees.com](mailto:khowatt@gordonrees.com)

11 Attorneys For Plaintiff,  
12 SEIRUS INNOVATIVE ACCESSORIES, INC.

13 UNITED STATES DISTRICT COURT  
14  
15 SOUTHERN DISTRICT OF CALIFORNIA

17 SEIRUS INNOVATIVE ACCESSORIES,  
18 INC., a Utah corporation,  
19  
20 Plaintiff,  
21  
22 v.  
23 CABELA’S, Inc., a Delaware corporation  
24 and ROSS GLOVE COMPANY, a  
25 Wisconsin corporation,  
26  
27 Defendants.

Case No. 09 CV 0102 JLS  
**AMENDED COMPLAINT FOR:**  
**(1) PATENT INFRINGEMENT;**  
**(2) UNFAIR COMPETITION**  
**DEMAND FOR JURY TRIAL**

26 For its claims against defendants CABELA’S, INC. (“CABELA’S”) and ROSS GLOVE  
27 COMPANY (“ROSS GLOVE”) (collectively, “Defendants”), plaintiff SEIRUS INNOVATIVE  
28 ACCESSORIES, INC. (“SEIRUS”), hereby alleges as follows:

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**PARTIES**

1  
2 1. SEIRUS is a Utah corporation with its principal place of business at 13975  
3 Danielson Street, Poway, California 92064.

4 2. Upon information and belief, CABELA’S is a Delaware corporation with a  
5 principal place of business at One Cabela Drive, Sidney, Nebraska 69160.

6 3. Upon information and belief, ROSS GLOVE, is a Wisconsin corporation with a  
7 principal place of business at 1032 Alabama Avenue, Sheboygan, Wisconsin 53081.

8 **JURISDICTION AND VENUE**

9 4. This civil action for patent infringement arises under the patent laws of the United  
10 States, 35 U.S.C. §§ 271, *et seq.*, and for unfair competition, palming off and passing off and  
11 arises under the Lanham Act, and, more specifically, under the provisions of 15 U.S.C. §1125(a).  
12 The Court also has jurisdiction under 15 U.S.C. § 1121(a) and 28 U.S.C. §§ 1338(a) and (b).

13 5. Venue is proper in this district under 28 U.S.C. §§ 1391(c) and 1400(b) because  
14 ROSS GLOVE manufactures the accused products alleged herein, and CABELA’S advertises,  
15 offers for sale and sells the accused products within this judicial district, and the facts alleged  
16 herein and giving rise to the claims in this Complaint substantially occurred within this judicial  
17 district.

18 **FACTS COMMON TO ALL CLAIMS**

19 (A) **SEIRUS’ PATENTS**

20 6. SEIRUS is the owner of United States Letters Patent No. 5,214,804 (the “804  
21 PATENT”) which issued on June 1, 1993 and is titled “PROTECTIVE MASK WITH SCARF.”

22 7. SEIRUS is the owner of United States Letters Patent No. 6,272,690 (the “690  
23 PATENT”) which issued on August 14, 2001 and is titled “HEAD COVERING.”

24 8. SEIRUS is the owner of United States Letters Patent No. D510,652 (the “652  
25 PATENT”) which issued on March 13, 2007 and is titled “NECK PROTECTOR.”

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1           **(B)    CABELA’S AND ROSS GLOVE’S INFRINGEMENT OF SEIRUS’**  
2           **PATENTS**

3           9.       Upon information and belief, ROSS GLOVE manufactures, and CABELA’S  
4 offers for sale, has sold and continues to sell in this judicial district and elsewhere throughout the  
5 United States, the following product, that falls within the scope of at least one claim of the ‘804  
6 PATENT: CABELA’S SOFT SHELL TECHNICAL BALACLAVA.

7           10.      Upon information and belief, ROSS GLOVE manufactures, and CABELA’S  
8 offers for sale, has sold and continues to sell in this judicial district and elsewhere throughout the  
9 United States, the following product, that falls within the scope of the claim of the ‘690  
10 PATENT: CABELA’S SOFT SHELL TECHNICAL BALACLAVA.

11          11.      Upon information and belief, ROSS GLOVE manufactures, and CABELA’S  
12 offers for sale, has sold and continues to sell in this judicial district and elsewhere throughout the  
13 United States, the following product, that falls within the scope of the claim of the ‘652  
14 PATENT: CABELA’S ZIP NECK GAITER.

15          12.      Upon information and belief, CABELA’S and ROSS GLOVE are inducing others  
16 to infringe and are contributorily infringing the ‘804, ‘690 and ‘652 PATENTS, literally or under  
17 the doctrine of equivalents by manufacturing, using, offering for sale and/or selling in this  
18 judicial district and elsewhere throughout the United States the following products, including but  
19 not limited to, CABELA’S SOFT SHELL TECHNICAL BALACLAVA and sport goggles, in  
20 violation of 35 U.S.C. §§ 271(b) and (c).

21           **(C)    SEIRUS’ TRADE DRESS IN PRODUCTS AND PACKAGING**

22           (i)    SEIRUS’ PRODUCT TRADE DRESS

23          13.      By virtue of the extensive use, sale and advertising by SEIRUS and others on  
24 behalf of SEIRUS, the shape, form and appearance (hereinafter the “SEIRUS PRODUCT  
25 TRADE DRESS”) of the *MASQUE*<sup>TM</sup> face protector; the *NEOFLEECE*<sup>®</sup> *COMFORT*  
26 *MASQUE*<sup>TM</sup> face protector; the *NEOFLEECE*<sup>®</sup> *EXTREME MASQUE*<sup>TM</sup> neck and face protector;  
27 the *NEOFLEECE*<sup>®</sup> *COMBO SCARF*<sup>TM</sup> face and neck protector; the *WEATHER SHIELD*<sup>TM</sup> face  
28 and neck protector; the *COMBO CLAVA*<sup>®</sup> head, face and neck protector; the *ULTRA CLAVA*<sup>®</sup>

1 head, face and neck protector; the *MICRO COMBO HEADLINER*<sup>™</sup> face, head and neck  
2 protector; *COMBO TNT HEADLINER*<sup>™</sup> face, head and neck protector; and *NEOFLEECE*<sup>®</sup>  
3 *HEADLINER*<sup>™</sup> head, face and neck protector (the “SEIRUS PROTECTOR LINE”), are  
4 inherently distinctive and have acquired distinctiveness and secondary meaning to signify  
5 SEIRUS as the manufacturer and the source of these goods.

6 (ii) SEIRUS’ PACKAGING TRADE DRESS

7 14. By virtue of the extensive use, sale and advertising by SEIRUS and others on  
8 behalf of SEIRUS, the shape, form and appearance in use of its packaging for the *MASQUE*<sup>™</sup>  
9 face protector, (hereinafter the “SEIRUS PACKAGING TRADE DRESS”), has acquired  
10 secondary meaning in the market for cold-weather headgear.

11 SEIRUS’ CLAIMS FOR RELIEF

12 I. FIRST CLAIM FOR RELIEF

13 (PATENT INFRINGEMENT – U.S. PATENT NO. 5,214,804)

14 15. The allegations of paragraphs 1 through 14 are incorporated by this reference as if  
15 each were fully set forth in this claim.

16 16. As alleged herein, CABELA’S and ROSS GLOVE infringe at least one claim of  
17 the ‘804 PATENT literally and/or under the doctrine of equivalents.

18 17. As a direct and proximate result of Defendants’ infringement of the ‘804  
19 PATENT, SEIRUS has been damaged in an amount to be proved at trial, but in an amount not  
20 less than a reasonable royalty, as well as lost sales, and/or lost profits.

21 18. Based upon its prior knowledge of SEIRUS’ patent rights, its relationship as a  
22 purchaser of SEIRUS goods in the past (including those which practice one or more claims of the  
23 ‘804 PATENT), CABELA’S knows and has known of its infringement of the ‘804 PATENT.  
24 Despite demands that it cease its infringing activity, CABELA’S has refused to cease infringing  
25 and continues to actively infringe the ‘804 PATENT. On information and belief, ROSS GLOVE  
26 had prior knowledge of SEIRUS’ patent rights and of SEIRUS’ products that practice one or  
27 more of the claims of the ‘804 PATENT such that ROSS GLOVE knows and has known of its  
28 infringement of the ‘804 PATENT. Despite such knowledge, ROSS GLOVE has refused to

1 cease its infringing activity and has continued to actively infringe the '804 PATENT.

2 Defendants' infringement is willful and done with intentional disregard of SEIRUS' rights in the  
3 '804 PATENT, so as to render this case exceptional within the purview of 35 U.S.C. §§ 284, and  
4 285, such that SEIRUS is entitled to enhanced damages, costs, and an award of attorneys' fees.

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

8 **II. SECOND CLAIM FOR RELIEF**

9 (PATENT INFRINGEMENT – U.S. PATENT NO. 6,272,690)

10 20. The allegations of paragraphs 1 through 19 are incorporated by this reference as if  
11 each were fully set forth in this claim.

12 21. As alleged herein, CABELA'S and ROSS GLOVE have infringed and are  
13 infringing the claim of the '690 PATENT literally and/or under the doctrine of equivalents.

14 22. As a direct and proximate result of Defendants' infringement of the '690  
15 PATENT, SEIRUS has been damaged in an amount to be proved at trial, but in an amount not  
16 less than a reasonable royalty, as well as lost sales, and/or lost profits.

17 23. Based upon its prior knowledge of SEIRUS' patent rights, its relationship as a  
18 purchaser of SEIRUS goods in the past (including those which practice the claim of the '690  
19 PATENT), CABELA'S knows and has known of its infringement of the '690 PATENT. Despite  
20 demands that it cease its infringing activity, CABELA'S has refused to cease infringing and  
21 continues to actively infringe the '690 PATENT. On information and belief, ROSS GLOVE had  
22 prior knowledge of SEIRUS' patent rights and of SEIRUS' products that practice the claim of  
23 the '690 PATENT such that ROSS GLOVE knows and has known of its infringement of the  
24 '690 PATENT. Despite such knowledge, ROSS GLOVE has refused to cease its infringing  
25 activity and has continued to actively infringe the '690 PATENT. Defendants' infringement is  
26 willful and done with intentional disregard of SEIRUS' rights in the '690 PATENT, so as to  
27 render this case exceptional within the purview of 35 U.S.C. §§ 284, and 285, such that SEIRUS  
28 is entitled to enhanced damages, costs, and an award of attorneys' fees.



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1 **IV. FOURTH CLAIM FOR RELIEF**  
2 (UNFAIR COMPETITION)

3 30. The allegations of paragraphs 1 through 29 are incorporated by this reference the  
4 same as if each were fully set forth in this claim.

5 31. SEIRUS manufactures and sells, *inter alia*, the SEIRUS PROTECTOR LINE and  
6 by virtue of the extensive, use, sale and advertising by SEIRUS, the associated SEIRUS  
7 PRODUCT TRADE DRESS and SEIRUS PACKAGING TRADE DRESS have become  
8 inherently distinctive and have acquired distinctiveness, secondary meaning, and sufficient fame  
9 to signify SEIRUS as the manufacturer and source.

10 32. Upon information and belief, Defendants have unlawfully and without license or  
11 right, copied, imitated, and otherwise created a collection of ACCUSED TRADE DRESS  
12 PRODUCTS. Defendants have also packaged some or all of the ACCUSED TRADE DRESS  
13 PRODUCTS, all of which emulate, imitate, palm off as, pass off as and copy the SEIRUS  
14 PRODUCT TRADE DRESS of the SEIRUS PROTECTOR LINE and SEIRUS PACKAGING  
15 TRADE DRESS of the *MASQUE*<sup>TM</sup> line to thereby emulate, imitate, palm off as, and pass off its  
16 products as members of the family of products that are the SEIRUS FACE PROTECTOR LINE  
17 and the SEIRUS *MASQUE*<sup>TM</sup> line. Such products of CABELA'S include the CABELA'S ZIP  
18 NECK GAITER; CABELA'S SOFT SHELL TECHNICAL BALACLAVA; CABELA'S  
19 NEOPRENE FACE MASK; and CABELA'S CONVERTIBLE HAT (the "ACCUSED TRADE  
20 DRESS PRODUCTS").

21 33. The activities of ROSS GLOVE in manufacturing the ACCUSED TRADE  
22 DRESS PRODUCTS, and of CABELA'S in advertising, selling and offering to sell each of the  
23 ACCUSED TRADE DRESS PRODUCTS, separately and together, is likely to cause confusion,  
24 mistake, and deception as to the source and origin thereof so that purchasers thereof and others  
25 will likely be confused and believe the ACCUSED TRADE DRESS PRODUCTS are part of the  
26 SEIRUS FACE PROTECTOR LINE and SEIRUS *MASQUE*<sup>TM</sup> line. In turn, Defendants are  
27 unfairly competing and misrepresenting their products to be those of SEIRUS in violation of 15  
28 U.S.C. § 1125(a).





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

6           3.       That the damages awarded pursuant to the preceding paragraph 2 be increased to  
7 three times the amount awarded because this is an exceptional case under 35 U.S.C. § 284.

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

10          5.       That the Court preliminarily and/or permanently enjoin and restrain CABELA’S  
11 and ROSS GLOVE, their officers, agents, servants, employees and those persons in active  
12 concert or participation with any or all of them, from further acts of infringement for the  
13 remaining life of the ’804 PATENT under 35 U.S.C. § 283.

14           **B.       On The Second Claim For Relief:**

15          1.       For Judgment that CABELA’S and ROSS GLOVE have infringed, contributorily  
16 infringed and/or induced the infringement, the claim of the ’690 PATENT.

17          2.       That SEIRUS recover damages from CABELA’S and ROSS GLOVE under 35  
18 U.S.C. § 284 in an amount to be determined at trial or by accounting for the lost profits, but no  
19 less than a reasonable royalty, on all sales of each of the infringing products alleged above and  
20 any others that are subsequently discovered in the course of this proceeding, plus pre-judgment  
21 and post-judgment interest.

22          3.       That the damages awarded pursuant to the preceding paragraph 2 be increased to  
23 three times the amount awarded because this is an exceptional case under 35 U.S.C. § 284.

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

26          5.       That the Court preliminarily and/or permanently enjoin and restrain CABELA’S  
27 and ROSS GLOVE, their officers, agents, servants, employees and those persons in active

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1 concert or participation with any or all of them, from further acts of infringement for the  
2 remaining life of the '690 PATENT under 35 U.S.C. § 283.

3 **C. On The Third Claim For Relief:**

4 1. For judgment that CABELA'S and ROSS GLOVE, have infringed, contributorily  
5 infringed and/or induced the infringement, the claim of the '652 PATENT.

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

11 3. That the damages awarded pursuant to the preceding paragraph 2 be increased to  
12 three times the amount awarded because this is an exceptional case under 35 U.S.C. § 284.

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

15 5. That the Court preliminarily and/or permanently enjoin and restrain CABELA'S  
16 and ROSS GLOVE, their officers, agents, servants, employees and those persons in active  
17 concert or participation with any or all of them, from further acts of infringement for the  
18 remaining life of the '652 PATENT under 35 U.S.C. § 283.

19 **D. On The Fourth Claim For Relief:**

20 1. For judgment that SEIRUS be awarded damages under U.S.C. § 1117 for all of its  
21 lost profits, the profits of CABELA'S and ROSS GLOVE, and the costs of this action.

22 2. That the damages awarded under the preceding paragraph 1 are to be increased to  
23 three times the amount awarded under 15 U.S.C. § 1117(b).

24 3. That the Court declare this case exceptional and, under 15 U.S.C.  
25 § 1117(b), award SEIRUS its attorneys' fees.

26 4. That CABELA'S and ROSS GLOVE, their officers, agents, servants, employees  
27 and those persons in active concert of participation with any or all of them, be permanently  
28 enjoined from further acts of unfair competition in violation of 15 U.S.C. § 1125(a)(1).

