

1 MATTHEW D. MURPHEY (SBN: 194111)  
LINDSAY J. HULLEY (SBN: 184924)  
2 MARC A. HOLMQUIST (SBN: 258406)  
3 GORDON & REES LLP  
2211 Michelson Drive, Suite 400  
4 Irvine, California 92612  
Telephone: (949) 255-6950  
5 Facsimile: (949) 474-2060  
Email: [mmurphey@gordonrees.com](mailto:mmurphey@gordonrees.com)  
6 Email: [lhulley@gordonrees.com](mailto:lhulley@gordonrees.com)  
7 Email: [mholmquist@gordonrees.com](mailto:mholmquist@gordonrees.com)

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

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

14 UNITED STATES DISTRICT COURT  
15 SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiff,

18 v.

19  
20 KOMBI LTD., a Connecticut corporation;  
21 KOMBI SPORTS, INC., a Canadian  
corporation,

22 Defendants.  
23  
24  
25  
26  
27  
28

Case No. 09-CV-2213 BEN (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 KOMBI LTD. and KOMBI SPORTS, INC.  
2 (“DEFENDANTS”), plaintiff SEIRUS INNOVATIVE ACCESSORIES, INC. (“SEIRUS”),  
3 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, KOMBI LTD. (“KOMBI”) is a Connecticut  
9 corporation with a principal place of business at 6 Thompson Drive, Essex, Vermont, 05451.  
10 Upon information and belief, KOMBI is engaged in the business of selling men’s, women’s, and  
11 children’s outdoor apparel and accessories, including cold weather head gear and face masks.

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

17 **JURISDICTION AND VENUE**

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

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

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

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: BALACLAVA WITH FACE  
16 MASK ("'804 PATENT ACCUSED PRODUCTS").

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

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

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

24 11. By virtue of the extensive use, sale and advertising by SEIRUS and others on  
25 behalf of SEIRUS, the shape, form and appearance of SEIRUS products (hereinafter the  
26 "SEIRUS PRODUCT TRADE DRESS"), are inherently distinctive and have acquired  
27 distinctiveness and secondary meaning to signify SEIRUS as the manufacturer and the source of  
28 these goods.

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

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

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

11        (C)     **THE INVALIDITY OF DEFENDANT'S PATENT NO. D**

12           14.     Upon information and belief, DEFENDANT is the assignee and owner of United  
13 States Design Patent No. D566,339, entitled "Combined Nose and Mouth Guard" (the "'339  
14 PATENT"). The application (No. 29/278,839) for the '339 PATENT was filed on or about April  
15 11, 2007, and the patent issued on or about April 8, 2008. However, the invention in the '339  
16 PATENT was known or used by others prior to the invention thereof by the applicant for the  
17 '339 PATENT. The Claim of the '339 PATENT is invalid for failure to satisfy the statutory  
18 criteria for patentability under the patent laws of the United States, including without limitation  
19 35 U.S.C. §§ 101, 102, 103, and 171.

20                                   **CLAIMS FOR RELIEF**

21                                   **FIRST CLAIM FOR RELIEF**  
22                                   **(Patent Infringement)**

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

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

27     ///

28     ///



1 activities are preliminarily and permanently enjoined by this Court as provided by 35 U.S.C. §  
2 271(b).

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

8 24. Upon information and belief, DEFENDANTS' infringement of the '804 and '690  
9 PATENTS is willful and done with an intent to harm SEIRUS or in reckless disregard for the  
10 rights of SEIRUS. Therefore, this is an exceptional case and SEIRUS is entitled to enhanced  
11 damages under 35 U.S.C. § 284.

12 25. This is an exceptional case under 35 U.S.C. § 285 entitling SEIRUS to its  
13 reasonable attorneys' fees.

14 26. SEIRUS has been and continues to be damaged by the unlawful infringing  
15 activities of the DEFENDANTS and will be irreparably harmed unless the unlawful infringing  
16 activities are preliminarily and permanently enjoined by this Court as provided by 35 U.S.C. §  
17 283.

18 **THIRD CLAIM FOR RELIEF**  
19 **(Federal Trade Dress Infringement)**  
20 **[15 U.S.C. § 1125(a)]**

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

23 28. DEFENDANTS' actions in connection with the sale, offering for sale, distribution  
24 or advertising of the ACCUSED TRADE DRESS PRODUCTS in interstate commerce, without  
25 the consent of SEIRUS, constitute willful, deliberate and intentional infringement of the SEIRUS  
26 PACKAGING TRADE DRESS and SEIRUS PRODUCT TRADE DRESS, and have caused and  
27 continue to cause a likelihood of confusion, in violation of 15 U.S.C. § 1125.

28 29. By reason of the foregoing, SEIRUS has been injured in an amount to be proven.  
In addition, as a result of DEFENDANTS' unlawful acts, SEIRUS has suffered and will continue

1 to suffer irreparable harm, and SEIRUS has no adequate remedy at law with respect to this  
2 injury. Unless the acts of trademark infringement are enjoined by this Court, SEIRUS will  
3 continue to suffer a risk of irreparable harm. DEFENDANTS' actions have been knowing,  
4 intentional, wanton, and willful, entitling SEIRUS to damages, treble damages, profits,  
5 attorneys' fees, statutory damages, and the costs of this action.

6 **FOURTH CLAIM FOR RELIEF**  
7 **False Designation of Origin**  
8 **[15 U.S.C. § 1125(a)]**

9 30. 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 31. DEFENDANTS' actions in connection with the sale, offering for sale, distribution  
12 or advertising of the ACCUSED TRADE DRESS PRODUCTS in interstate commerce, without  
13 SEIRUS' consent, is a false designation of origin, and have caused and continue to cause a  
14 likelihood of confusion, mistake, and deception as to source, sponsorship, affiliation, and/or  
15 connection in the minds of the public.

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

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

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

27 ///

28 ///

///

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

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

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

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

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

///  
///  
///



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

5 41. On information and belief, DEFENDANTS' unfair competition in violation of 15  
6 U.S.C. § 1125(a)(1) is willful and done with an intent to harm SEIRUS or in reckless disregard  
7 for the rights of SEIRUS such that SEIRUS is entitled to triple damages under 15 U.S.C. §  
8 1117(b).

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

11 43. SEIRUS has been and continues to be damaged by the unlawful unfair  
12 competition of DEFENDANTS and will be irreparably harmed unless the unlawful infringing  
13 activities are permanently enjoined by this Court under the provisions of 15 U.S.C. § 1116.  
14 SEIRUS is entitled to an injunction enjoining and restraining DEFENDANTS from further acts  
15 of unfair competition.

16 **SIXTH CLAIM FOR RELIEF**  
17 **Unfair Competition**  
18 **[Cal. Bus. & Prof. Code § 17200 *et seq.*]**

19 44. 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 45. California Business & Professions Code § 17200 *et seq.* provides that unfair  
22 competition means and includes “any unlawful, unfair or fraudulent business act or practice and  
23 unfair, deceptive, untrue or misleading advertising.”

24 46. By and through DEFENDANTS' conduct, including the conduct detailed above,  
25 DEFENDANTS have engaged in activities that constitute unlawful, unfair, and fraudulent  
26 business practices prohibited by Business & Professions Code § 17200 *et seq.*

27 47. DEFENDANTS' acts of intentional and willful trade dress infringement as  
28 alleged above constitute unfair competition actionable under the laws of the State of California  
as unlawful business acts or practices in that, *inter alia*, said acts violate the federal Lanham Act.

1 Specifically, and without limitation, DEFENDANTS' actions of designing, manufacturing,  
2 packaging, selling, distributing, and/or offering for sale in interstate commerce products bearing  
3 the SEIRUS PRODUCT TRADE DRESS and SEIRUS PACKAGING TRADE DRESS, without  
4 consent of SEIRUS, have caused and continue to cause a likelihood of confusion, mistake, and  
5 deception in the minds of the public. Furthermore, said actions have a significant negative  
6 impact on the commercial value of and market for SEIRUS' products under the SEIRUS  
7 PRODUCT TRADE DRESS and SEIRUS PACKAGING TRADE DRESS, as well as the value  
8 of and market for other products bearing the SEIRUS name.

9 48. DEFENDANTS' acts of infringement as alleged above constitute unfair  
10 competition actionable under the laws of the State of California as fraudulent business acts or  
11 practices, in that, *inter alia*, said acts are likely to confuse the public as to the origin of the  
12 products.

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

16 50. Such acts and omissions described above are unlawful, unfair, fraudulent,  
17 deceptive, misleading, and untrue and constitute a violation of Business & Professions Code  
18 §17200 *et seq.* SEIRUS reserves the right to identify additional violations by DEFENDANTS as  
19 may be established through discovery.

20 51. As a result of DEFENDANTS' said acts of unfair competition, SEIRUS has  
21 suffered and will continue to suffer irreparable harm, and SEIRUS has no adequate remedy at  
22 law with respect to this injury. Unless the acts of unfair competition are enjoined by this Court,  
23 SEIRUS will continue to suffer irreparable harm.

24 52. As a direct and legal result of DEFENDANTS' unlawful, unfair, and fraudulent  
25 conduct described above, DEFENDANTS have been and will continue to be unjustly enriched  
26 with ill-gotten gains.

27 ///

28 ///

**SEVENTH CLAIM FOR RELIEF**  
**Unjust Enrichment**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26 ///

27 ///

28 ///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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.

**Demand for Jury Trial**

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

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.