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20 SEIRUS INNOVATIVE ACCESSORIES, INC.

21 UNITED STATES DISTRICT COURT  
22 SOUTHERN DISTRICT OF CALIFORNIA

23 SEIRUS INNOVATIVE ACCESSORIES,  
24 INC., a Utah corporation,

25 Plaintiff,

26 v.

27 BALBOA MANUFACTURING  
28 COMPANY, LLC, a California Limited  
Liability Company, and SPORTS  
ACCESSORIES AMERICA, INC., a  
Colorado Corporation,

Defendants.

Case No. 09-CV-2274 JAH (WMC)

**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. **DECLARATORY RELIEF FOR PATENT INVALIDITY**

**DEMAND FOR JURY TRIAL**

1 For its claims against defendants BALBOA MANUFACTURING COMPANY LLC and  
2 SPORTS ACCESSORIES AMERICA, INC. (collectively “DEFENDANTS”), plaintiff SEIRUS  
3 INNOVATIVE ACCESSORIES, INC. (“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, BALBOA MANUFACTURING COMPANY, LLC  
9 (“BALBOA”) is a California Limited Liability Company with a principal place of business at  
10 12220 Pkwy Center Drive, Suite B, Poway, California, 92064. Upon information and belief,  
11 BALBOA is the owner and operator of the brand name ZANheadgear, and is engaged in the  
12 business of selling men’s, women’s, and children’s action and outdoor apparel and accessories,  
13 including cold weather head gear and face masks.

14 3. Upon information and belief, SPORTS ACCESSORIES AMERICA, INC.  
15 (“S.A.A.”) is a Colorado Corporation with a principal place of business at 4935 Iris Street,  
16 Wheat Ridge, Colorado 80033. Upon information and belief, S.A.A. is the owner and operator  
17 of various name brands, and is engaged in the business of selling action and outdoor apparel and  
18 accessories, including cold weather head gear and face masks.

19 **JURISDICTION AND VENUE**

20 4. This civil action for infringement, unfair competition, and declaratory relief arises  
21 under the patent laws of the United States, 35 U.S.C. §§ 271, *et seq.*, under the Lanham Act, 15  
22 U.S.C. § 1051 *et seq.*, under 28 U.S.C. §§ 2201-2202, and under California state law governing  
23 unfair competition, specifically California Business and Professions Code § 17200 *et seq.*

24 5. This Court has subject matter jurisdiction over this action pursuant to 15 U.S.C.  
25 § 1121(a) and 28 U.S.C. §§ 1331 and 1338(a) and (b), and supplemental jurisdiction pursuant to  
26 28 U.S.C. § 1367.

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

1 or reasonably should have expected their acts to have consequence in the State of California and  
2 within this judicial district, thus subjecting DEFENDANTS to the personal jurisdiction of this  
3 Court.

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

8 **FACTS COMMON TO ALL CLAIMS**

9 **(A) DEFENDANTS' INFRINGEMENT OF SEIRUS'S PATENTS**

10 8. SEIRUS is the owner of United States Letters Patent No. 5,214,804 (the "'804  
11 PATENT") which issued on June 1, 1993 and is titled "PROTECTIVE MASK WITH SCARF,"  
12 and United States Letters Patent No. 6,272,690 (the "'690 PATENT") which issued on August  
13 14, 2001 and is titled "HEAD COVERING."

14 9. BALBOA is offering for sale and, upon information and belief, have sold in this  
15 judicial district and elsewhere throughout the United States, the following products or lines of  
16 products, that fall within the scope of at least one claim of the '804 PATENT:

17 ZANHEADGEAR NEODANNA, ZANHEADGEAR COOLMAX BALACLAVA,  
18 ZANHEADGEAR FLEECE BALACLAVA WITH DICKIE, ZANHEADGEAR FLEECE  
19 FACE MASK WITH MESH MOUTH ("'804 PATENT ACCUSED PRODUCTS").

20 10. BALBOA is also offering for sale and, upon information belief, has sold in this  
21 judicial district and elsewhere throughout the United States, the following products or lines of  
22 products, that fall within the scope of at least one claim of the '690 PATENT:

23 ZANHEADGEAR COOLMAX BALACLAVA, ZANHEADGEAR FLEECE BALACLAVA  
24 WITH DICKIE. ("'690 PATENT ACCUSED PRODUCTS").

25 11. S.A.A. is offering for sale and, upon information and belief, have sold in this  
26 judicial district and elsewhere throughout the United States products or lines of products that fall  
27 within the scope of at least one claim of the '804 PATENT.

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1           12.     S.A.A. is also offering for sale and, upon information belief, has sold in this  
2 judicial district and elsewhere throughout the United States products or lines of products that fall  
3 within the scope of at least one claim of the '690 PATENT.

4     **(B)     DEFENDANT'S INFRINGEMENT OF SEIRUS'S TRADE DRESS IN**  
5     **PRODUCTS AND PACKAGING**

6           (i)     **SEIRUS'S PRODUCT TRADE DRESS**

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

12           (ii)    **SEIRUS'S PACKAGING TRADE DRESS**

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

17           15.     BALBOA is offering for sale and, upon information and belief, has sold in this  
18 judicial district and elsewhere throughout the United States, the following products, that copy,  
19 imitate, palm off as, and pass off their products as members of the family of products that  
20 contain the SEIRUS PRODUCT TRADE DRESS and SEIRUS PACKAGING TRADE DRESS:  
21 ZANHEADGEAR NEODANNA, ZANHEADGEAR COOLMAX BALACLAVA,  
22 ZANHEADGEAR FLEECE BALACLAVA WITH DICKIE, ZANHEADGEAR FLEECE  
23 FACE MASK WITH MESH MOUTH (the "ACCUSED TRADE DRESS PRODUCTS").

24           16.     S.A.A. is offering for sale and, upon information and belief, has sold in this  
25 judicial district and elsewhere throughout the United States products that copy, imitate, palm off  
26 as, and pass off their products as members of the family of products that contain the SEIRUS  
27 PRODUCT TRADE DRESS and SEIRUS PACKAGING TRADE DRESS.

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1 (C) **THE INVALIDITY OF BALBOA’S PATENT NO. D566,339**

2 17. Upon information and belief, BALBOA is the assignee and owner of United  
3 States Design Patent No. D566,339, entitled “Combined Nose and Mouth Guard” (the “‘339  
4 PATENT”). The application (No. 29/278,839) for the ‘339 PATENT was filed on or about April  
5 11, 2007, and the patent issued on or about April 8, 2008. However, the invention in the ‘339  
6 PATENT was known or used by others prior to the invention thereof by the applicant for the  
7 ‘339 PATENT. The Claim of the ‘339 PATENT is invalid for failure to satisfy the statutory  
8 criteria for patentability under the patent laws of the United States, including without limitation  
9 35 U.S.C. §§ 101, 102, 103, and 171.

10 **CLAIMS FOR RELIEF**

11 **FIRST CLAIM FOR RELIEF**  
12 **(Patent Infringement)**

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

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

17 20. As a direct and proximate result of DEFENDANTS’ infringement(s) of the ‘804  
18 and/or ‘690 PATENTS, SEIRUS has been damaged in an amount to be proved at trial, but in an  
19 amount not less than a reasonable royalty, and includes lost sales, and/or lost profits.

20 21. Based upon its prior knowledge of SEIRUS’S patent rights, and other facts to be  
21 proved at trial, DEFENDANTS know and have known of their infringement(s) of the ‘804  
22 and/or ‘690 PATENTS. Based on these facts and those to be proved at trial, DEFENDANTS’  
23 infringement(s) is willful and done with intentional disregard of SEIRUS’S rights in the ‘804  
24 and/or ‘690 PATENTS, so as to render this case exceptional within the purview of 35 U.S.C. §§  
25 284, and 285, such that SEIRUS is entitled to enhanced damages, costs, and an award of  
26 attorneys’ fees.

27 22. SEIRUS has been and continues to be damaged by the unlawful infringing  
28 activities of DEFENDANTS and will be irreparably harmed unless the unlawful infringing

1 activities are preliminarily and permanently enjoined by this Court as provided by 35 U.S.C. §  
2 283.

3 **SECOND CLAIM FOR RELIEF**  
4 **(Inducing Patent Infringement)**

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

7 24. Upon information and belief, DEFENDANTS have been and are now unlawfully  
8 inducing others to infringe and/or contributorily infringe, literally or under the doctrine of  
9 equivalents, the claim of the '804 and/or '690 PATENTS by using, offering to sell, advertising  
10 for sale and selling DEFENDANTS' products in this judicial district and throughout the United  
11 States as follows: ZANHEADGEAR NEODANNA, ZANHEADGEAR COOLMAX  
12 BALACLAVA, ZANHEADGEAR FLEECE BALACLAVA WITH DICKIE,  
13 ZANHEADGEAR FLEECE FACE MASK WITH MESH MOUTH, and others to be proven at  
14 trial.

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

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

27 27. Upon information and belief, DEFENDANTS' infringement(s) of the '804 and  
28 '690 PATENTS is willful and done with an intent to harm SEIRUS or in reckless disregard for  
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1 the rights of SEIRUS. Therefore, this is an exceptional case and SEIRUS is entitled to enhanced  
2 damages under 35 U.S.C. § 284.

3 28. This is an exceptional case under 35 U.S.C. § 285 entitling SEIRUS to its  
4 reasonable attorneys' fees.

5 29. SEIRUS has been and continues to be damaged by the unlawful infringing  
6 activities of the DEFENDANTS and will be irreparably harmed unless the unlawful infringing  
7 activities are preliminarily and permanently enjoined by this Court as provided by 35 U.S.C. §  
8 283.

9 **THIRD CLAIM FOR RELIEF**  
10 **(Federal Trade Dress Infringement)**  
11 **[15 U.S.C. § 1125(a)]**

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

14 31. DEFENDANTS' actions in connection with the sale, offering for sale, distribution  
15 or advertising of the ACCUSED TRADE DRESS PRODUCTS in interstate commerce, without  
16 the consent of SEIRUS, constitute willful, deliberate and intentional infringement(s) of the  
17 SEIRUS PACKAGING TRADE DRESS and SEIRUS PRODUCT TRADE DRESS, and have  
18 caused and continue to cause a likelihood of confusion, in violation of 15 U.S.C. § 1125.

19 32. By reason of the foregoing, SEIRUS has been injured in an amount to be proven.  
20 In addition, as a result of DEFENDANTS' unlawful acts, SEIRUS has suffered and will continue  
21 to suffer irreparable harm, and SEIRUS has no adequate remedy at law with respect to this  
22 injury. Unless the acts of trademark infringement(s) are enjoined by this Court, SEIRUS will  
23 continue to suffer a risk of irreparable harm. DEFENDANTS' actions have been knowing,  
24 intentional, wanton, and willful, entitling SEIRUS to damages, treble damages, profits,  
25 attorneys' fees, statutory damages, and the costs of this action.

26 **FOURTH CLAIM FOR RELIEF**  
27 **False Designation of Origin**  
28 **[15 U.S.C. § 1125(a)]**

33. 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.





1 products including the ACCUSED TRADE DRESS PRODUCTS, all of which emulate, imitate,  
2 palm off as, pass off as and copy the SEIRUS PRODUCT TRADE DRESS and SEIRUS  
3 PACKAGING TRADE DRESS to thereby emulate, imitate, palm off as, and pass off its  
4 products as SEIRUS products.

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

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

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

19 44. On information and belief, DEFENDANTS' unfair competition in violation of 15  
20 U.S.C. § 1125(a)(1) is willful and done with an intent to harm SEIRUS or in reckless disregard  
21 for the rights of SEIRUS such that SEIRUS is entitled to triple damages under 15 U.S.C. §  
22 1117(b).

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

25 46. SEIRUS has been and continues to be damaged by the unlawful unfair  
26 competition of DEFENDANTS and will be irreparably harmed unless the unlawful infringing  
27 activities are permanently enjoined by this Court under the provisions of 15 U.S.C. § 1116.

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1 SEIRUS is entitled to an injunction enjoining and restraining DEFENDANTS from further acts  
2 of unfair competition.

3 **SIXTH CLAIM FOR RELIEF**  
4 **Unfair Competition**  
5 **[Cal. Bus. & Prof. Code § 17200 *et seq.*]**

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

8 48. California Business & Professions Code § 17200 *et seq.* provides that unfair  
9 competition means and includes “any unlawful, unfair or fraudulent business act or practice and  
10 unfair, deceptive, untrue or misleading advertising.”

11 49. By and through DEFENDANTS’ conduct, including the conduct detailed above,  
12 DEFENDANTS have engaged in activities that constitute unlawful, unfair, and fraudulent  
13 business practices prohibited by Business & Professions Code § 17200 *et seq.*

14 50. DEFENDANTS’ acts of intentional and willful trade dress infringement as  
15 alleged above constitute unfair competition actionable under the laws of the State of California  
16 as unlawful business acts or practices in that, *inter alia*, said acts violate the federal Lanham Act.  
17 Specifically, and without limitation, DEFENDANTS’ actions of designing, manufacturing,  
18 packaging, selling, distributing, and/or offering for sale in interstate commerce products bearing  
19 the SEIRUS PRODUCT TRADE DRESS and SEIRUS PACKAGING TRADE DRESS, without  
20 consent of SEIRUS, have caused and continue to cause a likelihood of confusion, mistake, and  
21 deception in the minds of the public. Furthermore, said actions have a significant negative  
22 impact on the commercial value of and market for SEIRUS’S products under the SEIRUS  
23 PRODUCT TRADE DRESS and SEIRUS PACKAGING TRADE DRESS, as well as the value  
24 of and market for other products bearing the SEIRUS name.

25 51. DEFENDANTS’ acts of infringement as alleged above constitute unfair  
26 competition actionable under the laws of the State of California as fraudulent business acts or  
27 practices, in that, *inter alia*, said acts are likely to confuse the public as to the origin of the  
28 products.

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1           59. SEIRUS and BALBOA have an actual case or controversy as to the invalidity of  
2 the '339 PATENT that is appropriate for adjudication by this Court. To avoid legal uncertainty  
3 and to protect its substantial investment, and anticipated future investment, in its business,  
4 SEIRUS now brings this declaratory relief action.

5           60. This is an exceptional case and SEIRUS is entitled to recover from BALBOA  
6 reasonable attorneys' fees and expenses in bringing this claim for relief.

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

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

11           2. That SEIRUS recover damages against DEFENDANTS under 35 U.S.C.  
12 § 284 in an amount to be determined at trial or by accounting for the lost profits, but no less than  
13 a reasonable royalty, on all sales of each of the infringing products alleged above and any others  
14 that are subsequently discovered in the course of this proceeding, plus pre-judgment and post-  
15 judgment interest;

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

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

20           5. That the Court preliminarily and/or permanently enjoin and restrain  
21 DEFENDANTS, its officers, agents, servants, employees and those persons in active concert or  
22 participation with DEFENDANTS, from further acts of infringement for the remaining life of the  
23 '804 PATENT and '690 PATENT under 35 U.S.C. § 283;

24           6. That the Court preliminarily and permanently enjoin DEFENDANTS and its  
25 employees, servants, agents, affiliates, distributors, dealers, attorneys, successors and/or assigns,  
26 and all persons in active concert or participation with DEFENDANTS, from manufacturing,  
27 using, selling, offering to sell, importing for sale, advertising, displaying, or using any of the

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1 ACCUSED TRADE DRESS PRODUCTS, or any products likely to cause confusion, mistake,  
2 and deception, or to misappropriate SEIRUS'S intellectual property;

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

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

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

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

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

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

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

20 14. For a declaration that the BALBOA'S United States Design Patent No. D566,399  
21 is invalid; and

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

23 Dated: February 10, 2010

GORDON & REES LLP

24  
25 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 10, 2010

GORDON & REES LLP

6 By: /s/ Matthew D. Murphey

7 Matthew D. Murphey

8 Kimberly D. Howatt

9 Lindsay J. Hulley

Marc A. Holmquist

Attorneys for Plaintiff

SEIRUS INNOVATIVE ACCESSORIES, INC.

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