

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
6 Email: lhulley@gordonrees.com
7 Email: 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

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,
18 Plaintiff,

19 v.

20 DA KINE HAWAII, INC., a Hawaii
corporation; BILLABONG
21 INTERNATIONAL, LTD., an Australian
22 corporation,
23 Defendants.

Case No. 09-CV-2272 IEG (BLM)

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 DA KINE HAWAII, INC. and BILLABONG
2 INTERNATIONAL LTD. (“DEFENDANTS”), plaintiff SEIRUS INNOVATIVE
3 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, DA KINE HAWAII, INC. (“DA KINE”) is a
9 Hawaii corporation with a principal place of business at 408 Columbia Street, Number 300,
10 Hood River, Oregon, 97031. Upon information and belief, DA KINE is engaged in the business
11 of selling men’s, women’s, and children’s outdoor apparel and accessories, including cold
12 weather head gear and face masks.

13 3. Upon information and belief, BILLABONG INTERNATIONAL, LTD.
14 (“BILLABONG”) is an Australian corporation with a principal place of business at 1 Billabong
15 Place, Burleigh Heads QLD 4220, Australia. Upon information and belief, BILLABONG is
16 engaged in the business of selling men’s, women’s, and children’s sportswear and clothing and is
17 the parent company of its subsidiary DA KINE.

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'S 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: DA KINE FITTED
16 BALACLAVA ("'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: DA KINE FITTED
20 BALACLAVA ("'690 PATENT ACCUSED PRODUCTS").

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

23 **(i) SEIRUS'S 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 SEIRUS'S consent, is a false designation of origin, and have caused and continue to cause a
2 likelihood of confusion, mistake, and deception as to source, sponsorship, affiliation, and/or
3 connection in the minds of the public.

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

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

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

15 **FIFTH CLAIM FOR RELIEF**
16 **(Unfair Competition)**
17 **[15 U.S.C. § 1125(a)(1)]**

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

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

25 36. Upon information and belief, DEFENDANTS have unlawfully and without
26 license or right, copied, imitated, and otherwise created a collection of products and lines of
27 products including the ACCUSED TRADE DRESS PRODUCTS, all of which emulate, imitate,
28 palm off as, pass off as and copy the SEIRUS PRODUCT TRADE DRESS and SEIRUS

///

1 PACKAGING TRADE DRESS to thereby emulate, imitate, palm off as, and pass off their
2 products as SEIRUS products.

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

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

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

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

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

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

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

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

43. 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.

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

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

46. DEFENDANTS’ acts of intentional and willful trade dress infringement as 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. Specifically, and without limitation, DEFENDANTS’ actions of designing, manufacturing, packaging, selling, distributing, and/or offering for sale in interstate commerce products bearing the SEIRUS PRODUCT TRADE DRESS and SEIRUS PACKAGING TRADE DRESS, without the consent of SEIRUS, have caused and continue to cause a likelihood of confusion, mistake, and deception in the minds of the public. Furthermore, said actions have a significant negative impact on the commercial value of and market for SEIRUS’S products under the SEIRUS PRODUCT TRADE DRESS and SEIRUS PACKAGING TRADE DRESS, as well as the value of and market for other products bearing the SEIRUS name.

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

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

1 a reasonable royalty, on all sales of each of the infringing products alleged above and any others
2 that are subsequently discovered in the course of this proceeding, plus pre-judgment and post-
3 judgment interest;

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

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

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

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

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

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

22 9. For judgment that SEIRUS be awarded damages under 15 U.S.C. § 1117 for all of
23 its lost profits, the profits of DEFENDANTS, and the costs of this action;

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

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

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

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

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

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

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

10 Dated: February 10, 2010

GORDON & REES LLP

/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

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

20 Dated: February 10, 2010

GORDON & REES LLP

/s/ Matthew D. Murphey

Matthew D. Murphey

Kimberly D. Howatt

Lindsay J. Hulley

Marc A. Holmquist

Attorneys for Plaintiff

SEIRUS INNOVATIVE ACCESSORIES, INC.