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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 TURTLE FUR COMPANY, a Vermont  
21 corporation,

22 Defendant.

Case No. 09-CV-2271 JM (WMC)

**FIRST AMENDED COMPLAINT FOR:**

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

**DEMAND FOR JURY TRIAL**

1 For its claims against defendant TURTLE FUR COMPANY (“DEFENDANT”), plaintiff  
2 SEIRUS INNOVATIVE ACCESSORIES, INC. (“SEIRUS”), hereby alleges as follows:

3 **PARTIES**

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

7 2. Upon information and belief, TURTLE FUR COMPANY (“DEFENDANT”) is a  
8 Vermont corporation with a principal place of business at 146 Industrial Park Drive, Morrisville,  
9 Vermont, 05661. Upon information and belief, DEFENDANT is engaged in the business of  
10 selling men’s, women’s, and children’s outdoor apparel and accessories, including cold weather  
11 head gear and face masks.

12 **JURISDICTION AND VENUE**

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

17 4. This Court has subject matter jurisdiction over this action pursuant to 15 U.S.C.  
18 § 1121(a) and 28 U.S.C. §§ 1331 and 1338(a) and (b), and supplemental jurisdiction pursuant to  
19 28 U.S.C. § 1367.

20 5. Upon information and belief, DEFENDANT has either directly or through its  
21 agents transacted business in the State of California and within this judicial district, and expected  
22 or reasonably should have expected its acts to have consequence in the State of California and  
23 within this judicial district, thus subjecting DEFENDANT to the personal jurisdiction of this  
24 Court.

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

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**FACTS COMMON TO ALL CLAIMS**

**(A) DEFENDANT’S INFRINGEMENT OF SEIRUS’S PATENTS**

7. SEIRUS is the owner of United States Letters Patent No. 5,214,804 (the “‘804 PATENT”) which issued on June 1, 1993 and is titled “PROTECTIVE MASK WITH SCARF,” and United States Letters Patent No. 6,272,690 (the “‘690 PATENT”) which issued on August 14, 2001 and is titled “HEAD COVERING.”

8. DEFENDANT is offering for sale and, upon information and belief, has sold in this judicial district and elsewhere throughout the United States, the following products that fall within the scope of at least one claim of the ‘804 PATENT: SAVE FACE WINDTECH MASKOT (“‘804 PATENT ACCUSED PRODUCTS”).

9. DEFENDANT is also offering for sale and, upon information belief, has sold in this judicial district and elsewhere throughout the United States, the following products that fall within the scope of at least one claim of the ‘690 PATENT: SAVE FACE WINDTECH MASKOT (“‘690 PATENT ACCUSED PRODUCTS”).

**(B) DEFENDANT’S INFRINGEMENT OF SEIRUS’S TRADE DRESS IN PRODUCTS AND PACKAGING**

**(i) SEIRUS’S PRODUCT TRADE DRESS**

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

**(ii) SEIRUS’S PACKAGING TRADE DRESS**

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

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1 12. DEFENDANT is offering for sale and, upon information and belief, has sold in  
2 this judicial district and elsewhere throughout the United States, the following products, that  
3 copy, imitate, palm off as, and pass off their products as members of the family of products that  
4 contain the SEIRUS PRODUCT TRADE DRESS and SEIRUS PACKAGING TRADE DRESS:  
5 SAVE FACE WINDTECH MASKOT (the "ACCUSED TRADE DRESS PRODUCTS").

6 **CLAIMS FOR RELIEF**

7 **FIRST CLAIM FOR RELIEF**  
8 **(Patent Infringement)**

9 13. 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 14. As alleged herein, DEFENDANT is infringing at least one claim of the '804  
12 and/or '690 PATENTS literally and/or under the doctrine of equivalents.

13 15. As a direct and proximate result of DEFENDANT'S infringement of the '804  
14 and/or '690 PATENTS, SEIRUS has been damaged in an amount to be proved at trial, but in an  
15 amount not less than a reasonable royalty, and includes lost sales, and/or lost profits.

16 16. Based upon its prior knowledge of SEIRUS'S patent rights, and other facts to be  
17 proved at trial, DEFENDANT knows and has known of its infringement of the '804 and/or '690  
18 PATENTS. Based on these facts and those to be proved at trial, DEFENDANT'S infringement  
19 is willful and done with intentional disregard of SEIRUS'S rights in the '804 and/or '690  
20 PATENTS, so as to render this case exceptional within the purview of 35 U.S.C. §§ 284, and  
21 285, such that SEIRUS is entitled to enhanced damages, costs, and an award of attorneys' fees.

22 17. SEIRUS has been and continues to be damaged by the unlawful infringing  
23 activities of DEFENDANT and will be irreparably harmed unless the unlawful infringing  
24 activities are preliminarily and permanently enjoined by this Court as provided by 35 U.S.C. §  
25 283.

26 **SECOND CLAIM FOR RELIEF**  
27 **(Inducing Patent Infringement)**

28 18. 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           19.     Upon information and belief, DEFENDANT has been and is now unlawfully  
2 inducing others to infringe and/or contributorily infringe, literally or under the doctrine of  
3 equivalents, the claim of the '804 and/or '690 PATENTS by using, offering to sell, advertising  
4 for sale and selling DEFENDANT'S products in this judicial district and throughout the United  
5 States as follows: SAVE FACE WINDTECH MASKOT.

6           20.     SEIRUS is marking its products that fall within the scope of the '804 and '690  
7 PATENTS as required by 35 U.S.C. § 287; DEFENDANT has otherwise had knowledge and  
8 notice of the '804 and/or '690 PATENTS and its activities constitute knowing and willful patent  
9 infringement. SEIRUS has been and continues to be damaged by the unlawful infringing  
10 activities of DEFENDANT and will be irreparably harmed unless the unlawful infringing  
11 activities are preliminarily and permanently enjoined by this Court as provided by 35 U.S.C. §  
12 271(b).

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

18           22.     Upon information and belief, DEFENDANT'S infringement of the '804 and '690  
19 PATENTS is willful and done with an intent to harm SEIRUS or in reckless disregard for the  
20 rights of SEIRUS. Therefore, this is an exceptional case and SEIRUS is entitled to enhanced  
21 damages under 35 U.S.C. § 284.

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

24           24.     SEIRUS has been and continues to be damaged by the unlawful infringing  
25 activities of the DEFENDANT and will be irreparably harmed unless the unlawful infringing  
26 activities are preliminarily and permanently enjoined by this Court as provided by 35 U.S.C. §  
27 283.

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1 **THIRD CLAIM FOR RELIEF**  
2 **(Federal Trade Dress Infringement)**  
3 **[15 U.S.C. § 1125(a)]**

4 25. 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 26. DEFENDANT’S actions in connection with the sale, offering for sale, distribution  
7 or advertising of the ACCUSED TRADE DRESS PRODUCTS in interstate commerce, without  
8 the consent of SEIRUS, constitute willful, deliberate and intentional infringement of the SEIRUS  
9 PACKAGING TRADE DRESS and SEIRUS PRODUCT TRADE DRESS, and have caused and  
10 continue to cause a likelihood of confusion, in violation of 15 U.S.C. § 1125.

11 27. By reason of the foregoing, SEIRUS has been injured in an amount to be proven.  
12 In addition, as a result of DEFENDANT’S unlawful acts, SEIRUS has suffered and will continue  
13 to suffer irreparable harm, and SEIRUS has no adequate remedy at law with respect to this  
14 injury. Unless the acts of trade dress infringement are enjoined by this Court, SEIRUS will  
15 continue to suffer a risk of irreparable harm. DEFENDANT’S actions have been knowing,  
16 intentional, wanton, and willful, entitling SEIRUS to damages, treble damages, profits,  
17 attorneys’ fees, statutory damages, and the costs of this action.

18 **FOURTH CLAIM FOR RELIEF**  
19 **False Designation of Origin**  
20 **[15 U.S.C. § 1125(a)]**

21 28. 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 29. DEFENDANT’S actions in connection with the sale, offering for sale, distribution  
24 or advertising of the ACCUSED TRADE DRESS PRODUCTS in interstate commerce, without  
25 SEIRUS’S consent, is a false designation of origin, and have caused and continue to cause a  
26 likelihood of confusion, mistake, and deception as to source, sponsorship, affiliation, and/or  
27 connection in the minds of the public.

28 30. DEFENDANT’S false designation of origin is in violation of §43(a) of the  
Lanham Act, 15 U.S.C. §1125(a)(1).

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1 31. By reason of the foregoing, SEIRUS has been injured in an amount not yet fully  
2 determined, but believed to be in excess of \$75,000. In addition, as a result of DEFENDANT'S  
3 acts of infringement, SEIRUS has suffered and will continue to suffer irreparable harm, and  
4 SEIRUS has no adequate remedy at law with respect to this injury. Unless DEFENDANT'S acts  
5 of infringement are further enjoined by this Court, SEIRUS will continue to suffer a risk of  
6 irreparable harm.

7 32. DEFENDANT'S actions have been knowing, intentional, wanton, and willful,  
8 entitling SEIRUS to damages, treble damages, profits, attorney's fees, and the costs of this action  
9 pursuant to 15 U.S.C. § 1117 in this Court's discretion.

10 **FIFTH CLAIM FOR RELIEF**  
11 **(Unfair Competition)**  
12 **[15 U.S.C. § 1125(a)(1)]**

13 33. 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 34. SEIRUS manufactures and sells products and lines of products, and by virtue of  
16 the extensive, use, sale and advertising by SEIRUS, the associated SEIRUS PRODUCT TRADE  
17 DRESS and SEIRUS PACKAGING TRADE DRESS have become inherently distinctive and  
18 have acquired distinctiveness, secondary meaning, and sufficient fame to signify SEIRUS as the  
19 manufacturer and source of said products and lines of products.

20 35. Upon information and belief, DEFENDANT has unlawfully and without license  
21 or right, copied, imitated, and otherwise created a collection of products and lines of products  
22 including the ACCUSED TRADE DRESS PRODUCTS, all of which emulate, imitate, palm off  
23 as, pass off as and copy the SEIRUS PRODUCT TRADE DRESS and SEIRUS PACKAGING  
24 TRADE DRESS to thereby emulate, imitate, palm off as, and pass off its products as SEIRUS  
25 products.

26 36. The activities of DEFENDANT in advertising, selling and offering to sell each of  
27 the ACCUSED TRADE DRESS PRODUCTS, separately and together, is likely to cause  
28 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

1 emanate from SEIRUS. In turn, DEFENDANT is unfairly competing and misrepresenting its  
2 products to be those of SEIRUS in violation of 15 U.S.C. § 1125(a).

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

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

11 39. On information and belief, DEFENDANT'S unfair competition in violation of 15  
12 U.S.C. § 1125(a)(1) is willful and done with an intent to harm SEIRUS or in reckless disregard  
13 for the rights of SEIRUS such that SEIRUS is entitled to triple damages under 15 U.S.C. §  
14 1117(b).

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

17 41. SEIRUS has been and continues to be damaged by the unlawful unfair  
18 competition of DEFENDANT and will be irreparably harmed unless the unlawful infringing  
19 activities are permanently enjoined by this Court under the provisions of 15 U.S.C. § 1116.  
20 SEIRUS is entitled to an injunction enjoining and restraining DEFENDANT from further acts of  
21 unfair competition.

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

25 42. 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 43. California Business & Professions Code § 17200 *et seq.* provides that unfair  
28 competition means and includes "any unlawful, unfair or fraudulent business act or practice and  
unfair, deceptive, untrue or misleading advertising."



1           44. By and through DEFENDANT’S conduct, including the conduct detailed above,  
2 DEFENDANT has engaged in activities that constitute unlawful, unfair, and fraudulent business  
3 practices prohibited by Business & Professions Code § 17200 *et seq.*

4           45. DEFENDANT’S acts of intentional and willful trade dress infringement as  
5 alleged above constitute unfair competition actionable under the laws of the State of California  
6 as unlawful business acts or practices in that, *inter alia*, said acts violate the federal Lanham Act.  
7 Specifically, and without limitation, DEFENDANT’S actions of designing, manufacturing,  
8 packaging, selling, distributing, and/or offering for sale in interstate commerce products bearing  
9 the SEIRUS PRODUCT TRADE DRESS and SEIRUS PACKAGING TRADE DRESS, without  
10 the consent of SEIRUS, have caused and continue to cause a likelihood of confusion, mistake,  
11 and deception in the minds of the public. Furthermore, said actions have a significant negative  
12 impact on the commercial value of and market for SEIRUS’S products under the SEIRUS  
13 PRODUCT TRADE DRESS and SEIRUS PACKAGING TRADE DRESS, as well as the value  
14 of and market for other products bearing the SEIRUS name.

15           46. DEFENDANT’S acts of infringement as alleged above constitute unfair  
16 competition actionable under the laws of the State of California as fraudulent business acts or  
17 practices, in that, *inter alia*, said acts are likely to confuse the public as to the origin of the  
18 products.

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

22           48. Such acts and omissions described above are unlawful, unfair, fraudulent,  
23 deceptive, misleading, and untrue and constitute a violation of Business & Professions Code  
24 §17200 *et seq.* SEIRUS reserves the right to identify additional violations by DEFENDANT as  
25 may be established through discovery.

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1           49.     As a result of DEFENDANT’S said acts of unfair competition, SEIRUS has  
2 suffered and will continue to suffer irreparable harm, and SEIRUS has no adequate remedy at  
3 law with respect to this injury. Unless the acts of unfair competition are enjoined by this Court,  
4 SEIRUS will continue to suffer irreparable harm.

5           50.     As a direct and legal result of DEFENDANT’S unlawful, unfair, and fraudulent  
6 conduct described above, DEFENDANT has been and will continue to be unjustly enriched with  
7 ill-gotten gains.

8   **SEVENTH CLAIM FOR RELIEF**  
9   **Unjust Enrichment**

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

12           52.     DEFENDANT’S acts of misappropriation and illegal use of SEIRUS’S  
13 intellectual property rights and valuable goodwill associated with those rights have resulted in  
14 DEFENDANT being unjustly enriched at SEIRUS’S expense.

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

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

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

21           1.     For judgment that DEFENDANT has infringed, contributorily infringed and/or  
22 induced the infringement of, at least one claim of the ‘804 PATENT and/or ‘690 PATENT;

23           2.     That SEIRUS recover damages against DEFENDANT under 35 U.S.C.  
24 § 284 in an amount to be determined at trial or by accounting for the lost profits, but no less than  
25 a reasonable royalty, on all sales of each of the infringing products alleged above and any others  
26 that are subsequently discovered in the course of this proceeding, plus pre-judgment and post-  
27 judgment interest;

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

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

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

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

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

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

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

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

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

26           12.      That the Court direct the destruction of DEFENDANT'S current advertising,  
27 promotional and related materials and products, as they relate to such activity in the United  
28 States, that bear the SEIRUS PRODUCT TRADE DRESS and/or SEIRUS PACKAGING

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1 TRADE DRESS and/or any other confusingly similar trade dress, and DEFENDANT'S current  
2 inventory of products pursuant to 15 U.S.C. § 1118 and other applicable laws;

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

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

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

7 Dated: February 10, 2010

**GORDON & REES LLP**

8  
9 /s/ Matthew D. Murphey

10 Matthew D. Murphey

11 Kimberly D. Howatt

12 Lindsay J. Hulley

13 Marc A. Holmquist

14 Attorneys for Plaintiff

15 SEIRUS INNOVATIVE ACCESSORIES, INC.

16 **Demand for Jury Trial**

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

19 Dated: February 10, 2010

**GORDON & REES LLP**

20  
21 /s/ Matthew D. Murphey

22 Matthew D. Murphey

23 Kimberly D. Howatt

24 Lindsay J. Hulley

25 Marc A. Holmquist

26 Attorneys for Plaintiff

27 SEIRUS INNOVATIVE ACCESSORIES, INC.  
28