



interest and costs and there is diversity of citizenship among the parties. Accordingly jurisdiction is appropriate herein.

3. Venue is proper in the District Court pursuant to 28 U.S.C. §1391 on either of the following alternative grounds: (a) a substantial part of the events giving rise to the instant claim for declaratory relief and subject matter thereof occurred in this District, including, without limitation, that DCS received the “cease and desist” letter from HBC in this District, that counsel for DCS received a copy of the “cease and desist” letter from HBC in this District, that DCS’s principal place of business is located in this District, that DCS is a Georgia corporation [with its registered agent located in this District], and that DCS adopted and commenced use of the camouflage pattern that is the subject of the “cease and desist” letter in this District, and (b) HBC is subject to personal jurisdiction in this District in that it has systematic contacts with this District, sells goods to customers in this District, and conducts business in this District.

4. DCS is a limited liability company, organized and existing under the laws of the State of Georgia, wherein DCS markets and advertises, and its licensees market, advertise and sell, goods containing a DCS’s A-TACS FG Camo pattern that is the subject matter of HBC’s “cease and desist” letter to DCS.

5. HBC is a Canadian corporation with its principal place of business in Maple Ridge, British Columbia, Canada. HBC and its licensees and/or distributors are believed to sell items containing its camouflage patterns within this District, directly, through wholesale, retail and/or internet sales.

6. In its “cease and desist” letter to DCS, HBC demanded that DCS “cease and desist offering for sale products featuring the Infringing Pattern [the A-TACS FG Camo pattern], [and]... immediately remove from its website all images of the Infringing Pattern.”

7. In its “cease and desist” letter to DCS, HBC states that “The Infringing Pattern is

a virtual duplication of several of HyperStealth's copyrighted patterns, which have been published in the public domain since approximately 2005, including HyperStealth's Ghostex Delta, SpecAm, SOPAT, Eurospec, Ghostex Alpha and CAMOPAT patterns." The alleged violations for copyright infringement are discussed below.

## **II. No Copyright Infringement**

8. In its "cease and desist" letter to DCS, HBC contends that the "A-TACS FG Camo" pattern created by DCS is "a virtual duplication" of several of HyperStealth's copyrighted patterns, namely Ghostex, Delta, SpecAm, SOPAT, Eurospec, Ghostex Alpha and CAMOPAT (collectively the "HyperStealth Patterns"). A copy of HyperStealth's patterns are collectively attached hereto as Exhibit B.

9. Despite HBC's contention otherwise, the ATACS FG Camo pattern does not infringe on any of the HyperStealth Patterns. A copy of the A-TACS FG Camo Pattern is attached hereto as Exhibit C. A review of the A-TACS FG Camo pattern and the HyperStealth Patterns demonstrates clearly that they are not substantially similar to an ordinary observer.

10. In order for HBC to establish a case of copyright infringement, HBC must establish (a) ownership of a valid copyright; (b) unauthorized copying of the protected material; and (c) that the copying constituted unlawful appropriation.

11. DCS acknowledges that HBC may own common law copyrights in the HyperStealth Patterns.

12. DCS notes that when determining whether or not the patterns are the same or substantially similar, they must be compared in their entirety. On their face, it is clear that the A-TACS FG Camo pattern is far different than any of the HyperStealth Patterns.

13. The A-TACS FG Camo pattern was created through a different process than the HyperStealth Patterns and, therefore, cannot constitute a copy of the HyperStealth Patterns using

DCS's patent pending process which creates the optical illusion of foliage and vegetation and objects when viewed at a distance, whereas HyperStealth's patterns create visual noise through static fractals.

14. The A-TACS FG Camo pattern was not a copy of any of the HyperStealth Patterns.

15. The A-TACS FG Camo pattern is visually different from any of the HyperStealth Patterns in that it contains rounded shapes rather than straight, rigid pixilated shapes, contains far different repeat patterns, AND was created using a different medium and different methodology than any of the HyperStealth patterns.

16. As shown above, due to the differences in visual comparison, commercial impression and methodology of creation, there is no substantial similarity between the A-TACS FG Camo pattern and the HyperStealth Patterns that would be recognized by an ordinary person.

17. No other element essential to a copyright infringement upon the HyperStealth Patterns arises from DCS's A-TACS FG Camo pattern.

### **Count I**

#### **Declaratory Relief**

18. DCS re-states and re-alleges paragraphs 1 through 17 above, and further alleges:

19. As a result of HBC's "cease and desist" letter to DCS, an actual case or controversy exists between the parties.

20. DCS has engaged the undersigned counsel to represent it in this matter for which DCS is obligated to pay reasonable attorney's fees and expenses.

21. DCS is being threatened with an action for damages, preliminary and permanent injunctive relief and payment of HBC's attorney's fees. DCS is in need of, and entitled to, a judicial declaration of each party's respective rights and liabilities as they pertain to DCS's use

of it's A-TACS FG Camo pattern.

Wherefore, DCS respectfully requests:

Judgment in favor of DCS and against HBC declaring that:

(1) the A-TACS FG Camo pattern does not infringe on any of the copyrights  
HyperStealth Patterns;

(2) DCS is otherwise without liability to HBC, or any of its licensees or  
assigns, stemming from DCS's use of it's A-TACS FG Camo pattern.

(3) An award of costs against HBC;

(4) An award of reasonable attorney's fees against HBC; and

(5) Any other relief the Court may deem just and appropriate.

Respectfully submitted this 16<sup>th</sup> day of December, 2011.

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