

ESTTA Tracking number: **ESTTA264173**

Filing date: **02/03/2009**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91183065
Party	Plaintiff SMS CLOTHING
Correspondence Address	John Smart SMS Clothing 1390 Alpha Lake Road #201 Whistler, BC V0N1B1 CANADA john@smsclothing.com
Submission	Answer to Counterclaim
Filer's Name	John Smart
Filer's e-mail	john@smsclothing.com
Signature	/JOHN SMART/
Date	02/03/2009
Attachments	SMS_response_Interrogatories.pdf (3 pages)(79620 bytes) SMS_response_Document_Req.pdf (2 pages)(72552 bytes) SMS_response_Admissions_Req.pdf (1 page)(63121 bytes) SMS_Certificate_of_Service.pdf (1 page)(53818 bytes) Exib.1_Inv1365.pdf (1 page)(4649 bytes) Exib.1_Inv1267.pdf (1 page)(3924 bytes) Exib.1_Inv1265.pdf (1 page)(4061 bytes) Exib.2_sweep2000.pdf (1 page)(56910 bytes) Exib.2_strike2000.pdf (1 page)(57274 bytes) Exib.2_freeride2000.pdf (1 page)(54924 bytes) Exib.2_Carpenter2000.pdf (1 page)(106807 bytes) Exib.3_Freeskier_full_pg_2009.pdf (1 page)(141708 bytes) Exib.3_Freeskier_full_pg_2008.pdf (1 page)(119209 bytes) Exib.3_Freeskier_full_pg_2007.pdf (1 page)(101285 bytes) Exib.3_Freeskier_full_pg_2006.pdf (1 page)(136155 bytes) Exib.3_Freeskier_full_pg_2005.pdf (1 page)(137555 bytes) Exib.3_Freeskier_full_pg_2004.pdf (1 page)(66469 bytes) Exib.3_Freeskier_full_pg_2003.pdf (1 page)(123574 bytes) Exib.3_Freeskier_one_third_pg_2002.pdf (1 page)(39497 bytes) Exib.3_Freeskier_one_third_pg_2001(2).pdf (1 page)(45000 bytes) Exib.3_Freeskier_one_half_pg_2000.pdf (1 page)(66931 bytes) Exib.4_SMS_POSTER2.pdf (1 page)(239175 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

SMS CLOTHING,

Plaintiff – Opposer

V.

SAYO ISAAC DANIEL

Defendant-Applicant

Opposition No. 91183065

**PLAINTIFF – OPPOSER, SMS CLOTHING
RESPONSE TO FIRST SET OF INTERROGATORIES FROM
DEFENDANT-APPLICANT , SAYO ISAAC DANIEL**

Answers to Interrogatories

1. SMS CLOTHING was conceived in 1997, by JOHN SMART the proprietor of SMART MOGUL SKIING. At the time SMART MOGUL SKIING was a ski camp owned and operated by JOHN SMART since 1992. In 1997, with the emergence of SMS CLOTHING, SMART MOGUL SKIING became referred to as SMS CAMPS and both brands, Dba SMS CAMPS or Dba SMS CLOTHING were held under the new proprietorship registered in Canada as SMS CAMPS & CLOTHING. SMS CLOTHING is an outerwear brand of clothing designed for the outdoor market. The product was originally designed and manufactured locally in Canada and sold directly to it's captive ski camp market at SMS CAMPS, including select Freestyle teams in Canada and individuals in the US. In 2000 we moved production to China and began selling to retail accounts in USA, CANADA and JAPAN. In 2000 is also when we began attending the SIA (Ski Industry America) Tradeshow in Las Vegas.
2. I have sales records for all US accounts. The first US retailers in 2000 included Bob's Sea & Ski, Fred's Freeride and City Garage. See invoices attached, exhibit#1.
3. The SMS mark is used in the following way to identify the brand. Each item of clothing is clearly identified on the outside with the letters SMS and plus the company name, SMS CLOTHING is labeled on the inside of every item and used in all marketing material promoting the Brand. See all supporting graphics for the year 2000 including the Designs (exhibit #2) & Ads (exhibit #3). I have the same supporting graphics for every year from 2000 – 2009 available and have attached copies of our ads in the US Publication Freeskier Magazine over the last 10 years. There are more ads in other issues and magazines available. I also have copies of all catalogues for each of these years. Enclosed is a copy of our 2008/09 Catalogue, exhibit #4 and Team poster, exhibit # 5.

#201-1390 Alpha Lake Rd. Whistler, B.C. V0N 1B1

Ph. 604.905.4421 Fax 604.905.4407 Email: john@smsclothing.com www.smsclothing.com

4. Answered above
5. Answered above.
6. The first people involved with the initial use of SMS CLOTHING in 1997 included the designer and manufacturer, Hiro Kobayashi, and Owner/distributor John Smart
7. The following people were involved with the sales of SMS CLOTHING in the year 2,000.
 - a. John Smart – Production/Salesmanager
 - b. Hiro Kobayashi –Sales Rep, Japan
 - c. Kenny Oberhansly – Sales Rep, USA
 - d. Jay Vaughan – Sales rep, Teams
 - e. Julia Smart – Administration
8. The request to identify ALL customers of SMS CLOTHING involves thousands of people over a 11 year period. All sales are documented in our sales program and can be accessed easily and if necessary can be printed out but this would involve pages and pages of information. I would suggest a more reasonable request would be to identify key US accounts over these years. Sales of our products over the past 8 years have been sold through direct sales on our website, through regional reps across Canada and the US and through sales at the SKI Tradeshows we attend annually in Las Vegas and Montreal.
9. The Applicants Mark far as we know has not yet been used in the marketplace therefore has not caused any confusion yet. If SMSWEAR were in the marketplace the name SMSWEAR and SMS CLOTHING will be confused since SMS is the defining and unique mark for the two products, therefore it cannot be the same. Especially as SMSWEAR is requesting a trademark under the category 025, the same category of goods that SMS CLOTHING is in the business of selling. WEAR and CLOTHING are also interchangeable descriptions that mean the same thing. If you Google search SMSWEAR online, SMS CLOTHING pops up in the top 3 listings.
10. I, JOHN SMART, was researching online for available company names on the USPTO site and out of curiosity checked the status for SMS CLOTHING since we had not yet registered a trademark for the brand. By chance I found the application to register the trademark for SMSWEAR by the Defendant , Daniel Sayo Isaac. I apposed the application first by requesting an extension of time to oppose until I could learn what was needed on my side to stop this registration. After some time, unfortunately I learned that it was advisable that I should employ an Attorney to help represent my case. I hired Dechert LLP to represent me and they filed the Notice of Opposition on March 19, 2008. As the case continued I also learned that it would become prohibitively expensive for me to continue to employ an Attorney and decided to represent myself as of July 1, 2008.
 - a. **I feel my case is very visible as I have been in operation now for over 10 years with a sales record to reflect this, online website that shows the products and lists the clients, new products manufactured annually, clothing catalogues produced for 8 years, exhibited with our own tradeshow booth at the US National tradeshow for the past 8 years and the Canadian National tradeshow for the past 7 years plus ran multiple ads per year in the two major SKI magazines in the US and CANADIAN markets for the past 8 years.**

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Ph. 604.905.4421 Fax 604.905.4407 Email: john@smsclothing.com www.smsclothing.com

11. Total Sales Revenue per year... Following are the sales figures for SMS over the past 8 years.

2000	\$133,984.20
2001	\$148,388.60
2002	\$194,378.00
2003	\$232,849.15
2004	\$326,694.56
2005	\$233,652.35
2006	\$263,399.00
2007	\$544,715.50

Respectfully Submitted,

By: /John Smart/
John Smart
President, SMS CLOTHING
1390 Alpha Lake Rd. Unit# 201
Whistler, BC V0N 1B1 CANADA
P. 604.905.4420
F. 604.905.4407
E. john@smsclothing.com

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

SMS CLOTHING,

Plaintiff – Opposer

V.

SAYO ISAAC DANIEL

Defendant-Applicant

Opposition No. 91183065

**PLAINTIFF – OPPOSER, SMS CLOTHING
RESPONSE TO FIRST REQUEST FOR PRODUCTION OF DOCUMENTS FROM
DEFENDANT-APPLICANT , SAYO ISAAC DANIEL**

Answers to II Document Requests

1. All support documents for answers to Interrogatories are attached digitally and included in the mailing, Exhibits # 1-5.
2. Please refer to our included catalogue (exhibit # 4) or website for images of all our current products. If necessary we can provide physical items. Samples of our product labeling, advertising and promotional material have been included.
3. We did not register SMS CLOTHING as a trademark when we began in 1997 and therefore claim common law rights to it's use.
4. The documents that support the use of the mark SMS CLOTHING when it began have been supplied.
5. Refer to Invoices supplied for first 3 retail accounts sold in 2,000, Exhibit # 1.
6. Refer to Ads supplied from FREESKIER Magazine for past 9 years, Exhibit # 3.
7. If necessary we can provide all shipping documents for our distribution of Sales in Canada, USA, Japan, Sweden, England and Norway.
8. We have not filed for a trademark for SMS CLOTHING.
9. Refer to Ads (#3) supplied along with enclosed 2008/09 Catalogue (#4). Please also refer to our current website at www.smsclothing.com
10. Enclosed
11. Under the registered company SMS CAMPS & CLOTHING, we have the right to sell our products worldwide Db a SMS CLOTHING.
12. As the sole proprietor in Canada, all tax returns are filed in Canada under my personal name John Smart
13. Sales figures for SMS CLOTHING for the past 8 years have been listed in the answers to Interrogatories, Item #11.
14. Expense figures for Advertising and Marketing costs for the year 2007 are as follows. These costs and similar expenses over the past 8 years can be detailed if required. Documents to

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Ph. 604.905.4421 Fax 604.905.4407 Email: john@smsclothing.com www.smsclothing.com

support include copies of the Ads, Team Poster and Brochure supplied. Other marketing costs include exhibiting at both National Tradeshows in the US (SIA) and Canada (NSIA) annually.

2007 Marketing and Advertising

• NSIA TRADESHOW MONTREAL	\$6,187.07	EXHIBITOR
• SIA TRADESHOW LAS VEGAS	\$15,986.85	EXHIBITOR
• Freeskier Magazine (USA)	\$8,181.57	SAMPLE ENCLOSED
• SKIER Magazine (Canada)	\$3,720.00	SAMPLE ENCLOSED
• Team Poster	\$1,214.00	SAMPLE ENCLOSED
• Clothing Brochure	\$8,765.71	SAMPLE ENCLOSED

15. I John Smart have been the sole owner/operator of title of SMS CLOTHING since it's inception.

16. Samples of Invoices are attached (exhibit #1)

17. Refer to my responses to Demands for Admissions.

Respectfully Submitted,

By: /John Smart/

John Smart

President, SMS CLOTHING

1390 Alpha Lake Rd. Unit# 201

Whistler, BC V0N 1B1 CANADA

P. 604.905.4420

F. 604.905.4407

E. john@smsclothing.com

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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SMS CLOTHING,

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V.

SAYO ISAAC DANIEL

Defendant-Applicant

Opposition No. 91183065

**PLAINTIFF – OPPOSER, SMS CLOTHING
RESPONSE TO FIRST SET OF DEMANDS FOR ADMISSIONS FROM
DEFENDANT-APPLICANT , SAYO ISAAC DANIEL**

Response to II Admissions

1. We do not use the mark SMSWEAR but our clothing line has been commonly referred to as SMS wear and SMS sportswear.
2. We are not aware of the plaintiffs mark, SMSWEAR, being used in the marketplace and therefore are not aware of any individuals who have solicited goods from the Applicant. When we search SMSWEAR online we find our brand SMS CLOTHING.
3. As noted above, we have not witnessed or experienced the Applicants product under the label SMSWEAR in the marketplace nor have any customers requested the Applicants products SMSWEAR from us.
4. As a registered proprietor of SMS CAMPS & CLOTHING, SMS CLOTHING is the DBA for the clothing part of the company just as SMS CAMPS was the DBA for the camp part of the company.
5. Ian G.J.Macneil is not a lawyer. He was simply our US representative required for any out of country applications for an extension of time. A lawyer was not required for this role.

Respectfully Submitted,

By: /John Smart/

John Smart

President, SMS CLOTHING

1390 Alpha Lake Rd. Unit# 201

Whistler, BC V0N 1B1 CANADA

P. 604.905.4420 F. 604.905.4407

E. john@smsclothing.com

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Ph. 604.905.4421 Fax 604.905.4407 Email: john@smsclothing.com www.smsclothing.com

CERTIFICATE OF SERVICE

I hereby certify that, on the date set forth below, true copies of the foregoing along with the relevant support documents:

**PLAINTIFF – OPPOSER, SMS CLOTHING
RESPONSE TO FIRST SET OF INTERROGATORIES FROM
DEFENDANT-APPLICANT , SAYO ISAAC DANIEL**

**PLAINTIFF – OPPOSER, SMS CLOTHING
RESPONSE TO FIRST REQUEST FOR PRODUCTION OF DOCUMENTS FROM
DEFENDANT-APPLICANT , SAYO ISAAC DANIEL**

**PLAINTIFF – OPPOSER, SMS CLOTHING
RESPONSE TO FIRST SET OF DEMANDS FOR ADMISSIONS FROM
DEFENDANT-APPLICANT , SAYO ISAAC DANIEL**

Were mailed by First Class Mail, with adequate postage affixed, to:

Law Office of Sanford J. Asman
570 Vinington Court
Atlanta Georgia 30350

Plus emailed to sandy@asman.com and Electronically filed using ESTTA system.

Respectfully Submitted,

Dated : February 2, 2009

By: /John Smart/
John Smart
President, SMS CLOTHING
1390 Alpha Lake Rd. Unit# 201
Whistler, BC V0N 1B1 CANADA
P. 604.905.4420
F. 604.905.4407
E. john@smsclothing.com

#201-1390 Alpha Lake Rd. Whistler, B.C. V0N 1B1
Ph. 604.905.4421 Fax 604.905.4407 Email: john@smsclothing.com www.smsclothing.com

SMS CLOTHING

#201 - 1390 Alpha Lake Rd.
 Whistler, B.C. V0N 1B1
 Ph. 604.905.4421
 Fax 604.905.4407

Invoice

GST Registration #: 89650-5484 RT0001

Invoice #: 00001365

PST Registration #: R845257

Bill To:

Ship To:

Fred's Freeride & Tuning
 Killington Rd + West Park Road
 Killington VT 05751

Fred's Freeride & Tuning
 Killington Access Rd + West Park Road
 Killington VT 05751

SALESPERSON		YOUR NO.	SHIP VIA	COL	PPD	SHIP DATE	TERMS	DATE	PG.
Aaron Marcotte			UPS				0% 30 Net	11/7/00	1
QTY.	ITEM NO.	DESCRIPTION			PRICE	UNIT	DISC %	EXTENDED PRICE	TAX
2	PCA00L-N	Carpenter Pants			\$150.00	1		\$300.00	E
2	PCA00L-S	Carpenter Pant			\$150.00			\$300.00	E
2	JCA00L-N	Carpenter Jacket			\$150.00	1		\$300.00	E
2	JCA00L-S	Carpenter Jacket			\$150.00	1		\$300.00	E
1	PCA00M-N	Carpenter Pants			\$150.00	1		\$150.00	E
1	PCA00M-S	Carpenter Pants			\$150.00	1		\$150.00	E
1	JCA00M-N	Carpenter Jacket			\$150.00	1		\$150.00	E
1	JCA00M-S	Carpenter Jacket			\$150.00	1		\$150.00	E
1	PCA00S-N	Carpenter Pants			\$150.00	1		\$150.00	E
1	JCA00S-N	Carpenter Jacket			\$150.00	1		\$150.00	E
1	PFR00L-BR	Freeride Pants			\$150.00	1		\$150.00	E
1	PFR00L-N	Freeride Pants			\$150.00	1		\$150.00	E
1	PFR00L-S	Freeride Pants			\$150.00	1		\$150.00	E
1	JFR00L-N	Freeride Jacket			\$150.00	1		\$150.00	E
1	JFR00L-S	Freeride Jacket			\$150.00	1		\$150.00	E
1	JFR00L-BR	Freeride Jacket			\$150.00	1		\$150.00	E
1	PFR00M-BR	Freeride Pants			\$150.00	1		\$150.00	E
1	PFR00M-N	Freeride Pants			\$150.00	1		\$150.00	E
1	PFR00M-S	Freeride Pants			\$150.00	1		\$150.00	E
1	JFR00M-BR	Freeride Jacket			\$150.00	1		\$150.00	E
1	JFR00M-N	Freeride Jacket			\$150.00	1		\$150.00	E
1	JFR00M-S	Freeride Jacket			\$150.00	1		\$150.00	E
1	PFR00S-S	Freeride Pants			\$150.00	1		\$150.00	E
1	PFR00S-N	Freeride Pants			\$150.00	1		\$150.00	E
1	JFR00S-S	Freeride Jacket			\$150.00	1		\$150.00	E
1	JFR00S-N	Freeride Jacket			\$150.00	1		\$150.00	E
						SALE AMOUNT		\$4,500.00	
CODE						FREIGHT		\$150.00	E
RATE						GST		\$0.00	
TAX						PST		\$0.00	
SALE AMOUNT						TOTAL AMOUNT		\$4,650.00	
E.G 0%						PAID TODAY		\$4,650.00	
E.P 0%									
Memo: \$US Sale						BALANCE DUE		\$0.00	

SMS CLOTHING

#201 - 1390 Alpha Lake Rd.
 Whistler, B.C. V0N 1B1
 Ph. 604.905.4421
 Fax 604.905.4407

Invoice

GST Registration #: 89650-5484 RT0001

Invoice #: 00001267

PST Registration #: R845257

Bill To:

Ship To:

City Garage
 5 Monroe St
 Box 212
 Ellicottville NY 14731

City Garage
 5 Monroe St
 Box 212
 Ellicottville NY 14731

SALESPERSON		YOUR NO.	SHIP VIA	COL	PPD	SHIP DATE	TERMS	DATE	PG.
John Smart			UPS			9/20/00	Net 30	9/20/00	1
QTY.	ITEM NO.	DESCRIPTION			PRICE	UNIT	DISC %	EXTENDED PRICE	TAX
2	PST00L-S	Strike Pants			\$162.00	1	(40%)	\$453.60	E
1	PST00M-S	Strike Pants			\$162.00	1	(40%)	\$226.80	E
1	PST00S-S	Strike Pants			\$162.00	1	(40%)	\$226.80	E
2	JST00L-BK	Strike Jacket			\$162.00	1	(40%)	\$453.60	E
1	JST00M-BK	Strike Jacket			\$162.00	1	(40%)	\$226.80	E
1	JST00S-BK	Strike Jacket			\$162.00	1	(40%)	\$226.80	E
						SALE AMOUNT		\$1,814.40	
						FREIGHT		\$49.00	
						GST		\$0.00	
						PST		\$0.00	
						TOTAL AMOUNT		\$1,863.40	
						PAID TODAY		\$1,863.40	
Memo: SIA Show (10 piece + discount)						BALANCE DUE		\$0.00	

SMS CLOTHING

#201 - 1390 Alpha Lake Rd.
 Whistler, B.C. V0N 1B1
 Ph. 604.905.4421
 Fax 604.905.4407

Invoice

GST Registration #: 89650-5484 RT0001

Invoice #: 00001265

PST Registration #: R845257

Bill To:

Ship To:

Bob's Sea & Ski
 212 Popes Island Rd
 suite #1
 Bedford MA 02740

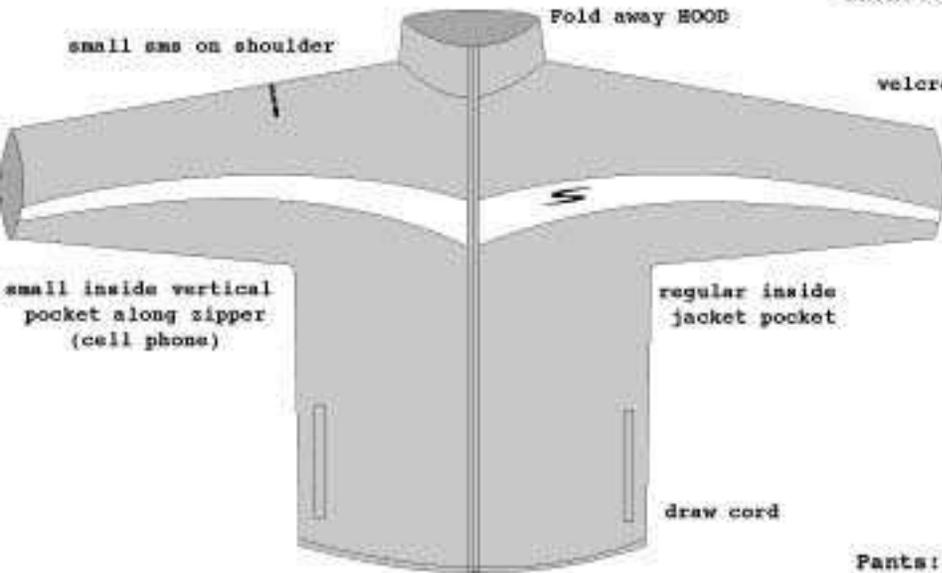
Bob's Sea & Ski
 212 Popes Island Rd
 suite #1
 Bedford MA 02740

SALESPERSON		YOUR NO.	SHIP VIA	COL	PPD	SHIP DATE	TERMS	DATE	PG.																						
John Smart			UPS			8/28/00	Net 30	8/28/00	1																						
QTY.	ITEM NO.	DESCRIPTION			PRICE	UNIT	DISC %	EXTENDED PRICE	TAX																						
2	JSW00L-BN	Sweep Jacket			\$150.00	1		\$300.00	E																						
2	JSW00M-BN	Sweep Jacket			\$150.00	1		\$300.00	E																						
1	JSW00S-BN	Sweep Jacket			\$150.00	1		\$150.00	E																						
2	JFR00L-BR	Freeride Jacket			\$150.00	1		\$300.00	E																						
2	JFR00M-BR	Freeride Jacket			\$150.00	1		\$300.00	E																						
2	PFR00L-BN	FREERIDE PANTS			\$150.00	1		\$300.00	E																						
2	PFR00M-BN	Freeride Pants			\$150.00	1		\$300.00	E																						
1	PFR00S-BN	Freeride Pants			\$150.00	1		\$150.00	E																						
2	PFR00L-BK	Freeride Pants			\$150.00	1		\$300.00	E																						
2	PFR00M-BK	Freeride Pants			\$150.00	1		\$300.00	E																						
1	PFR00S-BK	Freeride Pants			\$150.00	1		\$150.00	E																						
<table border="0"> <tr> <td>CODE</td> <td>RATE</td> <td>TAX</td> <td>SALE AMOUNT</td> </tr> <tr> <td>E.G</td> <td>0%</td> <td>\$0.00</td> <td>\$2,850.00</td> </tr> <tr> <td>E.P</td> <td>0%</td> <td>\$0.00</td> <td>\$2,850.00</td> </tr> </table>						CODE	RATE	TAX	SALE AMOUNT	E.G	0%	\$0.00	\$2,850.00	E.P	0%	\$0.00	\$2,850.00	<table border="0"> <tr> <td>SALE AMOUNT</td> <td>\$2,850.00</td> </tr> <tr> <td>FREIGHT</td> <td>\$120.00</td> </tr> <tr> <td>GST</td> <td>\$0.00</td> </tr> <tr> <td>PST</td> <td>\$0.00</td> </tr> <tr> <td>TOTAL AMOUNT</td> <td>\$2,970.00</td> </tr> <tr> <td>PAID TODAY</td> <td>\$2,970.00</td> </tr> </table>		SALE AMOUNT	\$2,850.00	FREIGHT	\$120.00	GST	\$0.00	PST	\$0.00	TOTAL AMOUNT	\$2,970.00	PAID TODAY	\$2,970.00
CODE	RATE	TAX	SALE AMOUNT																												
E.G	0%	\$0.00	\$2,850.00																												
E.P	0%	\$0.00	\$2,850.00																												
SALE AMOUNT	\$2,850.00																														
FREIGHT	\$120.00																														
GST	\$0.00																														
PST	\$0.00																														
TOTAL AMOUNT	\$2,970.00																														
PAID TODAY	\$2,970.00																														
Memo: SIA Show						BALANCE DUE		\$0.00																							

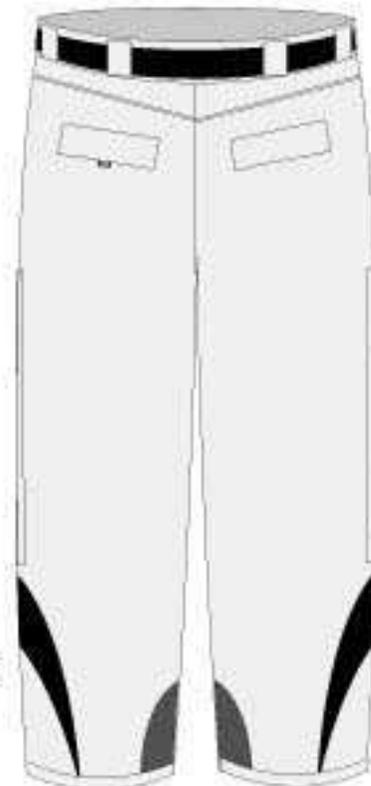
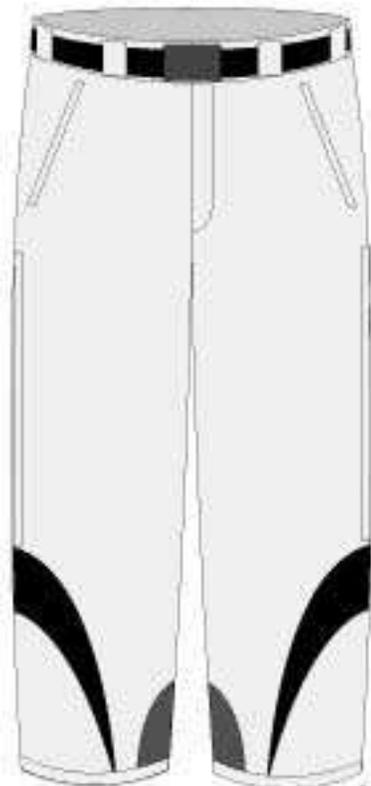
SWEEP 00

Fabric: Epical 2000 mm waterproof/breathable

Jacket: insulated



Pants: insulated



Double Stitched Yoke

Strike 00

Fabric: Epical 2000 mm waterproof/breathable

Jacket: insulated

ZIP OFF SLEEVES, flap

Fold away hood



chest flap with
small hidden
pocket (cell phone)

regular inside
pocket

Draw cord



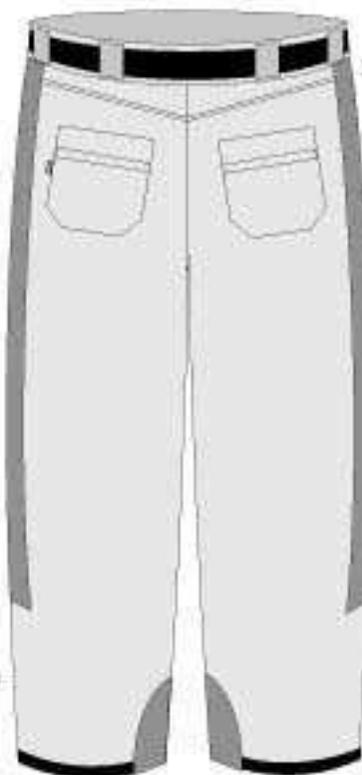
No insulation in pants
(shell with mesh lining)
(lining thinner than fleece)



binding
(same color fabric)



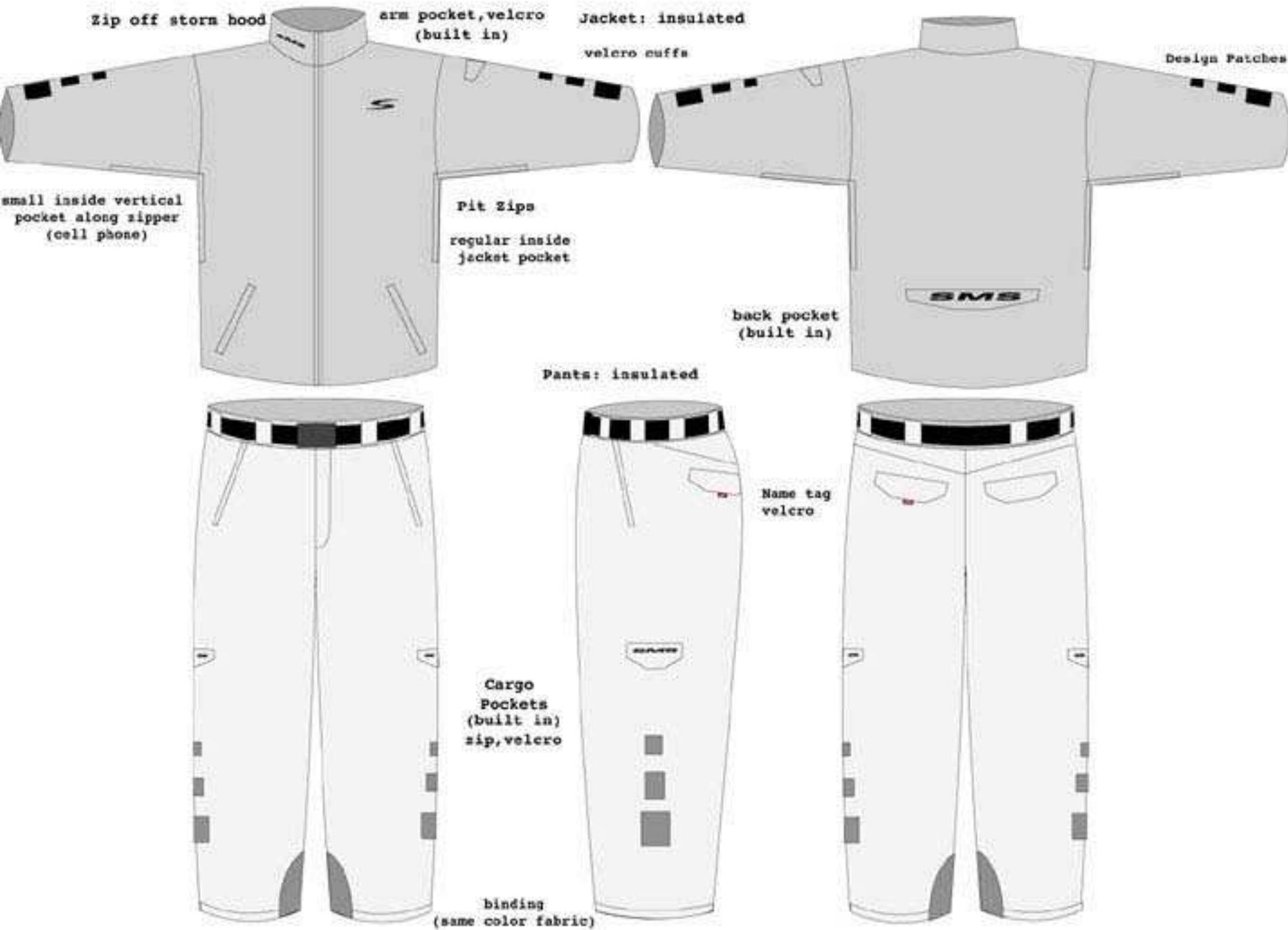
two double
stitched
vertical lines



Double Stitched Yoke

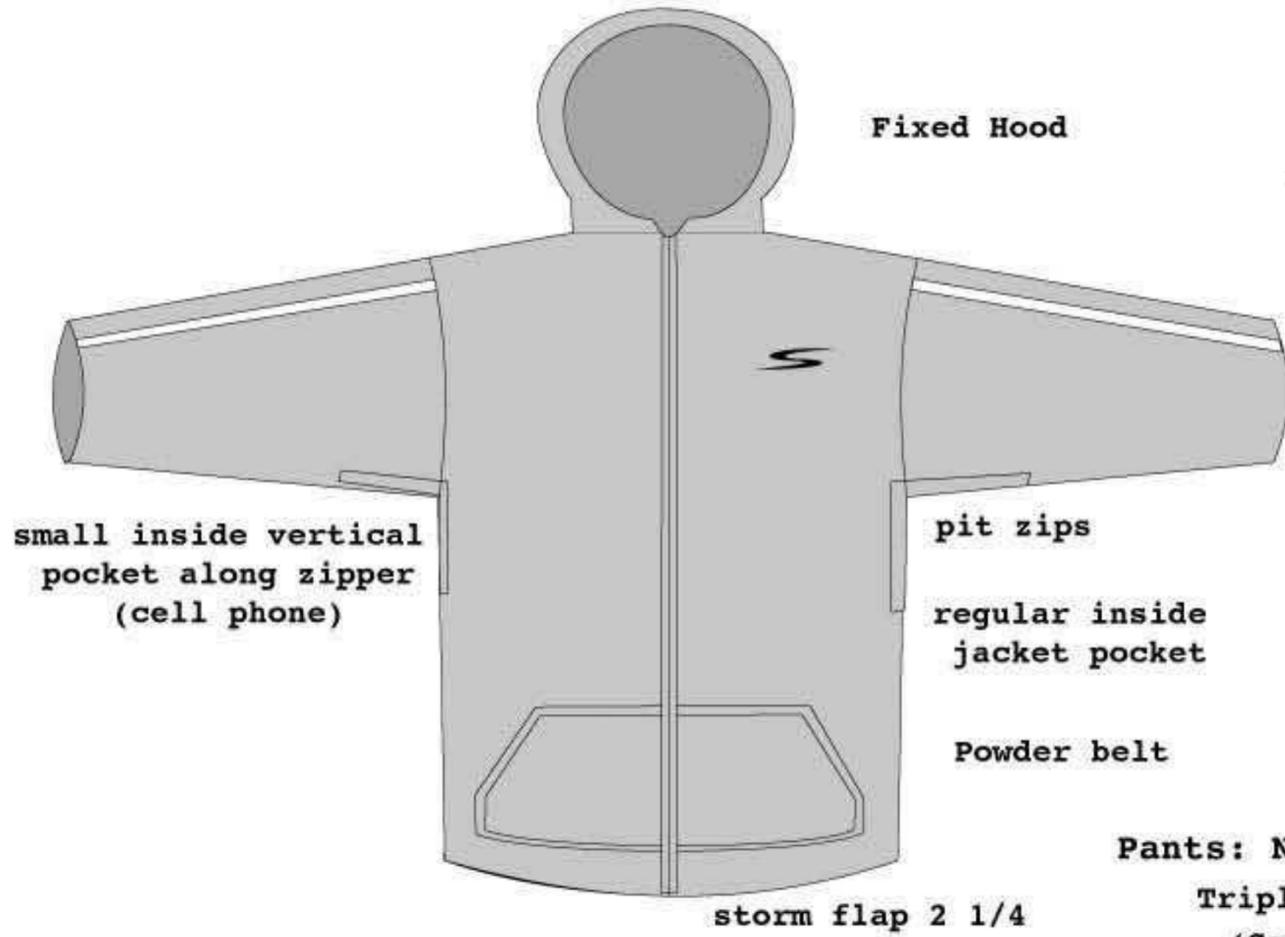
Freeride 00

Fabric: Epical 2000 mm waterproof/breathable



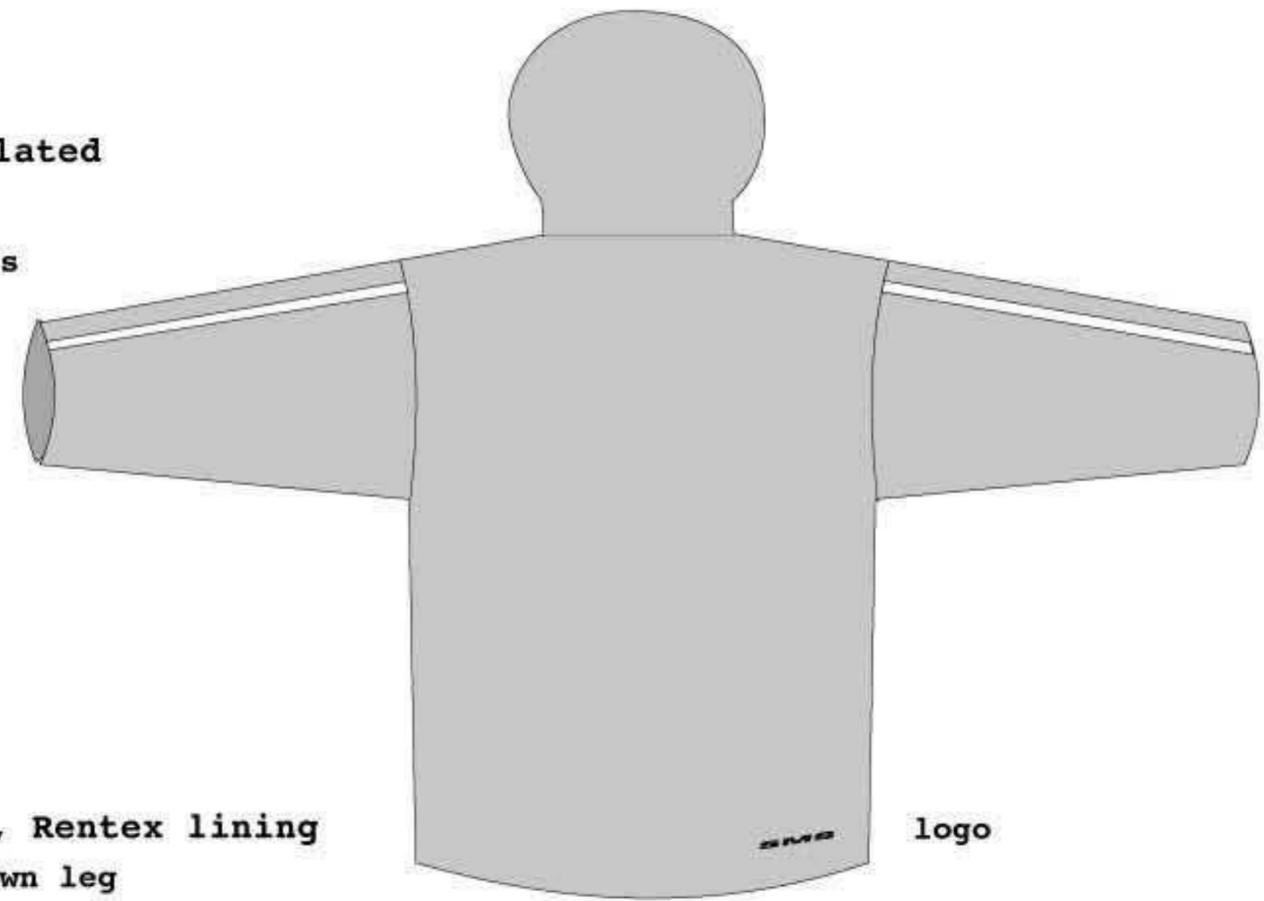
Carpenter 00

Fabric: Epical 2000 mm waterproof/breathable



Jacket: insulated

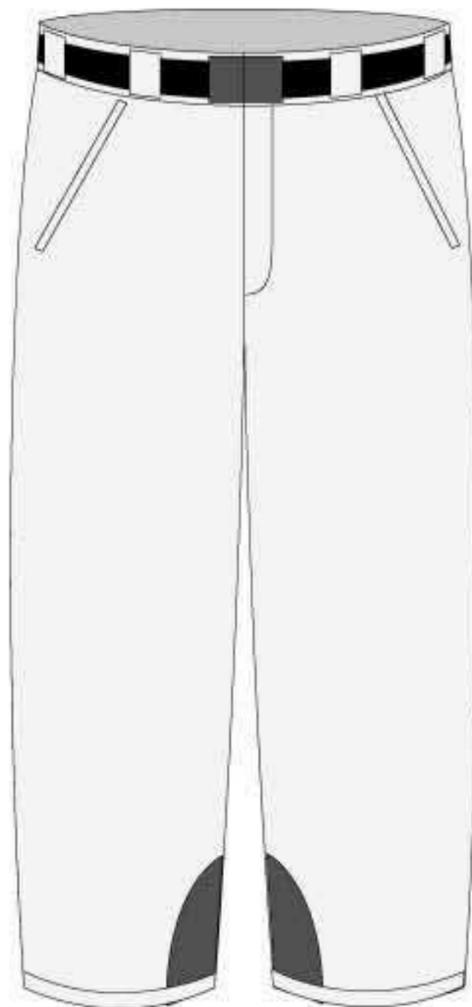
velcro cuffs



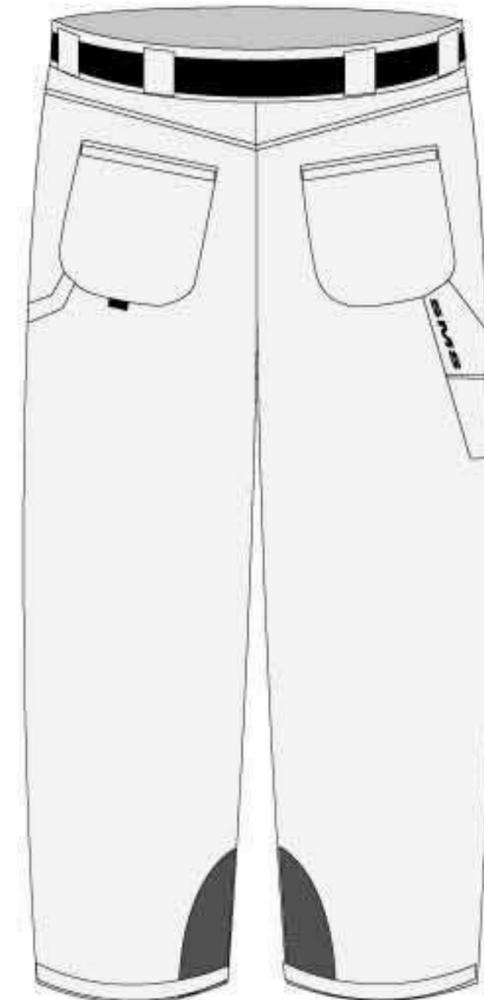
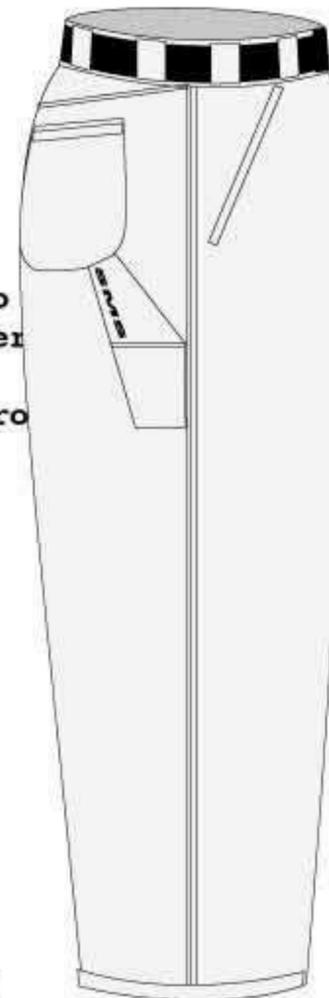
Pants: No insulation, Rentex lining

Triple stitching down leg

(Contrast stitching)



binding (same color fabric)






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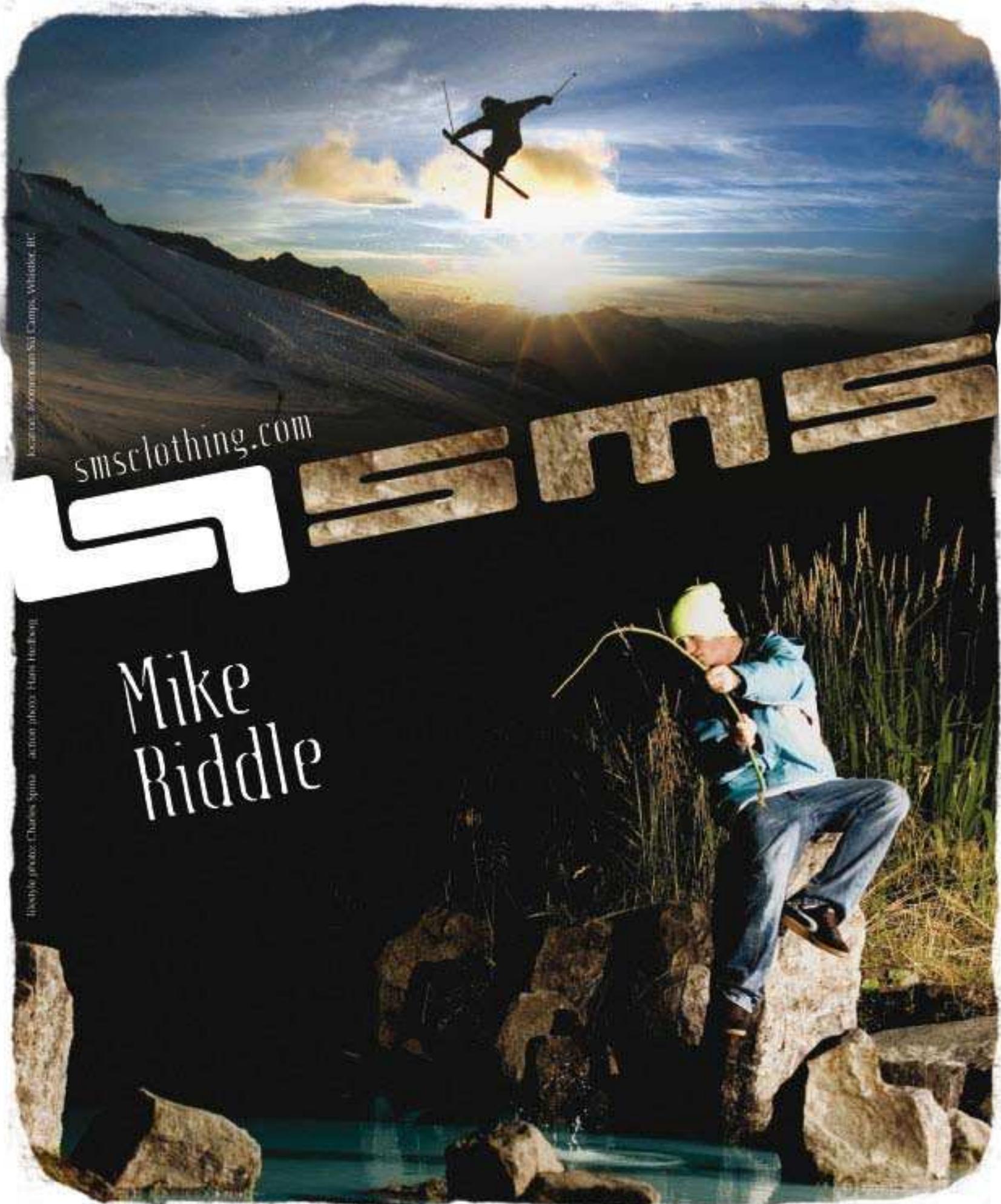
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Location: Whistler Mountain Ski Camps, Whistler, BC

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Mike
Riddle

Photo credit: Charles Spina - action photos; Hahn Hochberg



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Photos: Arne Gutmann

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Location: Blackcomb Glacier, Photos: Hans Hedberg



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