

ESTTA Tracking number: **ESTTA317908**

Filing date: **11/19/2009**

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

Petition for Cancellation

Notice is hereby given that the following party requests to cancel indicated registration.

Petitioner Information

Name	Phoenix Trading Inc. dba Amercare Products, Inc.		
Entity	Corporation	Citizenship	Washington
Address	17761 128th Place NE Woodinville, WA 98072-8783 UNITED STATES		

Attorney information	Rick Klingbeil Rick Klingbeil, PC 520 SW Sixth, Suite 950 Portland, OR 97204 UNITED STATES rick@klingbeil-law.com, saraw@klingbeil-law.com Phone:503-473-8565		
----------------------	--	--	--

Registrations Subject to Cancellation

Registration No	3424838	Registration date	05/06/2008
Registrant	Loops, LLC 7152 Everett Road Ferndale, WA 98248 UNITED STATES		

Goods/Services Subject to Cancellation

Class 021. First Use: 2005/11/30 First Use In Commerce: 2005/11/30 All goods and services in the class are cancelled, namely: Dental floss; Toothbrushes

Grounds for Cancellation

The mark is merely descriptive	Trademark Act section 2(e)(1)		
Registration No	3430304	Registration date	05/20/2008
Registrant	Loops, LLC 7152 Everett Road Ferndale, WA 98248 UNITED STATES		

Goods/Services Subject to Cancellation

Class 021. First Use: 2005/11/00 First Use In Commerce: 2005/11/00 All goods and services in the class are cancelled, namely: Toothbrushes

Grounds for Cancellation

The mark comprises matter that, as a whole, is functional	Trademark Act section 2(e)(5)
---	-------------------------------

<i>Torres v. Cantine Torresella S.r.l.Fraud</i>		808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986)	
Registration No	3430305	Registration date	05/20/2008
Registrant	Loops, LLC 7152 Everett Road Ferndale, WA 98248 UNITED STATES		

Goods/Services Subject to Cancellation

Class 021. First Use: 2005/11/00 First Use In Commerce: 2005/11/00 All goods and services in the class are cancelled, namely: Toothbrushes

Grounds for Cancellation

The mark comprises matter that, as a whole, is functional	Trademark Act section 2(e)(5)
<i>Torres v. Cantine Torresella S.r.l.Fraud</i>	808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986)

Related Proceedings	Loops, LLC et al. v. Phoenix, Inc., Case No. 2:08-cv-1064RSM (Western District of Washington)
---------------------	---

Attachments	Amercure.Petition.Cancel.pdf (19 pages)(948952 bytes)
-------------	--

Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/Rick Klingbeil/
Name	Rick Klingbeil
Date	11/19/2009

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

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

PHOENIX TRADING, INC., dba
AMERCARE PRODUCTS, INC., a
Washington corporation;

Petitioners,

v.

LOOPS LLC., a Delaware limited liability
corporation,

Respondent,

Cancellation No. _____
PETITION TO CANCEL

Mark: "Designed for Prison Safety"
Reg. No: 3,424,838
Reg. Date: May 6, 2008

Mark: Trade Dress - Flexbrush Toothbrush
Reg. No: 3,430,304
Reg. Date: May 20, 2008

Mark: Trade Dress - Flexbrush Toothbrush
Reg. No: 3,430,305
Reg. Date: May 20, 2008

PETITION TO CANCEL

1. Phoenix Trading, Inc. dba Amercare Products, Inc. ("Amercare") is a Washington business corporation, with its principal place of business at 17661 128th Place NE, Woodinville, WA 98072-8783.

2. Loops, LLC ("Loops") is the listed owner of United States Trademarks with Registration Numbers 3,424,838; 3,430,304; and 3,430,305 (collectively, "Trademarks"). Loops is located at 7152 Everett Rd., Ferndale, WA 98248. Its mailing address is P. O. Box 2936, Ferndale, WA 98248. Its

1 president is Steven L. Kayser.

2 3. Amercare has been and will continue to be damaged by the continued registration of
3 these Trademarks.

4 4. For the reasons set forth below, each of these trademarks should be cancelled, and
5 Amercare hereby seeks cancellation of each.

6 5. As grounds for cancellation for each for each Trademark, Amercare alleges as follows:

7 **FIRST CLAIM FOR CANCELLATION**

8 **(Mark: "Designed for Prison Safety", Reg. No. 3,424,838)**

9 **Descriptive**

10 6. Amercare realleges paragraphs 1 through 5, and further states:

11 7. Loops uses this mark in conjunction with the marketing and sales of toothbrushes and
12 dental floss designed for use in, and sold to prisons and other facilities involving incarceration of
13 persons.

14 8. Petitioner Amercare, and others similarly situated compete with Loops in the
15 marketplace by manufacturing, importing, offering to sell, and selling a variety of toothbrushes, dental
16 floss, and other personal hygiene items to prisons and other facilities involving incarceration of
17 persons (hereinafter and collectively, "prisons"). These offers to sell are primarily through catalogues
18 and information provided to prisons throughout the United States, direct solicitation of prisons with
19 requests that their offered products be included in the bidding specifications, and competitive bidding
20 on bid requests generated by the management or managing entity of any of the approximately 1,800
21 prison facilities throughout the United States. The primary market served by Loops and Amercare is,
22 therefore, the prison industry.

23 9. A substantial concern and safety risk of prison managers within their prison facilities
24

1 throughout the United States is that incarcerated persons will sometimes fashion items such as
2 toothbrushes and dental floss into makeshift, yet sometimes deadly weapons. These weapons are then
3 used to injure or kill other inmates or personnel at these facilities.

4 10. Because of the need for products that are less likely to be fashioned into weapons, bid
5 descriptions from these facilities will sometimes request products that are described as being related to
6 "prison safety," "for prison safety," or that are "designed for prison safety."

7 11. To meet this need, and to successfully market their products to these facilities, and /or
8 obtain inclusion on the approved product list or bid specification, manufacturers and suppliers such as
9 Amercare need to be free to describe their products as being related to "prison safety", "for prison
10 safety", "designed for prison safety," "designed for safety in prisons," or similar language. Failure to
11 specifically state or announce this characteristic of a particular product destined for use in prisons
12 could result in the failure of a product to be included on an approved product or bid list, its failure to
13 be approved for use by a prison facility, or other limitations on the ability of the product seller to
14 compete in the prison supply market, causing unfair financial hardship to Amercare and others.

15 12. Amercare's allegations are not merely an abstraction. A direct and recent example of this
16 is reflected in the excerpts from the sworn declaration of Steven Kayser, president of Loops, and
17 attached as Exhibit "1". (Kayser declaration, pp. 77-78). In a bid requested by the New York City
18 ("NYC") in April 2007, NYC solicited bids for a flexible handled toothbrush for use in one of its
19 prison facilities. Both Amercare and Loops submitted bids to supply the requested toothbrushes. In the
20 description set forth in its purchase order, NYC styled the toothbrushes as "toothbrushes for Prison
21 Safety". Based in part on the use of this descriptive term by NYC in its purchase order, Loops
22 brought a trademark infringement claim against Amercare in the Federal District Court, Western
23 District of Washington (Case No. 08-cv-1064 RSM) and has a current motion pending to amend its
24

1 Complaint against Amercare and add NYC as a defendant in the case.

2 13. Mr. Kayser specifically cites the use by NYC of the term "toothbrush for Prison Safety"
3 as one of the bases for his claims in the lawsuit, and the injunctive relief sought by Loops. (Exhibit
4 "2". (Kayser dec., pp. 77-78).

5 14. The Lanham Trademark Act, § 2(e)(1) (15 U.S.C.A. §1052(e)(1)) states:

6 "No trademark by which the goods of the applicant may be distinguished from
7 the goods of others shall be refused registration on the principal register on
8 account of its nature unless it

8 *****

9 (e) Consists of a mark which, (1) when applied to the goods of the applicant is
10 merely descriptive *** of them...."

11 15. The major reasons for not protecting merely descriptive marks are: (1) to prevent the
12 owner of a mark from inhibiting competition in the sale of particular goods; and (2) to maintain
13 freedom of the public to use the language involved, thus avoiding the possibility of harassing
14 infringement suits by the registrant against others who use the mark when advertising or describing
15 their own products. *In re Abcor Dev. Corp.*, 588 F.2d 811, 813 (CCPA 1978).

16 16. The continuing registration of Loops trademark "designed for prison safety", and its
17 enforcement by Loops implicates both of the major reasons for refusing to register a mark that are set
18 forth in *Abcor*. By limiting Amercare's ability to describe a salient characteristic of the products it
19 offers to the prison market, the mark inhibits competition in the sale of the particular goods in the
20 relevant market. Further, the inability to describe a product as related to "prison safety," "for prison
21 safety," "designed for prison safety," "toothbrushes for prison safety," or similar descriptive terms by
22 public entities such as NYC prohibits those entities from being able to fully and accurately describe
23 the type and characteristics of the products they desire in their bid solicitations. Finally, Amercare has
24 had to defend itself in the Federal District Court, Western District of Washington from a lawsuit based

25 **Page 4 - PETITION TO CANCEL**

Reg. No: 3,424,838
Reg. No: 3,430,304
Reg. No: 3,430,305

RICK KLINGBEIL, PC
520 SW Sixth Avenue
Suite 950
Portland OR 97204
Ph: 503.473.8565
Fx: 503-546-0598
email: rick@klingbeil-law.com

1 in part on alleged infringement of the term "for prison safety," and/or "toothbrushes for prison safety."
2 Loops also has a motion pending in that lawsuit to add New York City, apparently based in part on its
3 use of the term "toothbrushes for prison safety" in its purchase order documents.

4 17. For the foregoing reasons, Trademark Registration No. 3,424,838, "Designed for Prison
5 Safety" is merely descriptive, implicates the two major reasons for non-registration of descriptive
6 marks, and should be cancelled.

7 18. Amercare hereby requests cancellation of Trademark Registration Number 3,424,838.

8 **SECOND CLAIM FOR CANCELLATION**

9 **(Mark: Trade Dress Registration, Reg. No. 3,424,304)**

10 **The Protected Elements are Functional**

11 19. Amercare realleges paragraphs 1 through 5, and further states:

12 20. Registration Number 3,424,304 ("304 Mark" or "304") involves protection of trade
13 dress associated with the Loops Flexbrush flexible handled toothbrush. In general, it asserts protection
14 of the three dimensional, overall appearance of a particular toothbrush design.

15 21. Trademark Registration '304 claims the following as protected trade dress:

16 (1) *toothbrush with a rounded handle* -- "overall appearance of a toothbrush featuring a
17 *smoothly rounded handle*";

18 (2) *barbell shape* -- "having a top aspect which is *generally barbell shaped* with the rear
19 end portion being larger than the front end portion and with a narrow intermediate
portion smoothly interconnecting both ends";

20 (3) *bowed and tapered sides* -- "a *side* aspect being *slightly bowed and smoothly tapered*
21 toward its rear end."

22 22. The design and three-dimensional structure of the Loops Flexbrush is also protected by a
23 utility patent issued by the United States Patent and Trademark Office, Pat. No. 7,334,286 (" '286
24 Patent").

1 23. The '286 Patent, obtained by Loops before both of the Trademark Registrations, shows
2 that each of the characteristics and elements claimed in the '304 Trademark Registration is *de jure*
3 functional. Element-to-element comparison of the trademark / trade dress with the corresponding
4 descriptions in the '286 Patent are set forth below:

5 '304 Trademark: *overall appearance of a toothbrush with a rounded handle:*

6 '286 Patent: **"For the purposes of safety** (i.e. prison market) the length of the
7 body of the toothbrush should be up to approximately 4-1/2 inches
8 in length." (CSMF, §11 (Patent), Col. 3, l. 18-20);

9 **"an enlarged smoothly rounded bulbous handle end portion to
10 facilitate handling of the toothbrush**

11 '304 Trademark: *barbell shape:*

12 '286 Patent: "a narrowed elongated intermediate smooth continuous portion
13 being composed of the pliable flexible material to be limber in its
14 unstressed condition, and integrally connecting the enlarged head
15 portion and the enlarged handle portion substantially midway
16 therebetween [barbell shape] **to facilitate flexing of the
17 toothbrush with one hand of an adult user for stressing the
18 pliable flexible material to rigidify the body for teeth brushing
19 purposes."**

20 "the intermediate portion is narrower than the width of the head
21 portion and the end portion on the top and bottom side";

22 "wherein the handle portion is wider than the brush head portion
23 with the narrowed intermediate portion therebetween";

24 "a narrowed elongated intermediate smooth continuous portion
25 being composed of the pliable flexible material to be limber in its
unstressed condition and integrally connected to the enlarged head
portion and the enlarged handle end portion substantially midway
therebetween **to facilitate flexing of the toothbrush with one
hand of an adult user for stressing the pliable flexible material
to rigidify the body for teeth brushing purposes...."**

'304 Trademark: *bowed and tapered sides:*

'286 Patent: "as best seen in FIG 4, the body [] has a slightly curved side edge
or curved aspect [] between the head portion [] and the handle

1 portion [] to **help facilitate the flexing of the body** [] by the hand
2 of the user."

3 "A toothbrush according to claim 1, wherein the body has a curved
4 edge extending between the brush head and the handle portion."

5 "wherein the thickness of the elongated body at the head portion
6 being tapered and increasing toward the intermediate portion, and
7 at the handle portion being smoothly continuously tapered and
8 smoothly continuously decreasing toward a narrowed tip of the
9 handle portion wherein the thickness of the elongated body is
10 greatest at the intermediate portion;

11 "wherein the material of the body is sufficiently flexible **to enable**
12 **the manually applied external force to flex the handle portion**
13 **into a smoothly rounded shape."**

14 "wherein the flexibility of the material requires a manually applied
15 external force by the digit of the hand of the user holding the
16 toothbrush to flex the handle portion substantially along its entire
17 length **to make the body sufficient rigid to facilitate use of the**
18 **toothbrush for teeth brushing purposes."**

19 24. Each of the alleged trade dress elements claimed in Trademark Registration 3,430,304
20 are, by Loops' own representations and admissions in its '286 patent for the same Flexbrush flexible
21 handled toothbrush, *de jure* functional and not subject to trade dress protection. Trademark No.
22 3,424,304 should be cancelled.

23 25. Amercare hereby requests cancellation of Trademark Registration Number 3,430,304.

24 **THIRD CLAIM FOR CANCELLATION**

25 **(Mark: Trade Dress Registration, Reg. No. 3,424,304)**

Fraud on the United States Patent and Trademark Office

26 26. Amercare realleges paragraphs 1 through 5, and further states:

27 27. Loops filed and prosecuted its U.S. '286 patent application before the USPTO for over 3
28 years. Concurrent with the prosecution of the '286 patent, Loops was also pursuing the '304
29 Trademark. The '286 patent was granted on February 26, 2008. The '304 Trademark was registered on

1 May 20, 2008, approximately 90 days after the '286 patent.

2 28. Loops obtained the '304 Trademark by knowingly making one or more false, material
3 representations with the intent to deceive the USPTO. These material misrepresentations included
4 statements or assertions that the aspects claimed as trade dress were not primarily functional aspects
5 of the toothbrush, while at the same time representing in its '286 patent application that the exact same
6 aspects of the toothbrush were functional, and properly the subject to a utility patent.

7 29. The USPTO reasonably relied upon the truth of Loops' false statements in its decision to
8 grant registration of the '304 Trademark to Loops.

9 30. The continuous and continuing registration of the '304 Trademark has and is continuing
10 to cause injury and financial harm to Amercare, and will continue to cause injury to Amercare until the
11 registration is cancelled.

12 31. Loops obtained its '304 Trademark through fraud on the USPTO. Accordingly, the '304
13 Trademark should be cancelled.

14 32. Amercare hereby requests cancellation of Trademark Registration Number 3,430,304.

15 **FOURTH CLAIM FOR CANCELLATION**

16 **(Mark: Trade Dress Registration, Reg. No. 3,424,305)**

17 **The Protected Elements are Functional**

18 33. Amercare realleges paragraphs 1 through 5, and further states:

19 34. This mark also involves protection of trade dress associated with the Loops Flexbrush
20 flexible handled toothbrush. In general, it asserts protection of the pattern of dots and raised reliefs on
21 the handle and surface of its flexible handled prison safety toothbrush design.

22 35. Trademark Registration No. 3,430,305 claims the following as protected trade dress:

23 "The mark consists of the three symmetrical *dot pattern reliefs* depicted on the brush;
24

- (1) the top of the toothbrush (the non-bristle side) bears two symmetrical dot pattern reliefs
 - (a) the top back end comprising a series of symmetrically placed *protruding dots* of graduated size ...;
 - (b) the top middle pattern comprising a series of seven rows of *protruding dots* of uniform size;
- (2) and the bottom back end pattern comprising a series of seven rows of *protruding dots* of uniform size"

36. The dot and relief patterns on the Loops Flexbrush are also protected by the previously cited utility patent issued by the United States Patent and Trademark Office, U.S. Pat. No. 7,334,286. In the '286 patent, each of these dot patterns is described as being functional, and subject to utility patent protection. The '286 Patent, and its Figures 1 - 7 therein describe the dots as a functional component of the toothbrush. These form an "irregular surface," and are touted for their ability to facilitate grasping the body of the toothbrush, and prevent it from slipping from the user's grasp.

37. The relevant language from the '286 Patent is set forth below:

"A digit engageable irregular surface 20 on the upper surface of the intermediate portion 18 is adapted **to be engaged by a digit** of the user **to help flex it into a substantially rigid position for brushing the teeth**. The digit engageable irregular surface 20 includes a rigidified [sic] surface 21 formed of projections or ridges such as the ridges 23 and 25 and **to facilitate grasping the body with a digit of the user.**"

"An irregular surface 29 on the underside of the handle portion 16 includes a group of projections or ridges such as ridges 30 and 31. Similarly, an irregular surface 32 on the top side of the handle portion 16 includes projections or ridges such as ridges 34 and 36. Thus, the irregular surfaces on the handle portion 16 **facilitate the grasping of the handle portion when the hands are wet to help grasp the toothbrush 10 during use.**"

"The placement of the digit such as the thumb, index finger, or other on or near the ridge of the irregular surface 20 **helps to alleviate slippage if the body 12 becomes wet**. The ridges such as ridge 23 and 25 may be increased or decreased in number and arrangement or the irregular area expanded in area or length."

"The elongated body 12 may have added ridges positioned further up the inside

1 of the handle, about an inch from the thumb area **to prevent possible slippage in**
2 **case the user places their thumb outside the intended area."**

3 "The intermediate portion including **a digit engageable portion** on the top side
4 of the elongated body for engagement by a digit of the user's hand, **the digit**
5 **engageable portion** being spaced by a sufficient distance from from the bristle
6 brush head portion when flexed **to avoid the digit entering the user's mouth**
7 **during brushing...."**

8 38. Each of the trade dress elements claimed in Trademark Registration 3,430,305 are, by
9 Loops' own assertions and admissions in its '286 patent for the Flexbrush flexible handled toothbrush,
10 shown to be *de jure* functional and not subject to trade dress protection. Trademark No. 3,424,305
11 should be cancelled.

12 39. Amercare hereby requests cancellation of Trademark Registration Number 3,430,305.

13 **FIFTH CLAIM FOR CANCELLATION**

14 **(Mark: Trade Dress Registration, Reg. No. 3,424,305)**

15 **Fraud on the United States Patent and Trademark Office**

16 40. Amercare realleges paragraphs 1 through 5, and further states:

17 41. Loops filed and prosecuted its U.S. '286 patent application before the PTO for over 3
18 years. Concurrent with the prosecution of the '286 patent, Loops was also pursuing the '305
19 Trademark. The '286 patent was granted on February 26, 2008. The '305 Trademark was registered on
20 May 20, 2008, approximately 90 days after the '286 patent.

21 42. Loops obtained the '305 Trademark by knowingly making one or more false, material
22 representations with the intent to deceive the PTO. These material misrepresentations included
23 representations that the aspects claimed as trade dress were not primarily functional aspects of the
24 toothbrush, while at the same time representing in its '286 patent application that the exact same
25 aspects of the toothbrush were functional, and properly the subject to a utility patent.

43. The PTO reasonably relied upon the truth of Loops' false statements in its decision to

1 grant registration of the '305 Trademark to Loops.

2 44. The continuous and continuing registration of the '305 Trademark has and is continuing
3 to cause injury and financial harm to Amercare, and will continue to cause injury to Amercare until
4 the registration is cancelled.

5 45. Loops obtained its '305 Trademark through fraud on the PTO. Accordingly, the '305
6 Trademark should be cancelled.

7 46. Amercare hereby requests cancellation of Trademark Registration Number 3,430,305.

8 **WHEREFORE**, petitioner Amercare seeks the following:

- 9 1. Cancellation of United States Trademark Registration No. 3,424,838.
10 2. Cancellation of United States Trademark Registration No. 3,430,304.
11 3. Cancellation of United States Trademark Registration No. 3,430,305.

12 **DATED: November 19, 2009.**

13 **RICK KLINGBEIL, PC**

14 

15
16 Rick Klingbeil, OSB #933326
17 of Attorneys for Petitioner

18

19

20

21

22

23

24

25

1 **CERTIFICATE OF MAILING AND SERVICE**

2 I hereby certify that on November 19, 2009, the foregoing **PETITION TO CANCEL** was
3 electronically transmitted to:

4 United States Trademark Trial and Appeal Board
5 Commissioner for Trademarks
6 P.O. Box 1451
7 Alexandria, VA 22313-1451.

8 I further certify that a true and correct copy of the foregoing **PETITION TO CANCEL** was
9 served on the following attorneys, known to me to be counsel of record for Loops, Inc., by first class
10 United States Mail, in a sealed envelope, and by email to the email addresses shown below:

11 Gregory Paul Turner
12 LEE SMART
13 701 PIKE ST, STE 1800
14 ONE CONVENTION PL.
15 SEATTLE, WA 98101-3929
16 gpt@leesmart.com

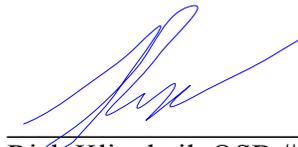
17 Robert Mark Steele
18 HERRON + STEELE
19 10TH AVE STE 880
20 SAN DIEGO, CA 92101
21 rsteele@herronsteele.com

22 William R Kiendl
23 LEE SMART
24 701 PIKE ST., STE 1800
25 ONE CONVENTION PL.
SEATTLE, WA 98101-3929
wrk@leesmart.com

Matthew V Herron
HERRON + STEELE
10TH AVE STE 880
SAN DIEGO, CA 92101
mherron@herronsteele.com

DATED: November 19, 2009.

RICK KLINGBEIL, PC



Rick Klingbeil, OSB #933326
of Attorneys for Petitioner

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

GREGORY P. TURNER
LEE SMART P.S., INC.
1800 One Convention Place
701 Pike Street
Seattle, Wash. 98101-3929
Telephone: (206) 624-7990
Facsimile: (206) 624-5944

MATTHEW V. HERRON #71193
ROBERT M. STEELE #163027
HERRON & STEELE,
A PROFESSIONAL CORPORATION
350 Tenth Avenue, Suite 880
San Diego, CA 92101-3545
Telephone: (619) 233-4122;
Facsimile: (619) 233-3709
Pro Hac Vice Application Pending

Attorneys for Plaintiff LOOPS, LLC and LOOPS FLEXBRUSH, LLC

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

LOOPS, L.L.C., a Delaware limited liability company and LOOPS FLEXBRUSH, L.L.C., a Delaware limited liability company

Plaintiffs,

PHOENIX TRADING INC. dba AMERCARE PRODUCTS INC., a Washington corporation; WENDY HEMMING, an individual; JEFFREY R. HEMMING, an individual; H&L INDUSTRIAL, a business of unknown formation; and DOES 1 through 50, inclusive,

CASE NO.: CV08-1064 RSM

DECLARATION OF STEVEN L. KAYSER IN SUPPORT OF COMPLAINT FOR PATENT INFRINGEMENT; TRADEMARK AND TRADE DRESS INFRINGEMENT; UNFAIR COMPETITION; FRAUD; INJUNCTIVE RELIEF AND DAMAGES

Defendants.

I, STEVEN L. KAYSER ("Declarant"), declare as follows:

THE PLAINTIFFS

1. I am the inventor of several inventions, including the LOOPS FLEXBRUSH, a flexible handle toothbrush. I am also a Certified Public Accountant licensed in the State of Washington. My background has been as a practicing forensic accountant and expert witness for

KAYSER 0001

Case No. _____

1 more than thirty (30) years. I was also a licensed Certified Fraud Examiner for thirteen (13) years
2 between 1992 and 2004 and conducted extensive fraud and criminal investigations and provided
3 expert testimony thereon. I am the president and principal owner of LOOPS, L.L.C. and LOOPS
4 FLEXBRUSH, L.L.C.

5 2. LOOPS, L.L.C., a Delaware limited liability company formed on April 22, 1996,
6 under the laws of the State of Delaware, with a Certificate of Registration issued by the State of
7 California on April 22, 1996 and by the State of Washington on May 1, 2006.

8 3. LOOPS FLEXBRUSH, L.L.C., a Delaware limited liability company, formed on
9 June 24, 2005, under the laws of the State of Delaware, with a Certificate of Registration issued
10 by the State of California on June 24, 2005 and by the State of Washington on April 24, 2006.

11 4. LOOPS, L.L.C. is the owner either by assignment from Declarant or the applicant
12 and owner of numerous patents either issued by or pending with the U.S. Patent and Trademark
13 Office and/or with other countries. LOOPS, L.L.C. is also the owner or applicant of numerous
14 trademarks for products either registered with or pending before the U.S. Patent and Trademark
15 Office. LOOPS, L.L.C. and LOOPS FLEXBRUSH, L.L.C. are collectively referred to hereinafter
16 as "Loops," unless otherwise stated.

17 **THE DEFENDANTS**

18 5. PHOENIX TRADING, INC., upon information and belief, is a domestic, for-profit
19 corporation registered with the State of Washington Secretary of State, King County, with articles
20 of incorporation issued March 19, 1992. The corporation was authorized to issue 50,000 shares
21 of common stock. The incorporators were stated to be WENDY HEMMING and JEFFREY R.
22 HEMMING. This corporation is active, was issued the United Business Identification ("UBI")
23 601-377-851 when incorporated. The nature of its business is stated to be "distributors of
24 personal care items" on the License Renewal and Annual Report signed on March 15, 2007 by
25 WENDY HEMMING. Corporate officers are stated to be WENDY HEMMING as President and
26 corporate officer, JEFFREY R. HEMMING as Vice President, Secretary and corporate officer,
27 and Terrence E. Hemming as Treasurer and a corporate officer. WENDY HEMMING is the
28 Registered Agent.

KAYSER 0002

1 6. Upon information and belief, the aforementioned corporate officers are also
2 directors. The address of principal place of business for PHOENIX TRADING, INC. is stated on
3 the License Renewal and Annual Report to be 10655 Exeter Avenue N.E., Seattle, WA 98125.
4 Its contact phone number is stated to be 425- 489-9575.

5 7. AMERCARE PRODUCTS INC. (also referred to hereafter as "AMERCARE"),
6 upon information and belief, is a dba of PHOENIX TRADING, INC and an unregistered trade
7 name under which WENDY HEMMING and JEFFREY RULON HEMMING conduct business.
8 It has represented itself, through the actions of the Hemmings, to be a corporation with the ability
9 to enter into contracts with state, county and city institutions and agencies, including New York
10 City, and Declarant believes with agencies of the federal government, with WENDY HEMMING
11 representing herself to be its "president."

12 8. The name "AMERCARE PRODUCTS INC.", upon information and belief, is
13 registered with the U.S. Food and Drug Administration (hereafter "FDA") in its Establishment
14 Registration Database as an "Initial Distributor" with an "Establishment" address of 10655 Exeter
15 Avenue N.E., Seattle, WA 98125. The "official correspondent" is stated to be Ms. WENDY
16 HEMMING with an address of P.O. Box 25326, Seattle, WA 98165-2226. The phone number
17 for WENDY HEMMING is stated to be 425-489-9575.

18 9. WENDY HEMMING, upon information and belief, is the "president" of
19 AMERCARE PRODUCTS INC. and also the president, a director, a stockholder and the
20 registered agent of PHOENIX TRADING INC. She is also the owner, official correspondent and
21 U.S. Agent of H&L INDUSTRIAL. She resides within the State of Washington and is believed
22 to reside at 10655 Exeter Avenue, Seattle, WA 98165.

23 10. JEFFREY RULON HEMMING, upon information and belief, is the "vice-
24 president" of AMERCARE PRODUCTS INC. and also the vice-president, secretary, a director
25 and a stockholder of PHOENIX TRADING INC. He resides within the State of Washington and
26 is believed to reside with WENDY HEMMING at 10655 Exeter Avenue, Seattle, WA 98165.

27 11. WENDY HEMMING AND JEFFREY RULON HEMMING, upon information
28 and belief, are husband and wife. (See **EXHIBIT 73.**)

KAYSER 0003

1 after July 1, 2007". On May 5, 2008, Declarant sent a letter to NYC-DOC specifically requesting
2 the public records related to the aforementioned Purchase Order, to include Amercare's billing
3 invoice and packing list, and NYC-DOC Receiving Report and payment records. A true and
4 correct copy of Declarant's letter dated May 5, 2008 is attached as **EXHIBIT 102**.

5 On May 22, 2008, the NYC-DOC responded to Declarant's May 5, 2008 follow-up FOIL
6 request for public records not produced May 3, 2008. NYC-DOC produced an additional 20
7 pages of records related to the aforementioned July 10, 2007 Purchase Order. These additional
8 public records will be specifically referred to hereinafter in detail.

9 The NYC-DOC Purchase Order #20080804637 referred specifically to the Amercare
10 toothbrush using the following language:

11 CONTRACT ITEM #2:
12 TOOTHBRUSH, COLOR-BLUE, SOFT NYLON
13 BRISTLES, DUPONT SOFT FLEXIBLE
14 POLYPROELENE RUBBER HANDLE
15 #TB-38-425-SH-BLUE

16 The aforementioned language is that reflected in Amercare's Bid Application for the
17 NYC-DOC contract (see **EXHIBIT 48**).

18 **C) NYC-DOC Purchase Order 320080805562 Dated 09/27/07**

19 This Purchase Order was produced by NYC-DCAS on February 21, 2008 as a single page,
20 with no other related records and was partially illegible. A true and correct copy as produced by
21 NYC-DCAS is attached as **EXHIBIT 103**. A distinctly more legible copy was produced by
22 NYC-DOC on May 3, 2008 and the latter agency produced 18 pages of related records with four
23 copies of this more legible and complete Purchase Order. The multiple copies appear to be the
24 result of various departments using the document to authenticate receipt and inspection of the
25 Amercare toothbrushes and to authorize payment by the NYC-DOC payment unit. A true and
26 correct copy of all four copies produced by NYC-DOC is collectively attached as **EXHIBIT 104**.

27 This Purchase Order # 20080805562 was issued to Amercare for 2,840 dozen
28 (34,080 pieces) of Amercare's counterfeit and infringing toothbrushes. This Purchase Order
referred to Contract Number 278380, the Contract issued by NYC-DCAS on May 17, 2007 for
their counterfeit and infringing toothbrushes. The Purchase Order referred specifically to the

1 Amercare toothbrush using the following language:

2 CONTRACT ITEM #2:
3 TOOTHBRUSH, ADULT FOR PRISON
4 SAFETY, 48 each PER CASE, 18 CASES
5 PER BOX, MODEL # TB-38- SH- BLUE
6 AS PER CONTRACT #2787380

7 The aforementioned language principally reflects that used in the NYC-DOC Purchase
8 Order dated July 10, 2007 (**EXHIBIT 101**), but also incorporates phraseology pertaining to a
9 trademark pending at that time for Declarant before the United States Trademark Office
10 ("Designed For Prison Safety"). See **EXHIBIT 139**. This Trademark was well known by both
11 Defendants and NYC as intellectual property belonging to Declarant and Loops, L.L.C. The
12 pending Trademark was used on not only the Loops Flexbrush printed packaging that had been
13 provided with the 329,376 toothbrushes previously sold by Declarant's company to NYC-DOC
14 between August 9, 2006 and June 6, 2007, but also on approximately 100 samples of the Loops
15 Flexbrush and the Loops Flexible Toothbrush Holders provided to Amercare/Hemming on
16 January 13, 2006 (**EXHIBITS 6 and 7**) and on February 7, 2007 (**EXHIBIT 20**). This
17 Trademark has been used by Plaintiffs for the Loops Flexbrush since November 30, 2005. The
18 registered Trademark "DESIGNED FOR PRISON SAFETY" was recorded in the Trademark
19 Supplemental Register on May 6, 2008, Reg. No. 3,428,838. See **EXHIBIT 139**.

20 **D) Amercare Invoice Number 273159 Dated Oct 31, 2007**

21 This Invoice from AMERCARE PRODUCTS, Inc was produced by NYC-DOC on May
22 3, 2008 and listed thereon the following information:

- 23 1) Purchasing agency was stated to be Department of Corrections
- 24 2) Shipment addressed to Rikers Island Central Whse, attention Kenneth Pezzuti
- 25 3) Customer PO—20080805562
- 26 4) Ship Date of 10/31/07
- 27 5) Due Date of 11/30/07
- 28 6) Quantity stated of 2,840DZ (sic-dozen)
- 7) Item number TB-38-S
- 8) Description stated of TOOTHBRUSH, SOFT, 38 TUFT, 4DZ/BX
[sic- dozen/box], 18 BX/CS [sic- box/case]. And the statement thereon:

WE SHIPPED 39 CASES OF 72 DOZEN
AND 1 CASE OF 32 DOZEN FOR A
TOTAL OF 2,840 DOZEN.

- 9) Unit price of 7.3200 [sic--\$7.3200]

1 oral health care, notwithstanding the issue of safety offered by Plaintiff's Loops Flexbrush (and
2 that of Defendant's infringing product). There exist other types of toothbrushes and products
3 available to prison inmates and the general population. There are approximately 5,500
4 correctional facilities in the US and the majority of these facilities either use either alternative
5 products such as regular toothbrushes and regular sting and nylon dental floss, albeit in lengths of
6 12 inches or less, of the type provided by Defendants and other vendors providing these products
7 to correctional facilities. Further, toothbrush holders are not a significant product being allowed
8 for inmate use in any large quantity.

9 332. Restricting the public's access to AMERCARE's infringing toothbrush and other
10 infringing products including dental floss and toothbrush covers does not tread on any "critical
11 public interest"

12 Security Bond

13 333. Plaintiffs respectfully request the court impose a minimal security of not more than
14 \$5,000 to reimburse Defendants for any alleged damages caused by the injunction in the event
15 Plaintiffs are not successful at trial.

16 334. Defendants have willfully infringed on all 32 claims of Plaintiff's Loops Flexbrush
17 patent as well as its registered trademarks including its two trade dress trademarks.

18 335. While Plaintiffs have not yet obtained samples or photos of Defendant's infringing
19 floss product, on information and belief, including Defendant's oral representations to Corcoran
20 State Prison that they had a "similar" floss product as Plaintiff's patented Floss Loops, Plaintiffs
21 believe Defendants have manufactured, imported, marketed, sold and offered for sale an exact
22 copy counterfeit which infringes on Plaintiff's patented and trademarked Floss Loops product.

23 336. Plaintiffs have suffered severe loss of sales and market share. Defendant's losses,
24 if any, are caused by their own willful infringing conduct.

25 Plaintiffs move the court to issue a preliminary injunction restraining AMERCARE
26 PRODUCTS INC. and its legal entity PHOENIX TRADING, INC., its subsidiaries, affiliated
27 companies, distributors, officers, agents, servants, employees including WENDY HEMMING,
28 JEFFREY R. HEMMING and all those acting in concert with them or at their direction from

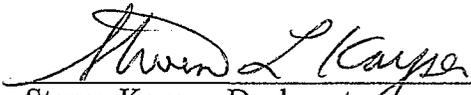
KAYSER 0124

1 infringing Plaintiff's patents by manufacturing, importing, using, marketing, selling and offering
2 for sale LOOPS, L.L.C. and LOOPS FLEXBRUSH, L.L.C. products.

3
4 I declare under penalty of perjury under the laws of the United States that the facts and
5 evidence presented herein are true and correct.

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: 7-10-2008


Steven Kayser, Declarant