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

Proceeding	92051757
Party	Defendant Loops, LLC
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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, Petitioner, vs. LOOPS, LLC, a Delaware limited liability company, Registrant.	Cancellation No.: 92051757 **REGISTRANT'S REPLY IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS** Mark: "Designed for Prison Safety" Reg. No.: 3,424,838 Mark: Trade Dress Reg. No.: 3,430,304 Mark: Trade Dress Reg. No.: 3,430,305

REPLY

LOOPS LLC ("Registrant") hereby respectfully submits this Reply in Support of its Motion for Judgment on the Pleadings in accordance with 37 C.F.R. § 2.127(a).

I. REG. NO. 3,424,838 – "DESIGNED FOR PRISION SAFETY"

Registrant notes with appreciation that PHOENIX TRADING, INC. dba AMERCARE PRODUCTS, INC. ("Petitioner") concedes in its Response to Registrant's Motion for Judgment on the Pleadings (the "Response") that the mark "DESIGNED FOR PRISON SAFETY" is not the proper subject of a cancellation proceeding. Response, page 1, lines 19-23. Since Registrant and Petitioner agree on this point, Registrant respectfully renews its request, *without opposition from Petitioner,* that the Board dismiss with prejudice Petitioner's First Claim for Cancellation.

II. REG. NO. 3,430,304 – TRADE DRESS–Three Dimensional, Overall Appearance

Petitioner, in its Response, misguides the Board as to Registrant's principal arguments in support of its Motion for Judgment on the Pleadings (the "Instant Motion") on Petitioner's Second and Third Claims for Cancellation. More specifically, Petitioner repackages Registrant's arguments on these Claims as "evidentiary" challenges to Petitioner's pleadings claiming Registrant argues that these Claims fail for lack of proof or Morton-Norwich analysis. Response, page 2, lines 2-5. To the contrary, Registrant argues that no such evidence could exist and the fact finder has all the information needed to dispose on the matter.

The rationale for Instant Motion with respect to the '304 mark is that the claim is drafted with an extremely high level of detail; and to suggest that the entire trade dress claim as a whole comprise functional subject matter is a factual impossibility. The claim even includes the words "three-dimensional" and "overall appearance." It should be noted that the trade dress claims in representative cases such as *Morton-Norwich* and *TrafFix* were to broad subject matter without the high degree of detail in the trade dress description. Here, where the specific overall appearance describing an exact shape in a top aspect and an exact shape in a side aspect is claimed, the strong presumption of functionality by mere existence of a utility patent on an identical product fails.

III. REG. NO. 3,430,305 – TRADE DRESS–Specific Arrangement of Dot Pattern Reliefs

Again, Petitioner in its Response misguides the Board as to Registrant's principal arguments in support of Instant Motion on Petitioner's Fourth and Fifth Claims for Cancellation. Also similarly, Petitioner construes Registrant as alleging that the pleadings are deficient for not containing recitations of evidence meeting each of the Morton-Norwich factors. However rather, Registrant argues that no such evidence *could* exist.

Once more, Registrant argues that the trade dress claim for the '305 Mark is drafted with such a high degree of detail that to suggest that this claim, as a whole, comprise *de jure* functional subject matter is a factual impossibility. Among the many details is a height of dots that "decrease progressively." Also, an exact arrangement of "nine rows of two, three, or four dots, with each row located next to and in parallel with a row containing plus or minus ONE dot." While the relief

patterns themselves may be functional according to a utility patent, the exact arrangement claimed with such a high degree of narrowing detail, could not possibly be *de jure* functional.

Therefore, the Petitioner pleadings are deficient under any test, such as *Morton-Norwich*, outlining a factual inquiry on *de jure* functionality.

IV. CONCLUSION

To be abundantly clear, it is not just that Petitioner's pleadings are deficient; but any expertly drafted pleadings challenging a highly detailed and narrowed claim to an overall appearance of a three-dimensional trademark would be similarly deficient. Moreover, it is not just that the allegations are very highly improbable, but rather impossible.

Accordingly, Petitioner's Second, Third, Fourth and Fifth Claims are ripe for dismissal without further delay; and Registrant respectfully requests that its Motion for Judgment on the Pleadings be granted in its entirety.

Respectfully submitted,

Dated: September 3, 2010

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