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08-CV-01064-CMP

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LOOPS LLC., a Delaware limited liability
company, LOOPS FLEXBRUSH LLC., a
Delaware limited liability company,

Plaintiffs,

vs.

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,

Defendants.

NO. **C 08-1064** Rsm

COMPLAINT FOR PATENT
INFRINGEMENT; TRADEMARK AND
TRADE DRESS INFRINGEMENT;
UNFAIR COMPETITION; FRAUD;
INJUNCTIVE RELIEF AND DAMAGES

DEMAND FOR JURY TRIAL

ALLEGATIONS REGARDING PARTIES

1. Plaintiff LOOPS, LLC is a Delaware limited liability company with its principal
place of business in Ferndale, Washington.

2. Plaintiff LOOPS FLEXBRUSH, LLC is a Delaware limited liability company
with its principal place of business in Ferndale, Washington.

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COMPLAINT FOR PATENT INFRINGEMENT;
TRADEMARK AND TRADE DRESS
INFRINGEMENT; UNFAIR COMPETITION; FRAUD;
INJUNCTIVE RELIEF AND DAMAGES - 1
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ORIGINAL

Summons-ISS. SEA 18 990

1 3. STEVEN L. KAYSER is an individual residing in Ferndale, Washington and
2 also is the president, the managing member and majority owner of LOOPS, LLC and LOOPS
3 FLEXBRUSH, LLC.

4 4. Defendant PHOENIX TRADING INC. dba AMERCARE PRODUCTS, INC.,
5 upon information and belief, is a Washington corporation doing business within and with its
6 principal place of business in Seattle, Washington (hereinafter "AMERCARE").

7 5. Defendant WENDY HEMMING, upon information and belief, is an individual
8 residing in Seattle, Washington and also the president, a shareholder, and the registered agent
9 of Defendant PHOENIX TRADING INC.

10 6. Defendant JEFFREY R. HEMMING, upon information and belief, is an
11 individual residing in Seattle, Washington and also the vice-president, secretary, a director and
12 shareholder of PHOENIX TRADING, INC.

13 7. Defendant H&L INDUSTRIAL, upon information and belief, is a business of
14 unknown origin, doing business within and with its principal place of business in Seattle,
15 Washington, owned and operated by Defendant PHOENIX TRADING INC. dba AMERCARE
16 PRODUCTS. The U.S. agent for H&L INDUSTRIAL is Defendant WENDY HEMMING.

17 8. The true names, conduct and capacities of the defendants sued herein as DOES 1
18 through 50 are presently unknown and therefore are sued by such fictitious names. Plaintiff
19 will include the DOE defendants' true names and capacities when ascertained. On information
20 and belief, each fictitiously named defendant is responsible in some manner, including, *inter*
21 *alia*, as partners or affiliated entities, for the conduct alleged herein and for the damages
22 suffered by plaintiffs.

23 9. On information and belief and based thereon, at all times mentioned in all the
24 causes of action alleged herein, each and every defendant was the agent, representative,
25 affiliate, controlling party, or employee of each and every other defendant, and in doing the
things alleged in the causes of action stated herein, each and every defendant was acting within

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1 the course and scope of such agency, representation, affiliation, control or employment and was
2 acting with the consent, permission, or authorization of the other defendants.

3 JURISDICTION AND VENUE

4 10. This Court has jurisdiction pursuant to both 28 U.S.C. §1338(a) and 28 U.S.C.
5 §1331 because this is an action arising under the patent laws of the United States and under
6 section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), as this is an action for trade dress and
7 trademark infringement. This Court also has jurisdiction of the action under 28 U.S.C. § 1332
8 as there is diversity of citizenship between the parties, and the amount in controversy exceeds
9 the sum of seventy five thousand dollars (\$75,000.00).

10 11. The United States District Court for the Western District of Washington is the
11 appropriate venue for this action in accordance with 28 U.S.C. §1391 and §1400(b), among
12 others, as Defendants are doing business and have committed acts of infringement within the
13 Western District of Washington.

14 COMMON FACTUAL ALLEGATIONS

15 12. Plaintiff LOOPS LLC designs, manufactures, markets and sells a variety of oral
16 hygiene products principally designed for use by prison populations in correctional facilities,
17 including Floss Loops Safety Dental Floss, U.S. Patent No. 6,371,133 B1. Floss Loops are
18 breakable, making the product less dangerous for use by prisoners. The product was designed
19 to prevent prison inmates from harming other inmates and correctional officers. Regular string
20 and nylon dental floss is a major weapon in the hands of prison inmates and is generally banned
21 for inmate usage as inmates can use regular dental floss as a hacksaw-type device and to use as
22 rope material to escape and also use as a garroting-type device to strangle other inmates and
23 correctional officers.

24 13. Plaintiff LOOPS LLC's Floss Loops Safety Dental Floss was designed to be
25 used for proper oral care by inmates and to eliminate safety concerns for its usage as a tooth
flossing device by inmates. This product is unique and widely used by correctional facilities

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1 throughout the U.S. and is preferred for inmate use over regular string and nylon dental floss of
2 the type sold by AMERCARE.

3 14. Plaintiff LOOPS LLC is the owner and assignee of several patents and
4 trademarks associated with the Floss Loops and Loops Flexbrush and related products.

5 15. Plaintiff LOOPS FLEXBRUSH, LLC also designs, manufactures and sells a
6 variety of oral hygiene products principally designed for use in correctional facilities, including
7 the Loops Flexbrush Safety Toothbrush and other products related to its toothbrush including
8 flexible toothbrush holders. The Loops Flexbrush toothbrush, U.S. Patent No. 7,334,286 B2, is
9 unique in that it was designed with a flexible handle and flexible materials and other features to
10 be used in the prison environment for the safety of prison inmates and correctional officers.
11 The Loops Flexbrush was also designed to enable prison inmates to maintain proper oral health
12 care while incarcerated, without being used as a weapon. Regular toothbrushes in the
13 correctional environment are a major weapon in the hands of prison inmates as they can be
14 sharpened into stabbing and slashing devices. Regular toothbrush holders are likewise weapons
15 for the same reason.

16 16. Plaintiff's Loops Flexbrush and related flexible toothbrush holders eliminate
17 these safety concerns and are used by many U.S. correctional facilities as a substitute for
18 regular toothbrushes and other related products such as those sold by AMERCARE. For
19 example, the New York City Department of Corrections (hereafter "NYC-DOC") purchased
20 the Loops Flexbrush toothbrushes as a substitute and replacement for the regular toothbrushes
21 sold by AMERCARE who previously had a contract with the New York City Department of
22 Citywide Administrative Services (hereafter "NYC-DCAS") for the sale of regular
23 toothbrushes.

24 17. STEVEN L. KAYSER ("KAYSER") is the inventor of the Loops Flexbrush as
25 well as other inventions including the flexible toothbrush holder. KAYSER assigned the
ownership of these inventions to LOOPS LLC.

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1 18. On April 16, 2002, the U.S. Patent & Trademark Office issued Patent No.
2 6,371,133 B1 to LOOPS LLC titled "VARIABLE GAUGE TOOTH-FLOSSING LOOPS" for
3 the Floss Loops invention.

4 19. On August 18, 2004, LOOPS LLC submitted an application for a Utility Patent
5 for a flexible handle toothbrush to the U.S. Patent & Trademark Office, Application No.
6 10/920,822, titled "TOOTHBRUSH AND METHODS OF MAKING AND USING SAME."

7 20. On August 18, 2004, LOOPS LLC submitted an application for a trademark for
8 the LOOPS FLEXBRUSH to the U.S. Patent & Trademark Office, Application No.
9 76/607,905.

10 21. On December 29, 2004, STEVEN L. KAYSER assigned the Patent Application
11 and Invention for "TOOTHBRUSH AND METHODS OF MAKING AND USING SAME" to
12 LOOPS LLC.

13 22. On January 3, 2005, the U.S. Patent & Trademark Office issued a Notice of
14 Recordation of Assignment evidencing KAYSER's assignment to LOOPS LLC.

15 23. On October 4, 2005, the trademark "LOOPS FLEXBRUSH" was first published
16 in the Official Gazette by the U.S. Patent & Trademark Office.

17 24. On November 23, 2005, LOOPS LLC engaged in the first use in commerce of
18 the trademark "LOOPS FLEXBRUSH" utilizing the trademark on the product, packaging,
19 marketing, correspondence, ordering and sales documents.

20 25. On November 30, 2005, LOOPS LLC and LOOPS FLEXBRUSH, LLC
21 engaged in the first use in commerce of the trademark "DESIGNED FOR PRISON SAFETY,"
22 utilizing the trademark on the packaging, marketing, correspondence, ordering and sales
23 documents for the Floss Loops and Loops Flexbrush products.

24 26. On January 13, 2006, LOOPS LLC received a call from WENDY HEMMING
25 with PHOENIX TRADING, INC. dba AMERCARE PRODUCTS, INC. HEMMING
represented that she owned AMERCARE PRODUCTS, INC. and provided products to

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1 correctional facilities. HEMMING requested price quotations for products sold by LOOPS
2 LLC, namely Floss Loops Safety Dental Floss, U.S. Patent No. 6,371,133 B1, which she
3 represented was for one of AMERCARE's customers. HEMMING also requested samples of
4 all products sold by LOOPS LLC and LOOPS FLEXBRUSH, LLC be sent to her attention at
5 AMERCARE's Woodinville, Washington address, including the Floss Loops Safety Dental
6 Floss and Loops Flexbrush toothbrushes.

7 27. On January 13, 2006, at the request of HEMMING, KAYSER shipped to
8 HEMMING samples of all products sold by LOOPS LLC and LOOPS FLEXBRUSH LLC
9 including Floss Loops Safety Dental Floss and Loops Flexbrush Toothbrushes in both 3" and
10 4.25" sizes. The Loops Flexbrush Toothbrushes were shipped in original factory packaging
11 which included "patents pending" and "LOOPS FLEXBRUSH" marks on both the
12 toothbrushes and packaging. The Floss Loops Safety Dental Floss was shipped in original
13 packaging which included thereon the U.S. Patent No. 6,371,133 B1 and the wording "other
14 patents pending."

15 28. On January 26, 2006, HEMMING contacted LOOPS LLC to order Floss Loops
16 Safety Dental Floss for AMERCARE. From January 26, 2006 through January 23, 2007,
17 HEMMING ordered on six (6) separate occasions Floss Loops Safety Dental Floss. With each
18 order of Floss Loops product, LOOPS LLC provided factory packaging labeled "U.S. Patent
19 No. 6,371,133 B1, Other Patents Pending." Also, with each order of Floss Loops product
20 shipped to AMERCARE, there were included marketing materials, color photographs and
21 samples of Loops Flexbrush toothbrushes. Further, on December 7, 2006, the Flexible
22 Toothbrush Holder was first used in commerce and AMERCARE was also provided samples,
23 marketing materials and color photographs of the product with their Floss Loops orders.

24 29. On February 23, 2006, the U.S. Patent & Trademark Office first published the
25 Utility Patent application for flexible handle toothbrush Patent Application No. 10/902,822,

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1 entitled "TOOTHBRUSH AND METHODS OF MAKING AND USING SAME" in the
2 Official Gazette.

3 30. On March 3, 2006, LOOPS FLEXBRUSH, LLC engaged in the first use of the
4 LOOPS MINI-FLEXBRUSH trademark for its 3" size Loops Flexbrush toothbrush.

5 31. On August 9, 2006 LOOPS FLEXBRUSH LLC began doing business with the
6 NYC-DOC. That agency began purchasing Plaintiff's Loops Flexbrush toothbrushes for use by
7 its inmates on an invitation to bid basis and issued orders thereon to Plaintiff approximately
8 every two to three months. On August 9, 2006, the NYC-DOC purchased 96,000 Loops
9 Flexbrush toothbrushes. Between August 9, 2006 and June 6, 2007, the NYC-DOC purchased
10 329,376 Loops Flexbrush toothbrushes.

11 32. On August 15, 2006, LOOPS FLEXBRUSH, LLC engaged in the first use in
12 commerce of the trademark LOOPS MINI-FLEXBRUSH for the 3" size Loops Flexbrush,
13 utilizing the trademark on the packaging, marketing, ordering and sales documents.

14 33. On August 22, 2006, LOOPS LLC submitted an application for a trademark for
15 the LOOPS FLEXBRUSH TOOTHBRUSH HOLDER to the U.S. Patent & Trademark Office,
16 Serial No. 78957851.

17 34. On September 19, 2006, the U.S. Patent & Trademark Office issued a Certificate
18 of Registration for the trademark "LOOPS FLEXBRUSH" in the Principal Register,
19 Registration No. 3.146,009.

20 35. On September 26, 2006, LOOPS LLC submitted an application for a trademark
21 for the LOOPS MINI-FLEXBRUSH to the U.S. Patent & Trademark Office, Application No.
22 77-007,857.

23 36. On November 28, 2006, the NYC-DOC issued its second purchase order to
24 LOOPS FLEXBRUSH LLC for 87,264 of the Loops Flexbrush toothbrushes.

25 37. On January 12, 2007, LOOPS LLC submitted an application for a Utility Patent
for a flexible toothbrush holder to the U.S. Patent & Trademark Office, Application No.

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1 11,653,153, titled "PACKAGED TOOTHBRUSH AND TOOTHBRUSH CONTAINER AND
2 METHODS OF MAKING SAME."

3 38. On January 23, 2007, HEMMING contacted LOOPS LLC to place what turned
4 out to be AMERCARE's last order for Floss Loops Safety Dental Floss. HEMMING indicated
5 her interest in selling both the Floss Loops Safety Dental Floss and Loops Flexbrush
6 toothbrushes. HEMMING requested that LOOPS LLC and LOOPS FLEXBRUSH, LLC give
7 AMERCARE any and all contracts LOOPS LLC and LOOPS FLEXBRUSH, LLC had for the
8 sale of these products to allow AMERCARE to manage these contracts with LOOPS LLC and
9 LOOPS FLEXBRUSH, LLC supplying the product to AMERCARE. On behalf of LOOPS
10 LLC and LOOPS FLEXBRUSH, LLC, KAYSER refused HEMMING's request.

11 39. On January 24, 2007, LOOPS LLC submitted an application for the trademark
12 "DESIGNED FOR PRISON SAFETY" to the U.S. Patent & Trademark Office, Serial No. 77-
13 090,434.

14 40. On January 24, 2007, LOOPS FLEXBRUSH LLC received a call from Michelle
15 McCoy from the NYC-DCAS requesting the material composition of the flexible handle Loops
16 Flexbrush. LOOPS FLEXBRUSH, LLC provided NYC-DCAS with product specification
17 sheets describing the material composition for the Loops Flexbrush.

18 41. On January 26, 2007, LOOPS LLC personally delivered what turned out to be
19 the last order of Floss Loops Safety Dental Floss to AMERCARE. KAYSER met with
20 HEMMING personally. HEMMING asked for additional samples of Loops Flexbrushes in 3"
21 and 4.25" sizes and Flexible Toothbrush Holders. HEMMING again requested that LOOPS
22 LLC and LOOPS FLEXBRUSH, LLC give AMERCARE any and all contracts LOOPS LLC
23 and LOPS FLEXBRUSH, LLC had for the sale of these products to allow AMERCARE to
24 manage these contracts with LOOPS LLC and LOOPS FLEXBRUSH, LLC supplying the
25 product to AMERCARE. HEMMING specifically requested that LOOPS FLEXBRUSH, LLC

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1 give AMERCARE the New York City contracts for the sale of the Loops Flexbrushes.
2 KAYSER, on behalf of LOOPS FLEXBRUSH, LLC again refused HEMMING's request.

3 42. On January 30, 2007, Michelle McCoy of the NYC-DCAS e-mailed a request to
4 LOOPS FLEXBRUSH, LLC for samples of the Loops Flexbrush being purchased at that time
5 by the NYC-DOC. LOOPS FLEXBRUSH, LLC sent ten samples of the 4.25" Loops
6 Flexbrush to NYC-DCAS that same day. The ten samples were shipped in original packaging
7 with the Loops Flexbrush trademark appearing on the back of each toothbrush and on the
8 original packaging along with the wording "patent pending" on each package. The trademark
9 "Designed For Prison Safety" also appeared on each original package.

10 43. On February 7, 2007, LOOPS FLEXBRUSH, LLC sent AMERCARE, at the
11 request of HEMMING, one case of 48 pieces of Loops Flexbrush samples of both 3" and 4.25"
12 sizes and a partial case of Loops Flexbrush Toothbrush Holders with price quotations. All
13 samples of the Loops Flexbrush toothbrushes were sent in original packaging bearing the
14 Loops Flexbrush trademark, the "Designed For Prison Safety" trademark and other trademarks
15 in addition to "patent pending" on each package. The Loops Flexbrush trademark appeared in
16 raised lettering on the back of each toothbrush. The Loops Flexible Toothbrush Holders
17 packaging had the wording "Patent Pending" and the "Loops Flexible Toothbrush Holder"
18 trademark thereon. The 3" Loops Flexbrush toothbrushes had the "Loops Mini-Flexbrush"
19 trademark on the original packaging and the "Loops Flexbrush" trademark on the back of each
20 toothbrush.

21 44. On March 8, 2007, the NYC-DOC issued its third purchase order to LOOPS
22 FLEXBRUSH, LLC for 24,000 of its Loops Flexbrush toothbrushes.

23 45. On March 21, 2007, the trademark "LOOPS FLEXBRUSH TOOTHBRUSH
24 HOLDER" was first published in the Official Gazette by the U.S. Patent & Trademark Office
25 as Serial No. 78/957,851.

1 46. On March 30, 2007, LOOPS FLEXBRUSH, LLC received a call from the NYC-
2 DCAS requesting additional information regarding the material composition of the Loops
3 Flexbrush. The NYC-DCAS advised LOOPS FLEXBRUSH, LLC they were preparing to put
4 the contract for Loops Flexbrush toothbrush out to bid and they had Loops Flexbrush samples
5 to compare with samples submitted by bidders.

6 47. On April 4, 2007, the NYC-DOC issued its fourth purchase order to LOOPS
7 FLEXBRUSH, LLC for 24,480 of the Loops Flexbrush toothbrushes.

8 48. On April 12, 2007, LOOPS FLEXBRUSH, LLC received an Invitation to Bid
9 from NYC-DCAS. Item 2 of the Invitation to Bid provided the product specifications of the
10 Loops Flexbrush which LOOPS FLEXBRUSH, LLC had previously sent to the NYC-DCAS at
11 the request of the NYC-DCAS. The Invitation to Bid was for a 39 month contract from August
12 30, 2007 through November 29, 2010. The Invitation to Bid referred to the manufacturer as
13 "Loops Flexbrush or Equal" and the brand as "Loops Flexbrush #FBM02 or equal." The
14 Invitation to Bid required a manufacturer's authorization.

15 49. On April 23, 2007, HEMMING contacted LOOPS FLEXBRUSH, LLC.
16 HEMMING represented that NYC-DCAS used AMERCARE for all toothbrush orders in the
17 past until LOOPS FLEXBRUSH, LLC started to supply the Loops Flexbrushes. HEMMING
18 communicated her displeasure with LOOPS FLEXBRUSH, LLC for not giving her the NYC-
19 DCAS contract.

20 50. On information and belief, in the last week of April 2007, AMERCARE
21 submitted four (4) samples of their counterfeit and infringing Loops Flexbrush toothbrush to
22 NYC-DCAS for the Invitation to Bid for the Loops Flexbrush. AMERCARE bid the Loops
23 Flexbrush toothbrush contract at a price of \$7.32 per dozen toothbrushes, which was 42 percent
24 of the price submitted by LOOPS FLEXBRUSH, LLC with its bid. The contract information
25 was withheld from LOOPS FLEXBRUSH, LLC and LOOPS FLEXBRUSH, LLC did not

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1 discover this information until July 25, 2007 when the documents were produced to LOOPS
2 FLEXBRUSH, LLC as a result of a FOIL request for public documents.

3 51. On May 17, 2007, NYC-DCAS issued a Notice of Award for Invitation to Bid
4 #700788 to AMERCARE PRODUCTS, INC. for the Loops Flexbrush Toothbrush for the time
5 period of August 30, 2007 through November 29, 2010. This information was withheld from
6 LOOPS FLEXBRUSH, LLC and LOOPS FLEXBRUSH, LLC did not discover this
7 information until July 25, 2007, when the documents were produced to LOOPS FLEXBRUSH,
8 LLC as a result of a FOIL request for public documents. The FOIL document production
9 indicating the award to AMERCARE did not include a manufacturer's authorization from
10 LOOPS FLEXBRUSH, LLC.

11 52. On May 31, 2007, the U.S. Patent & Trademark Office published the LOOPS
12 FLEXIBLE TOOTHBRUSH HOLDER Utility Patent Application No. 11/653,153 in the
13 Official Gazette as Publication No. US 2007/0119736 A1.

14 53. On June 6, 2007, LOOPS FLEXBRUSH, LLC received its fifth and last order
15 for its Loops Flexbrush toothbrushes from the NYC-DOC for 97,632 toothbrushes. From
16 August 9, 2006 through June 6, 2007, LOOPS FLEXBRUSH, LLC received orders from the
17 NYC-DOC for 329,376 Loops Flexbrush toothbrushes.

18 54. On June 26, 2007, the U.S. Patent & Trademark Office recorded the LOOPS
19 MINI-FLEXBRUSH trademark in the Principal Register as Registration No. 3,254,567.

20 55. On July 10, 2007, and unbeknownst to LOOPS FLEXBRUSH, LLC, NYC-
21 DCAS initiated an order with AMERCARE for 191,808 Loops Flexbrush counterfeit and
22 infringing toothbrushes pursuant to the contract awarded to AMERCARE. This information
23 was withheld from LOOPS FLEXBRUSH, LLC and LOOPS FLEXBRUSH, LLC only
24 discovered this information for the first time as a result of a FOIL document request from
25 NYC-DCAS which were produced February 21, 2008. The order by NYC-DCAS was placed
well before the contract date of August 30, 2007. AMERCARE shipped 182,304 of its

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1 counterfeit and infringing toothbrushes to NYC-DOC on December 12, 2007 and 9,504 of its
2 counterfeit and infringing toothbrushes to NYC-DOC on February 5, 2008, pursuant to
3 purchase orders released by NYC-DOC to AMERCARE based on the July 10, 2007 purchase
4 order. The reason for the delay in the NYC-DOC releasing its July 10, 2007 purchase order has
5 been withheld from LOOPS FLEXBRUSH, LLC.

6 56. On July 25, 2007, LOOPS FLEXBRUSH, LLC discovered for the first time that
7 the Invitation to Bid for the Loops Flexbrush was awarded to AMERCARE. LOOPS
8 FLEXBRUSH, LLC learned this information only when documents were produced to LOOPS
9 FLEXBRUSH, LLC as a result of a FOIL request for public documents. The FOIL document
10 production indicating the award to AMERCARE did not include a manufacturer's authorization
11 from LOOPS FLEXBRUSH, LLC.

12 57. On August 15, 2007, KAYSER traveled to New York City on behalf of LOOPS
13 FLEXBRUSH, LLC to meet with representatives of NYC-DCAS and review documents and
14 samples to be produced pursuant to additional FOIL requests for public records by LOOPS
15 FLEXBRUSH, LLC. KAYSER was shown four (4) toothbrush samples submitted by
16 AMERCARE in support of their winning Invitation to Bid. The four (4) toothbrush samples
17 were identical (which the Invitation to Bid required) to the Loops Flexbrush toothbrushes.
18 KAYSER informed representatives of NYC-DCAS that LOOPS FLEXBRUSH, LLC was the
19 sole source of the trademarked and patent pending Loops Flexbrush toothbrushes and that
20 LOOPS FLEXBRUSH, LLC had not authorized anyone to manufacture the products, including
21 but not limited to, AMERCARE.

22 58. On September 4, 2007, LOOPS LLC filed Loops Trade Dress Trademarks with
23 the U.S. Patent & Trademark Office. The marks referred to and identified the nonfunctional
24 total image, design and appearance of the Loops Flexbrush flexible handle toothbrush product
25 as a source identifying role and to prevent consumer confusion of any other product. One
application was assigned Serial No. 77271421 for that mark for three symmetrical dot pattern

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1 reliefs depicted on the toothbrush. The second application was assigned Serial No. 77271405
2 for that mark for the design of the three-dimensional overall appearance of a toothbrush. The
3 two applications for the trade dress trademarks were first published on March 4, 2008, in the
4 Official Gazette of the U.S. Patent & Trademark Office.

5 59. On September 27, 2007, and unbeknownst to LOOPS FLEXBRUSH, LLC,
6 NYC-DCAS placed an additional order with AMERCARE for 34,080 Loops Flexbrush
7 counterfeit and infringing toothbrushes pursuant to the contract awarded to AMERCARE. This
8 information was withheld from LOOPS FLEXBRUSH, LLC and LOOPS FLEXBRUSH, LLC
9 only discovered this information for the first time as a result of a FOIL document request from
10 NYC-DCAS which were produced February 21, 2008.

11 60. On November 17, 2007, LOOPS LLC and LOOPS FLEXBRUSH, LLC
12 personally served HEMMING with LOOPS LLC's Utility Patent application for a flexible
13 handle toothbrush to the U.S. Patent & Trademark Office, Application No. 10/920,822, titled
14 "TOOTHBRUSH AND METHODS OF MAKING AND USING SAME."

15 61. On December 12, 2007, AMERCARE shipped 182,304 of its counterfeit and
16 infringing toothbrushes to the NYC-DOC pursuant to the July 10, 2007 purchase order. This
17 information was withheld from LOOPS FLEXBRUSH, LLC and LOOPS FLEXBRUSH, LLC
18 only discovered this information for the first time as a result of a FOIL document request from
19 NYC-DOC which were produced June 5, 2008.

20 62. On February 5, 2008, AMERCARE shipped 9,504 of its counterfeit and
21 infringing toothbrushes to the NYC-DOC pursuant to the July 10, 2007 purchase order. This
22 information was withheld from LOOPS FLEXBRUSH, LLC and LOOPS FLEXBRUSH, LLC
23 only discovered this information for the first time as a result of a FOIL document request from
24 NYC-DOC which were produced June 5, 2008.

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1 63. On February 12, 2008, the U.S. Patent & Trademark Office recorded the
2 LOOPS FLEXIBLE TOOTHBRUSH HOLDER trademark in the Principal Register as
3 Registration No. 3,383,396.

4 64. On February 26, 2008, the U.S. Patent & Trademark Office granted LOOPS
5 LLC's Utility Patent application for a flexible handle toothbrush, Application No. 10/920,822,
6 titled "TOOTHBRUSH AND METHODS OF MAKING AND USING SAME." The U.S.
7 Patent & Trademark Office issued United States Patent No. 7,334,286 for Toothbrush and
8 Methods of Making and Using Same (hereinafter '286 Patent).

9 65. On March 4, 2008, the U.S. Patent & Trademark Office published the
10 DESIGNED FOR PRISON SAFETY trademark Application Serial No. 77-090,434.

11 66. On March 4, 2008, the U.S. Patent & Trademark Office published the two
12 Loops Trade Dress Trademark Applications for Trademark Serial Nos. 77/271,405 and
13 77/271,421 for the marks "Loops Flexbrush Trade Dress" and "Loops Flexbrush Relief Pattern
14 Trade Dress" respectively in the Official Gazette.

15 67. On May 6, 2008, the U.S. Patent & Trademark Office recorded the DESIGNED
16 FOR PRISON SAFETY trademark in the Supplemental Register as Registration No. 3,424,838.

17 68. On May 20, 2008, the U.S. Patent & Trademark Office recorded the LOOPS
18 FLEXBRUSH Trade Dress Trademark for the three symmetrical dot pattern reliefs depicted on
19 the toothbrush for Serial No. 77271421 in the Principal Register as Registration No. 3,340,305.

20 69. On May 20, 2008, the U.S. Patent & Trademark Office recorded the LOOPS
21 FLEXBRUSH Trade Dress Trademark for the design consisting of a three dimensional overall
22 appearance of a toothbrush for Serial No. 77271405 in the Principal Register as Registration
23 No. 3,340,304.

24 70. On June 8, 2008, LOOPS LLC and LOOPS FLEXBRUSH, LLC personally
25 served JEFFREY R. HEMMING of AMERCARE with LOOPS LLC Utility Patent No. US
7,334,286 B2 recorded by the U.S. Patent & Trademark Office on February 26, 2008 for the

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COMPLAINT FOR PATENT INFRINGEMENT;
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INFRINGEMENT; UNFAIR COMPETITION; FRAUD;
INJUNCTIVE RELIEF AND DAMAGES - 14
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1 Loops Flexbrush "TOOTHBRUSH AND METHODS OF MAKING SAME." JEFFREY R.
2 HEMMING was also personally served with LOOPS, LLC Trade Dress Trademark, Serial No.
3 77271421 recorded in the Principal Register May 20, 2008, and the LOOPS LLC trademark
4 "LOOPS FLEXBRUSH" registered in the Principal Register on September 19, 2006, and the
5 LOOPS LLC Utility Patent No. US 6,371,133 B1 recorded by the U.S. Patent & Trademark
6 Office on April 16, 2002 for the Floss Loops Dental Floss.

7 **FIRST CLAIM FOR RELIEF**

8 **(Patent Infringement against All Defendants of '286 Patent)**

9 71. Plaintiffs re-allege and incorporate the allegations of Paragraphs 1 through 70
10 above as though fully set forth herein.

11 72. On February 26, 2008, United States Patent No. 7,334,286 for TOOTHBRUSH
12 AND METHODS OF MAKING AND USING SAME (hereinafter '286 Patent) was duly and
13 legally issued to Plaintiff.

14 73. Plaintiff is informed and believes and based thereon alleges that since the issue
15 date of the '286 Patent, AMERCARE has infringed and is now infringing Claims 1-32 of the
16 '286 Patent by using, offering for sale and selling the AMERCARE Toothbrush embodying the
17 invention described and claimed in the '286 Patent.

18 74. The infringement was, and continues to be, willful.

19 75. Plaintiff has complied with 35 U.S.C. §287 in providing notice to AMERCARE.

20 76. Plaintiff is entitled to recover damages as provided by 35 U.S.C. §284 and
21 reasonable attorneys' fees as provided by 35 U.S.C. §285.

22 **SECOND CLAIM FOR RELIEF**

23 **(Trademark and Trade Dress Trademark Infringement against All Defendants)**

24 77. Plaintiffs re-allege and incorporate the allegations of Paragraphs 1 through 76
25 above as though fully set forth herein.

1 78. At all material times herein, Plaintiffs have been and are engaged in the design,
2 manufacture, marketing and sale of a variety of oral hygiene products designed for use in
3 prisons, including toothbrushes, toothbrush holders, and dental floss under trademark and trade
4 dress trademarks.

5 79. Plaintiff first adopted and used the Loops Flexbrush trademarks and trade dress
6 trademarks in commerce on November 23, 2005.

7 80. Plaintiff submitted its application for trademark registration for "LOOPS
8 FLEXBRUSH" on August 18, 2004, to the U.S. Patent & Trademark Office. The application
9 for the trademark was first published on October 4, 2005, in the Official Gazette of the U.S.
10 Patent & Trademark Office. On September 19, 2006 the U.S. Patent & Trademark Office
11 issued a Certificate of Registration No. 3,146,009 for the trademark LOOPS FLEXBRUSH.
12 Plaintiff owns the registration, which is and continues to be in full force and effect. Plaintiff
13 initially displayed Loops Flexbrush TM and then displayed Loops Flexbrush R with its
14 trademark on its products.

15 81. Plaintiff submitted its two applications for trade dress trademark registration on
16 September 4, 2007 with the U.S. Patent & Trademark Office. The applications for the trade
17 dress trademarks were first published on March 4, 2008, in the Official Gazette of the U.S.
18 Patent & Trademark Office. On May 20, 2008 the U.S. Patent & Trademark Office issued
19 Certificate of Registration Nos. 3,340,304 and 3,340,305 for the two trade dress trademarks.
20 Plaintiff owns the registration, which is and continues to be in full force and effect.

21 82. Plaintiff has used the trademark and trade dress trademarks continuously since
22 November 23, 2005 to identify Plaintiff's toothbrushes. In this connection, Plaintiff uses its
23 trademarks on products and packaging.

24 83. Plaintiff has been engaging in the sale of hygiene products, including but not
25 limited to, toothbrushes, to the prison industry since 1996. Plaintiff has actively and

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1 continuously promoted the sale of its full line of products, including the toothbrush, to the
2 prison industry bearing its trademarks and trade dress trademarks since November 23, 2005.

3 84. Plaintiff's toothbrushes, have been and continue to be extensively advertised and
4 sold throughout the United States, including the State of Washington, under the trademark
5 LOOPS FLEXBRUSH. By virtue of advertising and sales, together with customer acceptance
6 and recognition, Plaintiff's trademarks and trade dress trademarks identify Plaintiff's
7 toothbrushes only, and distinguish them from toothbrushes manufactured and sold by others.
8 Plaintiff's trademarks and trade dress trademarks have thus become and are valuable assets
9 symbolizing Plaintiff, its quality toothbrushes, and its goodwill.

10 85. Plaintiff is informed and believes, and thereon alleges, that Defendants, with
11 actual knowledge of Plaintiff's ownership of the trademarks and trade dress trademarks, has
12 been and is selling and offering for sale the LOOPS FLEXBRUSH toothbrush to the New York
13 City Department of Corrections and other correctional facilities.

14 86. Plaintiff is informed and believes, and thereon alleges, that Defendants are
15 infringing on Plaintiff's trademarks and trade dress trademarks by selling, and offering for sale
16 to the New York City Department of Corrections and other correctional facilities toothbrushes
17 which are identical to the LOOPS FLEXBRUSH toothbrush which is protected by Plaintiff's
18 trademarks and trade dress trademarks without the permission or authority of Plaintiff and said
19 use by Defendants is likely to cause confusion, to cause mistake and to deceive consumers as to
20 the source, quality, and nature of Defendants' goods.

21 87. Defendants' acts of trademark and trade dress trademark infringement have been
22 committed with the intent to cause confusion, to cause mistake and to deceive consumers as to
23 the source, quality, and nature of Defendants' goods.

24 88. Plaintiff has provided notice to Defendants of their trademarks and trade dress
25 trademarks by supplying Defendants with samples of the products, packaging, marketing and
sales documents which are prominently displayed and marked with pending trademarks. In

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COMPLAINT FOR PATENT INFRINGEMENT;
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1 addition, on June 8, 2008, LOOPS LLC and LOOPS FLEXBRUSH, LLC personally served
2 JEFFREY R. HEMMING of AMERCARE with LOOPS LLC Utility Patent No. US 7,334,286
3 B2 recorded by the U.S. Patent & Trademark Office on February 26, 2008 for the Loops
4 Flexbrush "TOOTHBRUSH AND METHODS OF MAKING SAME." JEFFREY R.
5 HEMMING was also personally served with LOOPS, LLC Trade Dress Trademark, Serial No.
6 77271421 recorded in the Principal Register May 20, 2008, and the LOOPS LLC trademark
7 "LOOPS FLEXBRUSH" registered in the Principal Register on September 19, 2006, and the
8 LOOPS LLC Utility Patent No. US 6,371,133 B1 recorded by the U.S. Patent & Trademark
9 Office on April 16, 2002 for the Floss Loops Dental Floss.

10 89. By reason of Defendants' acts alleged herein, Plaintiff has and will suffer
11 damage to its business, reputation, and goodwill and the loss of sales and profits Plaintiff would
12 have made but for Defendants' acts.

13 90. Defendants continue to do the acts complained of herein, and unless restrained
14 and enjoined, will continue to do so, all to the Plaintiff's irreparable damage. It would be
15 difficult to ascertain the amount of compensation which could afford Plaintiff adequate relief
16 for such continuing acts, and a multiplicity of judicial proceedings would be required.
17 Plaintiff's remedy at law is not adequate to compensate it for injuries threatened.

18 **THIRD CLAIM FOR RELIEF**

19 **(Violation of the Lanham Act against All Defendants)**

20 91. Plaintiffs re-allege and incorporate the allegations of Paragraphs 1 through 90
21 above as though fully set forth herein.

22 92. Defendants have caused Loops Flexbrush Toothbrushes to enter into interstate
23 commerce with representations that the products source is AMERCARE. Such designation of
24 origin is false and is likely to cause confusion, to cause mistake and to deceive as to the
25 affiliation, connection or association of defendant with Plaintiff as to the origin, sponsorship, or
approval of such Loops Flexbrush Toothbrushes by Plaintiff. These acts are in violation of 15

1 U.S.C. 1125(a) in that Defendants are palming and/or passing off which is recognized as a false
2 designation of origin under section 43(a) of the Lanham Act.

3 93. Plaintiff has been harmed, among other ways, in that its toothbrushes were
4 misused in that Defendants' acts have allowed Defendants to unfairly reap the advertising and
5 promotional value that would otherwise go to Plaintiff. By presenting customers with a sample
6 of Plaintiff's product, represented to be Plaintiff's product or equal, and either falsely or
7 impliedly representing that they have the authorization to sell or offer for sale the product,
8 Defendants have misrepresented the origin of Plaintiff's product, as well as the origin of its
9 own product, resulting in harm to Plaintiff.

10 94. Plaintiff has been damaged and will continue to be damaged by diversion of
11 business, injury to its business, reputation and goodwill, reduced association of Plaintiff's
12 trademarks and trade dress trademarks with its toothbrushes, and the false association of
13 Defendants with Plaintiff's goods and business. Plaintiff is entitled to all available relief under
14 15 U.S.C. §1117, including but not limited to, damages, costs, treble damages, interest,
15 compensation for corrective advertising, and an accounting and disgorgement of Defendants'
16 profits, according to proof.

17 95. If not enjoined by the Court, Defendants' acts will continue to mislead
18 customers, and continue to confuse and mislead consumers as to the origin of Plaintiff's
19 toothbrushes and as to the origin and authorization of the toothbrushes actually sold by
20 Defendants.

21 **FOURTH CLAIM FOR RELIEF**

22 **(Unfair Competition under the Washington Consumer Protection Act 23 against All Defendants)**

24 96. Plaintiffs re-allege and incorporate the allegations of Paragraphs 1 through 95
25 above as though fully set forth herein.

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COMPLAINT FOR PATENT INFRINGEMENT;
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1 97. RCW § 19.86.020 provides that unfair methods of competition and unfair or
2 deceptive acts or practices in the conduct of any trade or commerce are declared unlawful.
3 RCW § 19.86.090 makes such violations remediable through a civil action.

4 98. Defendants WENDY HEMMING, JEFFREY R. HEMMING, H&L
5 INDUSTRIAL, and PHOENIX TRADING INC. dba AMERCARE PRODUCTS are engaged
6 in trade or commerce in the State of Washington.

7 99. Because of Defendants' actions, more particularly described herein, including
8 but not limited to, palming and/or passing off Plaintiff's goods without authorization and false
9 designation of origin, Plaintiff has been damaged in its business or property in an amount to be
10 proven at trial.

11 100. Defendants' conduct impacts the public interest.

12 101. Plaintiff is entitled to recover costs of suit and reasonable attorney's fees to
13 enjoin Defendants' unlawful conduct.

14 102. Due to the nature of Defendants' actions and the circumstances described herein,
15 Plaintiff is also entitled to treble damages within the limits of RCW § 19.86.090.

16 103. Plaintiff is further entitled to an injunction enjoining Defendants WENDY
17 HEMMING, JEFFREY R. HEMMING, H&L INDUSTRIAL, and PHOENIX TRADING INC.
18 dba AMERCARE PRODUCTS from committing such further acts in violation of RCW §
19.86.020.

19 **FIFTH CLAIM FOR RELIEF**

20 **(Unfair Competition under Washington Common Law**
21 **against All Defendants)**

22 104. Plaintiffs re-allege and incorporate the allegations of Paragraphs 1 through 103
23 above as though fully set forth herein.

24 105. By committing the above described acts, including but not limited to, palming
25 and/or passing off Plaintiff's goods without authorization and false designation of origin,

1 Defendants WENDY HEMMING, JEFFREY R. HEMMING, H&L INDUSTRIAL, and
2 PHOENIX TRADING INC. dba AMERCARE PRODUCTS have violated the common law of
3 unfair competition.

4 106. Plaintiff is entitled to all relief available pursuant to such common law,
5 including but not limited to, an injunction restraining Defendants from impliedly or
6 affirmatively representing the nature, quality, and characteristics of its own products or those of
7 Plaintiff, or falsely stating the origin of Plaintiffs' products and/or their authorization from
8 Plaintiff concerning the Plaintiff's products.

9 **SIXTH CLAIM FOR RELIEF**

10 **(Fraud against Defendants Wendy Hemming and Phoenix Trading Inc.**
11 **dba Americare Products, Inc.)**

12 107. Plaintiff re-alleges and incorporates the allegations of Paragraphs 1 through 106
13 above as though fully set forth herein.

14 108. On January 13, 2006, Defendant WENDY HEMMING represented that she
15 owned AMERCARE PRODUCTS, INC. and provided products to correctional facilities.
16 HEMMING requested price quotations for products sold by LOOPS LLC, namely Floss Loops
17 Safety Dental Floss, U.S. Patent No. 6,371,133 B1 which she represented was for one of
18 AMERCARE's customers. HEMMING also requested samples of all products sold by
19 Plaintiffs be sent to her attention at AMERCARE's Woodinville, Washington address,
20 including the Floss Loops Safety Dental Floss and Loops Flexbrush toothbrushes. On January
21 13, 2006, at the request of HEMMING, KAYSER shipped samples of all products sold by
22 Plaintiffs including Floss Loops Safety Dental Floss and Loops Flexbrush Toothbrushes in both
23 3" and 4.25" sizes.

24 109. On January 26, 2006, HEMMING contacted Plaintiffs to order Floss Loops
25 Safety Dental Floss for AMERCARE. From January 26, 2006 through January 23, 2007,
HEMMING ordered on six (6) separate occasions Floss Loops Safety Dental Floss. With each

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COMPLAINT FOR PATENT INFRINGEMENT;
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1 order of Floss Loops product, Plaintiffs provided factory packaging labeled "U.S. Patent No.
2 6,371,133 B1, Other Patents Pending." Also, with each order of Floss Loops product shipped
3 to AMERCARE, there were included marketing materials, color photographs and samples of
4 Loops Flexbrush toothbrushes.

5 110. On January 23, 2007, HEMMING contacted Plaintiffs to place what turned out
6 to be AMERCARE's last order for Floss Loops Safety Dental Floss. HEMMING represented
7 her interest in selling both the Floss Loops Safety Dental Floss and Loops Flexbrush
8 toothbrushes. HEMMING requested that Plaintiffs give AMERCARE any and all contracts
9 Plaintiffs had for the sale of these products to allow AMERCARE to manage these contracts
10 with Plaintiffs supplying the product to AMERCARE. On behalf of Plaintiffs, KAYSER
11 refused HEMMING's request.

12 111. On January 26, 2007, Plaintiffs personally delivered what turned out to be the
13 last order of Floss Loops Safety Dental Floss to Amercare. HEMMING asked for additional
14 samples of Loops Flexbrushes in 3" and 4.25" sizes and Flexible Toothbrush Holders.
15 HEMMING again requested that LOOPS LLC and LOOPS FLEXBRUSH, LLC give
16 AMERCARE any and all contracts LOOPS LLC and LOOPS FLEXBRUSH, LLC had for the
17 sale of these products to allow AMERCARE to manage these contracts with LOOPS LLC and
18 LOOPS FLEXBRUSH, LLC supplying the product to AMERCARE. HEMMING specifically
19 requested that LOOPS FLEXBRUSH, LLC give AMERCARE the New York City contracts
20 for the sale of the Loops Flexbrushes. KAYSER, on behalf of LOOPS FLEXBRUSH, LLC
21 again refused HEMMING's request.

22 112. HEMMING's representations concerning the need for samples of Loops
23 Flexbrush toothbrushes were false, as the true reason for the need for samples of Loops
24 Flexbrush toothbrushes was HEMMING's intent to manufacture counterfeit toothbrushes in
25 China to unfairly compete with Plaintiffs.

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COMPLAINT FOR PATENT INFRINGEMENT;
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1 113. Defendants made these representations knowing they were false and with the
2 intent to induce Plaintiffs to provide samples of the Loops Flexbrush toothbrushes under the
3 false premise that HEMMING intended to order the product for resale to correctional facilities
4 in the same manner as she had ordered the Floss Loops Safety Dental Floss from Plaintiffs.

5 114. Plaintiffs detrimentally relied on the representations of Defendants by agreeing
6 to supply and then actually supplying Loops Flexbrush toothbrush samples to Defendants on
7 several occasions. Defendants thereafter counterfeited the Loops Flexbrush toothbrush by
8 manufacturing and then importing into the United States from China counterfeit and infringing
9 Loops Flexbrush toothbrushes.

10 115. As a result of Defendants' fraudulent representations, Plaintiffs have been
11 damaged in an amount subject to proof.

12 116. The misrepresentations by Defendants were motivated and practiced through
13 fraud, malice and oppression with the intent to harm Plaintiffs in their business operations.

14 **DEMAND FOR JURY TRIAL**

15 117. Plaintiffs demand trial by jury on all causes of action.

16 **PRAYER FOR RELIEF**

17 WHEREFORE, Plaintiffs LOOPS LLC and LOOPS FLEXBRUSH, LLC pray for
18 judgment against Defendants WENDY HEMMING, JEFFREY R. HEMMING, H&L
19 INDUSTRIAL, and PHOENIX TRADING INC. dba AMERCARE PRODUCTS as follows:

- 20 1. That Defendants be required to make an accounting and pay all damages based
21 on Defendants' infringement of Plaintiffs' patents;
- 22 2. For damages pursuant to 35 U.S.C. §284 and reasonable attorney's fees pursuant
23 to 35 U.S.C. §285;
- 24 3. For compensatory and special damages subject to proof;
- 25 4. That this Court grant preliminary and permanent injunctions enjoining
Defendants WENDY HEMMING, JEFFREY R. HEMMING, H&L INDUSTRIAL, and

1 PHOENIX TRADING INC. dba AMERCARE PRODUCTS, and their agents, servants,
2 employees, and successors, from directly or indirectly importing, manufacturing, contracting
3 out for manufacture, advertising, marketing, using, selling, or offering for sale Loops Flexbrush
4 toothbrushes and/or their equals embodying the '286 patent including, but not limited to, the 3"
5 flexible handle toothbrush and the 4.25" flexible handle toothbrush sold or offered for sale to
6 the New York City Department of Corrections and New York City Department of Citywide
7 Administrative Services pursuant to Notice of Award for Invitation to Bid #700788 and to other
8 correctional facilities and non-correctional consumers;

9 5. That Defendants be ordered to surrender for destruction all products,
10 advertisements, marketing materials, and other materials constituting a false designation of
11 origin of Defendants' toothbrushes;

12 6. That Defendants be ordered to surrender for destruction all products,
13 advertisements, marketing materials, and other materials concerning or related to Loops
14 Flexbrush toothbrushes and/or their equals;

15 7. That Defendants be ordered to pay Plaintiff the Defendants' profits and the
16 actual damages suffered by Plaintiff as a result of Defendants' acts and that, where authorized
17 by law, such damages be trebled because of the willful acts described herein in disregard of
18 Plaintiffs' rights;

19 8. That Defendants be compelled to pay Plaintiffs' attorneys fees and costs of suit,
20 as allowed by law; and

21 9. For such other relief as the Court deems proper.

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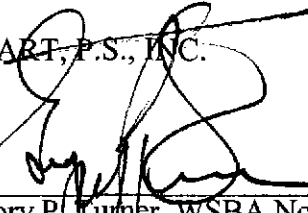
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1 DATED this 11th day of July, 2008.

2 LEE SMART, P.S., INC.

3
4
5 By:


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10 Applications for admission *pro hac vice* pending

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COMPLAINT FOR PATENT INFRINGEMENT;
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