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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,

v.

PHOENIX TRADING, INC., dba  
AMERCARE PRODUCTS, INC., *et al.*,

Defendants.

CASE NO. C08-1064 RSM

ORDER GRANTING PLAINTIFFS'  
MOTION FOR ADVERSE  
INFERENCE INSTRUCTION

This matter comes before the Court on Plaintiffs' "Motion for Contempt of Court Sanctions" (Dkt. #110). Plaintiffs contend that Defendants are withholding or have deleted relevant documents. They ask the Court to give the jury an adverse inference instruction as a sanction for Defendants' discovery abuse. The record shows that relevant requested documents either exist and are being withheld or existed during the pendency of this litigation and were lost or destroyed by Defendants. Therefore, the Court will GRANT the motion and award Plaintiffs an adverse inference instruction.

## **I. BACKGROUND**

1  
2 Plaintiffs in this action manufacture and sell a patented flexible toothbrush known as the  
3 Loops Flexbrush. The toothbrush is unique in that it can be bent in half or twisted into a  
4 spiral without breaking, making it particularly attractive to correctional facilities since it  
5 cannot be used as a weapon. Plaintiffs allege that Defendants obtained samples of the Loops  
6 Flexbrush, sent them to a Chinese entity to be copied, imported the copies back into the  
7 United States as the Amercare Soft Handle toothbrush, and sold them to compete with the  
8 Loops Flexbrush. Plaintiffs specifically allege patent infringement, violations of the Lanham  
9 Act, and unfair competition.

10 Throughout discovery, Plaintiffs have sought documents related to the manufacture of  
11 Amercare flexible toothbrushes in China and their importation into the United States. Early in  
12 the litigation, Plaintiffs sought to compel documents from Defendants related to the  
13 manufacture of all toothbrushes. The Court held in an order dated September 10, 2009, that  
14 “[t]his case concerns only flexible handle toothbrushes” and discovery related to non-flexible  
15 toothbrushes was overbroad. (Dkt. #69). The Court held that Plaintiffs’ document requests,  
16 once narrowed to pertain only to flexible handle toothbrushes, were proper and ordered  
17 Defendants to comply with those requests. (*Id.* at 5). Defendants did not produce any  
18 documents immediately following that order, implicitly stating that they had produced all  
19 relevant documents regarding the flexible handle toothbrushes at issue in this case.

20 In October 2009, Plaintiffs twice wrote to Defendants requesting that Defendants  
21 comply with the Court’s order by turning over relevant documents. Plaintiffs believed that  
22 Defendants were withholding documents concerning the manufacture and importation of the  
23 flexible toothbrushes, specifically purchase orders to the Chinese factories that manufacture  
24 the toothbrushes, invoices from those factories to Defendants, records of payment, and  
25 communications with the factories, mold and tool makers, and other Chinese entities involved  
26 in the manufacture and distribution of the products. Defendants did not respond, again  
27 implying that there were no more responsive documents to produce.

1 In November 2009, Plaintiffs took the deposition of Wendy Hemming, the owner and  
2 operator of Defendant Amercare, who was designated as the Rule 30(b)(6) representative of  
3 both Amercare and Defendant H&L Industrial, Amercare's manufacturer's representative, a  
4 Chinese entity that acts as a facilitator between Amercare and manufacturers in China. At the  
5 deposition, it became clear that Defendants had not produced all relevant documents. The  
6 following colloquy took place:

7  
8 Q: How many invoices did Kai Yuen Import and Export Company<sup>1</sup> send you  
related specifically to the 4-and-a-quarter-inch flexible handle toothbrush?

9 A: Five. Probably five, four to five.

10 Q: And do you have copies of those invoices they sent to you?

11 A: Yes.

12 (Dkt. #111 at 14). However, despite acknowledging that four to five invoices exist and  
13 promising to produce them, Defendants only produced two invoices. Ms. Hemming also  
14 testified:

15 Q: And did you receive invoices from H&L Industrial for their services related  
to the flexible handle toothbrushes that you supplied to New York City?

16 A: Yes.

17 Q: And is that also a document that you'll be producing tomorrow for us?

18 A: Yes.

19 (*Id.* at 17). These invoices have not been produced either.

20 Hemming also indicated that there are written purchase orders from Amercare to H&L  
21 Industrial for flexible handle toothbrushes:

22 Q: So there is a purchase order that reflects the purchase orders for each flexible  
23 handle toothbrush order?

24 A: Yes.

25 ...

26 Q: We would like copies of all of the purchase orders issued by H&L, your  
27 manufacturer's representative, for the purchase of the flexible handle toothbrush.

28 A: Sure.

Q: Is that something you can produce for us?

A: Yes. Yes. I can request from H&L.

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<sup>1</sup> Later in her deposition, Ms. Hemming stated that Kai Yuen Import and Export Company is also known as Jiangsu Light Industrial Products.

1 (*Id.* at 29). Hemming also testified that there are documents regarding the transportation of  
2 toothbrushes from the factories to Chinese ports:

3  
4 Q: I assume that Amercare has invoices that they received for the freight that  
5 was incurred from taking the flexible handle toothbrushes from the factory to  
6 the Shanghai port.

7 A: Yes.

8 Q: And are those invoices also that you're going to include in the documents  
9 you're going to send us tomorrow?

10 A: I will.

11 (*Id.* at 16). These invoices were not sent to Plaintiffs either.

12 Finally, Ms. Hemming indicated that there were wire transfers from Amercare to H&L  
13 Industrial regarding flexible handle toothbrushes. (*Id.* at 18). These were never produced.

14 Plaintiffs also deposed Julie Siegel, Ms. Hemming's assistant and Amercare's  
15 operations manager. Siegel was instructed by Ms. Hemming to search through Amercare's e-  
16 mail system for e-mails responsive to Plaintiffs' requests. (Dkt. #111 at 36). She appears to  
17 be the only person who searched for responsive e-mails.<sup>2</sup> E-mails between Amercare and  
18 H&L Industrial are especially important because in addition to possibly containing  
19 conversations relevant to this suit, the e-mails often contained attachments including invoices  
20 or purchase orders. (Dkt. #111 at 36). Relevant e-mails between Amercare and H&L  
21 Industrial were put in a special folder called the "Lai file."

22 At her deposition, Ms. Siegel testified that she searched for responsive e-mails by  
23 searching through e-mails that were sent or received within a month of the dates of invoices to  
24 New York City, where Amercare sold the flexible handle toothbrushes. (Dkt. #111 at 36).  
25 Defendants do not contend that anybody ever did a keyword search or any other search for  
26 relevant emails. Additionally, Siegel testified that Amercare did not implement a litigation  
27 hold to refrain from deleting relevant files.

28 Q: Does Amercare have a policy and procedure by which they delete files at  
regular intervals?

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<sup>2</sup> Ms. Hemming indicated that she did not go through them and Defendants have not indicated that anybody else did. (Dkt. #129 at 2).

1 A: No, we do not.

2 Q: Have you deleted files from the Lai files within the last year?

3 A: Probably.

4 Q: Were you ever instructed after this lawsuit was filed not to delete any  
5 information from the computer system of Amercare?

6 A: No. Not to my knowledge. I don't recall being instructed that ever.

7 (Dkt. #111 at 37). No e-mails between Amercare and any Chinese entity have been produced  
8 to Plaintiffs although some attachments to e-mails seem to have been produced.

9 Ms. Hemming also testified that H&L might have a contract with Jiangsu Light  
10 Industrial, one of the Chinese manufacturers.

11 Q: [D]o you know if H&L Industrial entered into a contract with Jiangsu Light  
12 Industrial Products - -

13 A: I think so.

14 Q: - - for the manufacture of flexible handle toothbrushes that's in addition to  
15 the purchase orders that they issued?

16 [Defendants' Counsel]: Don't guess. If you know, you know.

17 A: I think yes. That's one the first question we talk about. There's requirement  
18 - there's a requirement of the million pieces of certain mold. We have to order  
19 certain quantity . . . .

20 (Dkt. #111 at 30).

21 After their depositions and in response to the present motion, Ms. Hemming and Ms.  
22 Siegel filed new declarations. Ms. Hemming declared that she had not reviewed all the  
23 documents that Amercare produced and was therefore not aware that some documents had not  
24 been produced. (Dkt. # 129 at 2). Once aware that some documents were missing, Ms.  
25 Hemming tried to locate them. (*Id.*). While she was able to locate some, such as the two  
26 invoices from Jiangsu that Defendants produced, she was not able to locate all the documents  
27 that she testified existed and would be produced. According to Hemming, all responsive  
28 documents under her control have been produced. (*Id.* at 3).

Ms. Siegel stated in her declaration that while she periodically deleted e-mails from the  
Lai folder, she "never deleted any e-mails from the system that referred to, related to, or  
discussed in any way the TB-38S model flexible handled toothbrush at issue in this case."  
(Dkt. #128 at 2). She "carefully scanned all the files and folders on the Amercare computer  
system that might potentially contain such information." (*Id.* at 3).

## II. DISCUSSION

1  
2 Plaintiffs request the Court give an adverse inference instruction based on Defendants'  
3 nonproduction of documents that are or were within its control. "An adverse inference is an  
4 instruction to the trier of fact that evidence made unavailable by a party was unfavorable to  
5 that party." *Lewis v. Ryan*, 261 F.R.D. 513, 521 (S.D. Cal. 2009). An adverse inference  
6 instruction can be given based on spoliation of documents if the party seeking the instruction  
7 can establish (1) the party having control over the evidence had an obligation to preserve it,  
8 (2) the evidence was destroyed with a negligent or more culpable state of mind, and (3) the  
9 destroyed evidence was relevant to the party's claim or defense. *Id.*; *see also Glover v. BIC*  
10 *Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993) (bad faith not required to give adverse inference  
11 instruction). The obligation to preserve evidence arises when a party has "some notice that the  
12 documents are potentially relevant." *Akiona v. U.S.*, 938 F.2d 158, 161 (9th Cir. 1991); *see*  
13 *also Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Securities LLC*, --- F.  
14 *Supp. 2d* ---, 2010 WL 184312 (S.D.N.Y. 2010) ("It is well established that the duty to  
15 preserve evidence arises when a party reasonably anticipates litigation.").

16  
17 The adverse inference sanction is based on two rationales, one evidentiary and  
18 one not. The evidentiary rationale is nothing more than the common sense  
19 observation that a party who has notice that a document is relevant to litigation  
20 and who proceeds to destroy the document is more likely to have been  
21 threatened by the document than is a party in the same position who does not  
22 destroy the document . . . . The other rationale for the inference has to do with  
23 its prophylactic and punitive effects. Allowing the trier of fact to draw an  
24 inference presumably deters parties from destroying relevant evidence before it  
25 can be introduced at trial.

26  
27 *Akiona*, 938 F.2d at 161.

28  
These same rationales also apply where a party is withholding evidence. Where a party  
withholds evidence in violation of a court order to produce the evidence, the Court may award  
appropriate sanctions under Rule 37(b) and the Court's inherent powers. This includes giving  
an adverse inference instruction. *See Commercial Ins. Co. of Newark v. Gonzalez*, 512 F.2d  
1307, 1314 (1st Cir. 1975) ("It is elementary that if a party has evidence . . . in its control and

1 fails to produce it, an inference may be warranted that the document would have been  
2 unfavorable.”).

3 In the instant case, the Court makes the following findings based on the deposition  
4 testimony summarized above and the remainder of the record. Defendants had four or five  
5 invoices from Kai Yuen/ Jiangsu Light within their possession or control during the pendency  
6 of this litigation. They only produced two of them. Defendants were also in control of  
7 purchase orders for flexible handle toothbrushes sent from Amercare to H&L Industrial, and  
8 invoices from H&L to Amercare, which were not produced. Additionally, Defendants were  
9 in control of invoices detailing freight charges for transportation of flexible toothbrushes from  
10 factories in China to Chinese ports as well as wire transfers from Amercare to H&L  
11 Industrial, and these have not been produced. The Court finds that Defendants are culpable in  
12 either withholding these documents or negligently destroying or losing them after having a  
13 duty to preserve them. The Court further finds that these materials were relevant to prove the  
14 extent of Defendants’ damages. Finally, the Court finds that some number of e-mails between  
15 Amercare and H&L existed during the pendency of this lawsuit which were not produced and  
16 have since been negligently deleted. These e-mails were likely relevant to damages and  
17 liability. Defendants’ contention that no documents have been destroyed and no more  
18 responsive documents exist is directly contradicted by Ms. Hemming’s deposition testimony,  
19 which indicates that relevant documents do or did exist.

20 Plaintiffs contend that Defendants have not produced the contracts between Defendant  
21 H&L Industrial and manufacturers such as Kai Yuen / Jiangsu Light. However, on the record  
22 the Court cannot find that a written contract existed. Ms. Hemming testified that she  
23 “think[s]” there was a contract, but she does not indicate that the contract was ever written.  
24 (Dkt. #111 at 30).

25 It is unclear whether the documents that Ms. Hemming testified existed, but that have  
26 not been produced, are being withheld or have been destroyed or lost. However, the  
27 distinction is irrelevant. Either way, Plaintiffs are entitled to an adverse inference instruction.  
28 Accordingly, Plaintiffs’ Motion is GRANTED.

**III. CONCLUSION**

Having reviewed the relevant pleadings, the declarations and exhibits attached thereto, and the remainder of the record, the Court hereby finds and ORDERS:

- (1) Plaintiffs' Motion for Contempt of Court Sanctions (Dkt. #110) is GRANTED.
- (2) The Clerk is directed to forward a copy of this Order to all counsel of record.

DATED this 3 day of March, 2010.



RICARDO S. MARTINEZ  
UNITED STATES DISTRICT JUDGE