

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

LOGGERHEAD TOOLS, LLC,

Plaintiff,

v.

SEARS HOLDINGS CORPORATION and
APEX TOOL GROUP, LLC,

Defendants.

Case No. 1:12-cv-09033

JURY TRIAL DEMANDED

FIRST AMENDED COMPLAINT

This is an action for willful patent infringement; multiple violations of the Lanham Act, violation of the Uniform Deceptive Trade Practices Act and the Illinois Consumer Fraud and Deceptive Business Practices Act, violation of Illinois common law of unfair competition, violation of Illinois common law of trademarks, common law fraud, fraud in the inducement, promissory fraud, aiding and abetting wrongful acts, tortious interference with business relations and prospective advantage, and civil conspiracy, in which Plaintiff LoggerHead Tools, LLC makes the following allegations against Defendants Sears Holding Corporation and Apex Tool Group, LLC, based on (a) personal knowledge, (b) the investigation of its counsel, and (c) information and belief:

THE PARTIES

1. Plaintiff LoggerHead Tools, LLC (“LoggerHead”) is an Illinois limited liability company with its principal place of business at 8310 West 127th St., Palos Park, Illinois 60464.

2. Defendant Sears Holding Corporation (“Sears”) is a Delaware corporation having its principal place of business at 3333 Beverly Road, Hoffman Estates, Illinois. Sears may be served via its registered agent for service of process, The Corporation Trust Company, Corporation Trust Center, 1209 Orange St., Wilmington, Delaware 19801.

3. Defendant Apex Tool Group, LLC (“Apex”) is a Maryland corporation having its principal place of business in Sparks, Maryland. Apex may be served via its registered agent for service of process, The Corporation Trust Incorporated, 351 West Camden Street, Baltimore, Maryland 21201.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §1331 (federal question), §1338(a) (question related to patents) and supplemental jurisdiction pursuant to 28 U.S.C. §1367.

5. This Court has personal jurisdiction over Sears. Sears has conducted and does conduct business within the State of Illinois and within the Northern District of Illinois. Sears directly and/or through intermediaries (including distributors, sales agents, and others), ships, distributes, offers for sale, sells, and/or advertises its products (including, but not limited to, the products that are accused of patent infringement in this lawsuit) in the United States, the State of Illinois, and the Northern District of Illinois. Sears has committed patent infringement within the State of Illinois, and, more particularly, within the Northern District of Illinois as alleged in more detail below.

6. This Court has personal jurisdiction over Apex. Apex has conducted and does conduct business within the State of Illinois and within the Northern District of Illinois. Apex directly and/or through intermediaries (including distributors, sales agents, and others), ships, distributes, offers for sale, sells, and/or advertises its products (including, but not limited to, the

products that are accused of patent infringement in this lawsuit) in the United States, the State of Illinois, and the Northern District of Illinois. Apex has committed patent infringement within the State of Illinois, and, more particularly, within the Northern District of Illinois as alleged in more detail below.

7. Venue is proper in this judicial district pursuant to 28 U.S.C. §1391 and §1400.

8. Joinder of the Defendants in this action is proper pursuant to 35 U.S.C. § 299. As alleged in more detail below, both of the Defendants are offering to sell and/or selling the same infringing products, and questions of fact common to both Defendants will arise in this action.

THE PATENTS-IN-SUIT

United States Patent No. 6,889,579

9. On May 10, 2005, United States Patent No. 6,889,579 (the “’579 Patent”), entitled “Adjustable Gripping Tool,” was duly and legally issued to inventor Daniel P. Brown (“Brown.”) by the United States Patent and Trademark Office, after a full and fair examination. LoggerHead was assigned the ’579 Patent, and it continues to hold all rights, title, and interest in the ’579 Patent. A true and correct copy of the ’579 Patent is attached as Exhibit A.

10. By way of example only, Claim 1 of the ’579 Patent recites one of the inventions disclosed in the ’579 Patent:

An adjustable gripping tool for engaging a workpiece to impart work thereto, the tool comprising:

a first element and a second element connected for relative angular movement which generates movement of at least one gripping element;

the first element including a gripping portion configured to engage the workpiece including a first opening, at least one guide extending from the first opening and the at least one gripping element;

each at least one gripping element including a body portion adapted for engaging the workpiece, an arm portion configured to engage one of said at least one guide and a force transfer element contiguous with the arm portion;

the second element including an actuation portion having a second opening concentric with the first opening and at least one slot disposed adjacent the second opening external thereto, each said at least one slot having a first section configured to engage the force transfer element of one said at least one gripping element, such that movement of the second element with respect to the first element actuates each at least one first section to contact and move each respective force transfer element thereby actuating each said at least one gripping element along respective said at least one guide.

United States Patent No. 7,992,470

11. On August 9, 2011, United States Patent No. 7,992,470 (the “’470 Patent”), entitled “Adjustable Gripping Tool,” was duly and legally issued to Brown by the United States Patent and Trademark Office, after a full and fair examination. LoggerHead was assigned the ’470 Patent, and it continues to hold all rights, title, and interest in the ’470 Patent. A true and correct copy of the ’470 Patent is attached as Exhibit B.

12. By way of example only, Claim 1 of the ’470 Patent recites one of the inventions disclosed in the ’470 Patent:

An adjustable gripping tool for engaging a work piece to impart work thereto, the tool comprising:

(a) a first element and a second element connected for relative movement which generates movement of at least one gripping element;

(b) the first element including a gripping portion configured to engage the work piece including at least one guide defined in the gripping portion and said at least one gripping element;

(c) each at least one gripping element including a body portion adapted for engaging the work piece, an arm portion configured to engage one said at least one guide and a force transfer element contiguous with the arm portion;

(d) the second element including an actuation portion having at least one slot therein, each said at least one slot having a first section configured to engage the force transfer element of one said at least one gripping element, such that movement of the second element with respect to the first element actuates each at least one first section to contact and move each respective force transfer element thereby actuating each said at least one gripping element along respective said at least one guide, wherein the first element further includes at least one aligning element such that each said at least one aligning element is disposed between an adjacent pair of guides and extends parallel to the force transfer elements.

FACTUAL BACKGROUND

Inventor Dan Brown Designs and Develops the Patented Bionic Wrench® and Forms LoggerHead Tools, LLC

13. Brown is the inventor of the '579 Patent and the '470 Patent (collectively, “the Bionic Wrench Patents”), and the founder and President of LoggerHead Tools. Brown is a Clinical Associate Professor at the Segal Design Institute at Northwestern University, McCormick School of Engineering, where he teaches several engineering courses, including

product design and development. He is also the founder and president of Consul-Tech Concepts, LLC, a product design and development consultancy that develops new products for the marketplace.

14. Brown has spent his life using tools and has dedicated his career to developing products in various industries. He is a named inventor on more than 30 U.S. patents.

15. Brown spent more than three years designing and developing an innovative new tool called the Bionic Wrench. During that time, Brown researched the market, patents and potential competitors; profiled the ideal customer as well as the end users of the tool; evaluated sales channels to identify the best strategy for success in the sales and distribution channels; designed and redesigned the tool; defined the best material options; reduced the number of parts; standardized components; eliminated steps in the manufacturing process; and searched for the best American supplier that could build the tooling, stamp the product, and assemble the tool.

16. To protect the substantial resources devoted to developing the new tool, Brown applied for the first Bionic Wrench Patent (the '579 Patent) in January 2004.

17. In 2005, Brown founded LoggerHead Tools and launched the first Bionic Wrench product. LoggerHead expended extensive time, labor, skill, and money to create, market, produce, and sell its patented Bionic Wrenches. LoggerHead's efforts resulted in a recognized and distinctive brand that created substantial goodwill for LoggerHead and the Bionic Wrench.

18. The Bionic Wrench is a revolutionary tool that, among other features, adjusts a nut/bolt on its flat sides by squeezing the handles, thereby allowing a user to complete work without the wrench slipping off and damaging the bolt. The Bionic Wrench allows the user to use one tool for any size nut/bolt within a certain range, so the user does not have to search for

the correct size wrench and need not determine whether the nut/bolt is in metric or nonmetric dimensions. The following photographs depict LoggerHead's Bionic Wrench:



19. An important aspect of LoggerHead's business philosophy is that the Bionic Wrench is manufactured and assembled in the United States, using all American-made components. While it might have been easier to manufacture his products in low-cost, off-shore factories in China, Brown emphatically resisted sending his new invention to be manufactured off-shore. He chose to have the Bionic Wrench manufactured in the United States. Brown created a business model enabling LoggerHead to produce the Bionic Wrench in the United States and sell the product in a market dominated by low-cost imported tools. Brown was adamant about creating a company and a brand identity based on a "Made in America" business model.

20. After Brown's exhaustive search for the best American supplier that could build, stamp, and assemble the Bionic Wrench, LoggerHead established a relationship with Penn United Technologies, Inc. ("Penn United") in Pennsylvania, where every Bionic Wrench is manufactured.

21. In order to accomplish LoggerHead's "Made in America" business plan in a way that could compete against imported hand tools, Brown designed an entirely new tool that created unique value in the marketplace, and engineered a design that allowed for an efficient manufacturing process that was both productive and flexible. The result was LoggerHead's low overhead organizational structure and business model that has been widely praised for its commitment to manufacturing in the United States and creation of American jobs.

22. When LoggerHead introduced the Bionic Wrench in 2005, it was greeted with enthusiasm and accolades at trade shows and industrial design competitions. On March 21, 2006, The Wall Street Journal reported that,

[I]n two of this year's noted international design competitions, only two U.S. companies took home highest honors for their products. One, predictably, was giant Apple Computer Inc. for its sleek, high-tech iPod Nano music player. The other was a tiny unknown Illinois upstart named LoggerHead Tools.

23. LoggerHead built substantial goodwill in just a few years based on the quality and novelty of the Bionic Wrench – as well as its commitment to American manufacturing and jobs. LoggerHead's manufacturer, Penn United, had seven manufacturing and assembly lines for the Bionic Wrench, and employed between 20 and 50 American workers to manufacture and assemble LoggerHead's Bionic Wrench.

24. LoggerHead's hard-earned goodwill helped it survive the global recession in 2008. Despite the economic downturn, LoggerHead resisted overtures from retailers who wanted to sell the patented Bionic Wrench under their own brands. Instead, LoggerHead worked tirelessly to establish a unique brand of its own. By the end of 2008, in the midst of a global recession, LoggerHead had sold Bionic Wrenches for nearly \$11 million at wholesale prices – which resulted in over \$20 million in retail sales.

25. On August 26, 2008, LoggerHead received a U.S. trademark registration certificate from the United States Patent & Trademark Office for the phrase “Bionic Wrench®.” Attached as Exhibit C is LoggerHead's trademark registration certificate.

26. LoggerHead sells Bionic Wrenches on its own website and also to established retailers including Sears, Canadian Tire, QVC, Costco, Amazon, Ace Hardware, True Value, Menards, and others.

27. LoggerHead's Bionic Wrench has been recognized throughout the world by leading trade associations for its design and innovative creativity, receiving many significant domestic and international design and innovation awards, including the following:

- Popular Mechanics Breakthrough Innovation Award (2009)
- iF International Forum Design Universal Design Award (2008)
- Plant Engineering Magazine (Bronze) Product of the Year (2007)
- iF International Product of the Year Award (2007)
- Farm Industry News FinOvation Award for Product Design (2007)
- Chicago Innovation Award (2006)
- iF International Forum Design Product of the Year - Gold Award (2006)
- Red Dot Product Design Best of the Best Award (2006)
- Popular Mechanics Editor's Choice Award (2005)

- Chicago Athenaeum Good Design Award (2005)

28. LoggerHead has shipped 1.75 million units of the Bionic Wrench, all while operating on a low-overhead business model and investing much of the profit back into the company and its employees.

29. LoggerHead's Bionic Wrenches were substantially and continuously marked in accordance with the requirements of 35 U.S.C. § 287.

**LoggerHead and Sears Form a Strategic Partnership
to Promote and Sell the Bionic Wrench**

30. With the Bionic Wrench having been embraced in the marketplace as an innovative new tool, Sears placed an order with LoggerHead for 15,000 Bionic Wrench units for the Christmas 2009 season to test how well the tool would do at Sears. Sears sold-out of all the Bionic Wrenches it ordered.

31. For the 2010 Christmas season, Sears ordered 75,000 Bionic Wrenches – a five-fold increase over its order from the prior year. Once again, Sears sold-out of all the Bionic Wrenches it ordered.

32. Based on the Bionic Wrench's sales success in 2009 and 2010, Sears and LoggerHead entered into a one-year supply agreement. The supply agreement had an effective start date of February 1, 2011, and expired February 1, 2012. Sears and LoggerHead each acted in accordance with the effective date set forth in the supply agreement, even though neither LoggerHead nor Sears had signed the agreement until April 19, 2011.

33. Sears agreed to produce and run a full-length television advertisement known as a Direct Response TV program ("DRTV") to promote the Bionic Wrench during the 2011 holiday season. Sears agreed to produce the Bionic Wrench DRTV, and in return, LoggerHead agreed to pay a fee (per unit sold) to subsidize the expense of the DRTV advertising.

34. In addition to paying a subsidy for the DRTV promotion, and in response to Sears' request, LoggerHead agreed that it would not sell Bionic Wrenches to Home Depot or Lowes – Sears' two primary retail hand-tool competitors.

35. The 2011 DRTV promotion was an enormous success. Sears sold over 300,000 Bionic Wrenches – an amount that exceeded Sears' sales forecast target by 23 percent.

36. Sears shared its excitement for the successful 2011 Bionic Wrench sales with LoggerHead, informing Brown in writing in early December 2011 that the Bionic Wrench was Sears' best-selling and most profitable tool in its category. The 2009 to 2011 collaboration between two Chicago-based companies – one a small start-up and the other one of the largest and most well-recognized Chicago companies in history – was an enormous success.

37. As a result of Sears' sales of the Bionic Wrench in 2011 that exceeded Sears' forecasts, on December 7, 2011, Sears' hand-tool buyer Amanda Campana ("Campana") informed Brown that Sears wanted to enter into a 2012 supply agreement with LoggerHead for the Bionic Wrench.

38. On December 15, 2011, Brown and his son, Dan Brown Jr. ("Brown Jr."), a LoggerHead sales employee, met with Campana at her request, because she wanted to discuss terms for a 2012 supply agreement with LoggerHead. Campana told Brown and Brown Jr. that given the success of the 2011 Christmas DRTV campaign, Sears wanted to run DRTV promotions for Father's Day and Christmas 2012.

39. For the next six months, between December 2011 and the end of May 2012, Sears assured and represented to LoggerHead numerous times – both orally and in writing – that Sears was ready, excited, and committed to another successful year with LoggerHead and the Bionic Wrench. During this six-month timeframe, Sears represented and assured LoggerHead with both

oral and written commitments and promises that Sears would purchase at least 300,000 Bionic Wrench units in 2012. Sears further assured and promised LoggerHead that Sears would support the Bionic Wrench with DRTV advertising for Father's Day and Christmas 2012. Sears also repeatedly represented and promised LoggerHead that Sears would enter into a written supply agreement for 2012 reflecting such terms. These oral and written representations, assurances, and promises were provided to Brown and Brown Jr. by Sears' employees Campana, Carey Romano, and Stephanie Kaleta (among others) on several occasions between December 2011 and the end of May 2012:

- On December 20, 2011, at a dinner meeting between Brown, Brown Jr. and Campana to celebrate the success of the Bionic Wrench at Sears, Campana expressed Sears' excitement about 2012 and told LoggerHead that Sears was looking forward to another successful year.
- On December 21, 2011, Campana confirmed via email that Sears was looking forward to another successful year selling the Bionic Wrench. Later that day, Campana sent Brown another email reconfirming Sears' forecast of 73,000 Bionic Wrench units for Father's Day 2012.
- In January 2012, after Campana learned that she was being reassigned to a different Sears' department, Campana wrote an email to Brown emphasizing that her reassignment would not in any way undermine Sears' commitment to partner with LoggerHead in promoting and selling the Bionic Wrench in 2012.
- On February 8, 2012, Brown met at Sears with Sears' new hand-tool buyer, Stephanie Kaleta, Campana's replacement. During that meeting, consistent with Campana's prior representations, Kaleta again committed and promised to Brown

that Sears was forecasting 73,000 Bionic Wrench units for Father's Day 2012; that Sears was committed to run DRTV advertising campaigns for Father's Day and Christmas 2012; and that Sears would commit to purchasing 300,000 total Bionic Wrench units in 2012.

- On February 10, 2012, Sears began issuing purchase orders for the 73,000 Bionic Wrenches it had previously agreed to buy.
- Throughout February 2012, in reasonable reliance on Sears' commitment and promise to purchase 73,000 units for Father's day, LoggerHead worked with Penn United to fulfill Sears' Father's Day orders.
- On February 24, 2012, Kaleta wrote to LoggerHead confirming the Father's Day shipping schedule. Later that week the parties discussed marketing for the Bionic Wrenches, including artwork for the Father's Day displays.
- On March 6, 2012, LoggerHead sent to Kaleta a draft 2012 Supply Agreement containing Sears' commitment to purchase 300,000 units in 2012 as the parties had previously agreed.
- The next day, on March 7, 2012, upon receiving requested changes to the draft agreement from Kaleta, Brown Jr. sent the First Agreement Revision to the draft 2012 Supply Agreement inputting Sears' requested changes. Sears did not request any change to the provision committing Sears to a purchase of a minimum of 300,000 Bionic Wrench units for 2012.
- A week later, on March 13, 2012, Brown Jr. inquired into the status of the First Agreement Revision to the 2012 Supply Agreement. The following day Kaleta responded that she was waiting for the signoff and would advise Brown Jr.

“ASAP.” In a separate email, the parties discussed the Sears DRTV program for the Bionic Wrench for 2012.

- The following week, on March 19, 2012, Brown Jr. again inquired into the status of the 2012 Supply Agreement. The next day Kaleta had more revisions and on March 23, 2012, Brown Jr. sent Kaleta a Second Agreement Revision to the 2012 Supply Agreement incorporating her requested changes. There were no changes to the price, quantity, or lead times.
- Based on Sears’ representations, assurances, and promises that it would purchase 300,000 units in 2012, LoggerHead prepared a video display for Sears and demonstrated it to Kaleta. Kaleta explained that it was too late to use the display for the 2012 Father’s Day period, but that she would consider using it during the 2012 holiday sales period – thus providing further assurances to LoggerHead that Sears would proceed with purchases pursuant to the terms that the parties had repeatedly agreed to orally and in email correspondence.
- On April 10, 2012, and April 18, 2012, Brown Jr. and Kaleta talked about the 2012 draft supply agreement and exchanged a Third Agreement Revision to the 2012 Supply Agreement. None of the revisions changed Sears’ commitment to purchase 300,000 units in 2012.
- On April 25, 2012, Kaleta informed Brown Jr. that a signed agreement was imminent and was merely awaiting routine review by Sears’ legal team.
- On April 27, 2012, prior to the National Hardware Show, Kaleta sent Brown Jr. a Fourth Agreement Revision to the draft 2012 Supply Agreement. Sears’ edits that appeared in the Fourth Agreement Revision did not change or alter Sears’

commitment to purchase 300,000 units in 2012. Kaleta and Brown Jr. agreed to discuss the changes that Sears made when they would both be at the National Hardware Show so that the draft could be finalized.

- On May 15, 2012, Sears' employee, Elliot Lourie, sent to LoggerHead Sears' Christmas forecast for 213,519 Bionic Wrench units. Lourie stated that he was submitting the forecast with 120 days of advanced notice and indicated that the forecast was being provided per the notice terms contained in the draft 2012 supply agreement.
- On May 25, 2012, LoggerHead's Brown and Brown Jr. held a status call with Sears' Adam Whitney and Stephanie Kaleta. On the call, Sears and LoggerHead both reconfirmed the parties' pricing and DRTV subsidy terms for the Father's Day program. At no time during the call was there disagreement between the parties regarding pricing or the DRTV subsidy for the Father's Day and the Christmas DRTV advertising. At no time on the call did Sears suggest that its May 15 forecast for 213,519 Bionic Wrench units was going to change in any significant way. The only caveat Sears raised was that the forecast could change some depending on whether the 2012 Father's Day DRTV promotion met forecasts.
- As a result of the May 25 call and Sears' representations that it was committed to moving forward, as previously agreed, with the DRTV and 300,000 total units, LoggerHead continued taking all necessary measures to ramp up production in order to meet Sears' holiday forecast for 213,519 Bionic Wrench units. Such measures included ordering various parts, working with Penn United to ensure

assembly and production was proceeding at a pace to meet production deadlines, and ensuring that the quality of each Bionic Wrench met with LoggerHead's strict quality standards before arriving at Sears.

- Sales for the Bionic Wrench during the Father's Day period met or exceeded Sears' forecasts. Given Sears' assurance on May 25 that the Father's Day outcome would be the only thing that may change Sears' holiday forecast for 213,519 Bionic Wrench units, LoggerHead continued to take action to fulfill Sears' forecast for its large holiday purchase.
- All of the aforementioned promises and the parties' performance of the Father's Day DRTV and purchase orders that tracked or exceeded Sears' original forecast occurred in the absence of a signed supply agreement for 2012.

40. During that same six month time period between December 2011 and May 2012, Sears repeatedly sought assurances from LoggerHead that it would honor its commitment from the previous year to not sell the Bionic Wrench to Sears' retail competitors, including Home Depot and Lowes. Each time, LoggerHead confirmed that it would not sell to Sears' retail competitors, assuming Sears followed through on its commitment to purchase 300,000 Bionic Wrench units in 2012. Sears continued to promise that it would purchase 300,000 units. For example:

- On December 21, 2011 – the day after the celebratory dinner meeting between Sears' employee Campana and LoggerHead's Brown and Brown Jr., Campana emailed Brown about the terms of the 2012 supply agreement they had discussed at dinner. In order to induce LoggerHead to again agree that it would not sell the Bionic Wrench to Sears' retail competitors, Campana made it clear that Sears'

2012 Father's Day forecast would be lower if LoggerHead sold to Sears' competitors: "I wanted to ensure (sic) you that I am going to be able to give a ball park forecast for Father's Day when I return to the office after the New Year... We are very excited about the success of the Bionic Wrench and we are looking forward to another successful year. As I am working through my forecast though I wanted to know if there is any chance the Bionic Wrench will be in any of our competitors next year. This is something that I will need to factor in if it will be."

- Later that same day, Brown replied to Campana and once again assured Sears in writing that LoggerHead would not sell the Bionic Wrench to Sears' competitors given the strong, successful business partnership that Sears and LoggerHead had formed.
- In response to a letter Brown sent Kaleta on February 16, 2012, Kaleta and another Sears' employee, Adam Whitney, raised with Brown Jr. whether LoggerHead had signed any agreements with any of Sears' retail competitors. Brown Jr. assured him that LoggerHead had not signed any such agreements.
- Shortly after Brown Jr. confirmed that LoggerHead was not selling to Sears' competitors, Sears reissued purchase orders for Father's Day at the higher price LoggerHead insisted upon in Brown's February 16, 2012 letter.

41. Although Sears and LoggerHead proceeded for several months to perform the contemplated 2012 DRTV advertising and fulfill the original Sears' Father's Day forecast, Sears and LoggerHead never signed any version of the draft 2012 supply agreements.

42. Despite the absence of a signed supply agreement, Sears and LoggerHead produced and ran Father's Day DRTV advertising for the Bionic Wrench. Both Sears and

LoggerHead honored the respective commitments and promises each side had made over the course of their discussions of terms for a 2012 supply agreement, which always included DRTV advertising for Father's Day and Christmas 2012.

43. Likewise, despite the absence of a signed supply agreement, between February 2011 and May 2011, Sears issued Father's Day purchase orders to LoggerHead for more than 77,000 Bionic Wrench units and LoggerHead fulfilled those orders. The 77,000 units closely tracked the number of units Sears had forecasted for Father's Day while the parties were discussing terms for a 2012 supply agreement.

44. Throughout the 2012 Father's Day campaign, Sears and LoggerHead continued to work together on Sears' 2012 holiday season forecasts and continued to prepare for the 2012 holiday season DRTV advertising program without a signed supply agreement – just like the parties had done with respect to Father's Day in the absence of a signed supply agreement.

45. LoggerHead relied on Sears' repeated representations, commitments, and promises that Sears would purchase 300,000 total Bionic Wrench units in 2012. LoggerHead's reliance on those representations, commitments, and promises was reasonable – even in the absence of a signed supply agreement – for at least the following reasons:

- LoggerHead had relied on similar Sears' representations, commitments, and promises during the Father's Day sales period in the absence of a signed supply agreement, and throughout that entire process Sears' actions were consistent with its previous representations, commitments, and promises.
- In terms of sales and profit, Sears told LoggerHead that during the 2011 holiday season the Bionic Wrench was the best in its class. From LoggerHead's perspective, why would Sears abandon its 2012 holiday season commitment when

the previous year it had been a tremendous success – especially in light of the fact that Sears was proceeding with the Father’s Day plan even without a signed supply agreement.

- LoggerHead was not aware that Sears had any alternative to selling the Bionic Wrench during the 2012 holiday season.

46. After six months of Sears’ commitments, representations, and promises to LoggerHead that it would purchase a total of 300,000 Bionic Wrench units in 2012 – including Sears’ May 15, 2012 forecast for 213,519 Bionic Wrench units that was confirmed again in a May 25, 2012 phone call between Sears and LoggerHead – on June 20, 2012, Sears sent to LoggerHead a “revised” Christmas forecast for 2,971 Bionic Wrench units. The “revised” forecast was a complete and shocking departure from Sears’ prior commitments and promises that it would purchase a total of 300,000 units in 2012, as well as Sears’ specific commitment and promise that it would purchase approximately 213,519 units for Christmas 2012.

47. During all of the years LoggerHead sold Bionic Wrenches to Sears, Sears had never so dramatically revised its forecasts. To the extent Sears’ forecasts changed at all, any such changes had always been at the margins.

48. After receiving the Sears’ dramatically lower forecast, Brown sent numerous emails to Kaleta and several other Sears’ employees, stating that LoggerHead was blindsided, astonished, and at a complete loss as to why Sears reduced its Christmas forecast from more than 200,000 units to less than 3,000 units.

49. On June 25, 2012, Sears, through an email from Kaleta to LoggerHead, falsely stated (for the first time), that Sears reduced the forecast because of an alleged inability to reach mutual agreement on the holiday DRTV campaign. This statement was false because

LoggerHead had repeatedly agreed – both orally and in writing – to the very terms that Sears had proposed for the 2012 holiday DRTV campaign. In any event, even as late as June 25, 2012, Kaleta represented to Brown that Sears was still willing to move forward if the holiday DRTV issue was resolved.

50. At a complete loss as to why Sears had suddenly backed out of the commitments and promises it had made to LoggerHead for six months – and knowing that the parties had no disagreement with respect to the holiday DRTV campaign – Brown made a number of attempts to understand the real reason that Sears essentially cancelled an order it had agreed to make for months. In attempting to seek the truth about the cancellation from Sears, Brown also made it clear that even though LoggerHead did not and could not comprehend why Sears thought there was a disagreement on the terms for the holiday DRTV campaign, he was ready and willing to address whatever the issue was and move forward as the parties had been planning to do for months.

51. For weeks, Sears completely ignored Brown's questions and his attempts to resolve the phantom holiday DRTV issue – even though Kaleta had stated that Sears remained ready to proceed upon agreement of terms for the holiday DRTV campaign.

52. On July 19, 2012, Sears finally responded to Brown's inquiries. Sears' employee Adam Whitney sent an email purporting to "clarify" certain "facts" that explained Sears' conduct. Whitney's email actually confirms Sears' deceit, because Whitney was unable to identify any true disagreement between the parties that would prevent them from moving forward on the two promises and commitments Sears had made to LoggerHead for months: that it would produce a holiday DRTV advertisement promoting Bionic Wrenches, and that it would purchase approximately 200,000 Bionic Wrenches for the 2012 holiday. Whitney's email

merely establishes that Sears decided to exercise the unfettered discretion and power it had in its relationship with LoggerHead to inflict harm on LoggerHead – Sears did not exercise the unfettered discretion and power it had based on any legitimate or justifiable business explanation. Instead, Sears acted in extraordinary bad faith.

53. The July 19 email from Whitney and his mischaracterization of events was the last time LoggerHead heard from Sears regarding the 2012 holiday season Bionic Wrench purchases.

SEARS COMMITTED FRAUD

54. In September 2012, approximately two months after Sears' final communication from Whitney, Sears, through its Craftsman brand, announced the introduction of its "Max Axess Locking Wrench," which is a virtual copy of LoggerHead's Bionic Wrench. The photo on the right below depicts the Max Axess Locking Wrench, and the photo on the left depicts the Bionic Wrench:



55. During the six months that LoggerHead and Sears were planning and preparing the 2012 holiday DRTV campaign and Sears' commitment to purchase more than 200,000 Bionic Wrench units, Sears never disclosed to LoggerHead that it had agreed to partner with Apex to launch a Craftsman-branded knock-off version of the Bionic Wrench. LoggerHead was not aware, nor could it have reasonably found out, that over the previous six months when Sears was fraudulently negotiating a 2012 supply agreement, in what appeared to be "good faith," that Sears was secretly having its own Craftsman Bionic Wrench manufactured in China.

56. Given the lead times required to have a Craftsman-branded knock-off of the Bionic Wrench ready to be announced in September 2012, it is now apparent that during the six months Sears was representing, committing, and promising to LoggerHead that it would purchase 300,000 units in 2012, Sears was defrauding LoggerHead because Sears knew that it was not going to honor the commitment it had made repeatedly. Sears knew all along that it was going to partner with Apex to launch a Craftsman-branded imitation of the Bionic Wrench for sale during the 2012 holiday season.

57. When Sears changed its forecast from more than 200,000 units to less than 3,000 units on June 20, 2012, Sears had already finalized its agreement with Apex and knew that it would sell the Max Axess wrench instead of the Bionic Wrench for its Christmas sales campaign. For this reason, in addition to Sears' materially false statements and omissions to LoggerHead from December 2011 to May 2012, it is now clear that Sears' incomprehensible and ever-changing "explanations" for why it cancelled its May 2012 forecast for more than 200,000 Bionic Wrench units were also false. Sears radically changed the forecast not for any of the reasons it stated – it changed the forecast because it had secretly partnered with Apex to have a

Craftsman-branded knockoff made in China. Sears sold that product during the holiday 2012 season instead of purchasing LoggerHead's Bionic Wrench as it had repeatedly committed and promised to do.

58. For these reasons, it is now apparent that all of Sears' representations, commitments, and promises identified in Paragraph 39 of this First Amended Complaint were knowingly and intentionally false, and Sears made those representations and promises with the intent to deceive LoggerHead and were also intended to induce LoggerHead to act in reliance on Sears' false representations and promises.

59. As a direct result of Sears' fraudulent misrepresentations to LoggerHead from December 2011 to May 2012, as well as Sears' fraudulent omission that concealed the agreement it had with Apex to launch the Craftsman Max Axess Locking Wrench during the 2012 holiday season, LoggerHead lost substantial sales and profits, and its manufacturer, Penn United, was forced to lay-off more than 30 employees in Pennsylvania and shut down several of the manufacturing/assembly lines in its Pennsylvania manufacturing facilities.

60. LoggerHead's financial losses were clearly foreseeable to Sears, as it was intimately involved and aware of the process of events which must take place to bring an innovative tool like the Bionic Wrench to market. Sears also knew that by continuing its sham negotiations with LoggerHead, it would likely succeed in convincing LoggerHead not to sell the Bionic Wrench to Sears' retail competitors such as Home Depot and Lowes. As a result, when the Craftsman-branded knock-off launched, Sears knew and intended that it would do so without competition from the Bionic Wrench by Sears' key retail competitors.

SEARS' UNFAIR COMPETITION SCHEME

61. Remarkably, Sears' campaign of fraud and deception continued even after it began selling the Craftsman Max Axess Locking wrench. In competing against LoggerHead and

its patented Bionic Wrench, Sears repeatedly broke the law and violated virtually every federal, state, and common law proscription against unfair competition. Sears' deliberate and extensive unfair competition scheme was knowing, intentional, and in bad faith.

62. In addition to willfully infringing LoggerHead's Bionic Wrench Patents, Sears also willfully infringed LoggerHead's registered trademark. Sears has used and continues to use LoggerHead's "Bionic Wrench" trademark in interstate commerce. When a user performs a "Google," "Bing," or "Yahoo" search using LoggerHead's trademarked phrase "Bionic Wrench," sponsored ads for Sears appear at the top of the search results in all three search systems. The ads tout in bold "Craftsman Bionic Wrench at Sears." Upon clicking on the sponsored search result, the user is directed to Sears' websites selling the Craftsman Max Axess Locking Wrench and not the LoggerHead Bionic Wrench.

63. Sears appears to have purchased LoggerHead's federally registered trademark "Bionic Wrench" as keywords in the Google AdWords, Yahoo Advertising Solutions, and Bing Ads programs, so that an internet search for LoggerHead's trademark "Bionic Wrench" produces Sears' advertisements containing "Bionic Wrench" and "Craftsman Bionic Wrench" with links to Sears' websites selling the Craftsman Max Axess Locking Wrench. There is no product called the Craftsman Bionic Wrench. That phrase was created by Sears to intentionally deceive consumers and misappropriate sales of LoggerHead's Bionic Wrench for Sears.

64. Sears' use of "Bionic Wrench" as keywords and/or meta-tags, trigger commercial advertising for Sears to be displayed at the top of the page as a banner. And because search engines do not specify that these results are not organic or natural results of the user's search terms, it creates the illusion that these are the most relevant search results for the terms entered

by the user and allows Sears to reap the goodwill LoggerHead developed in the Bionic Wrench mark.

65. Furthermore, Sears' use of LoggerHead's mark in connection with these ad programs provides the user with direct access (*i.e.*, a link) to Sears' websites to purchase its goods.

66. Sears' willful and infringing use of Plaintiff's trademark causes consumer confusion, and dilutes the value of LoggerHead's federally registered trademark. Sears intends for users searching for LoggerHead's Bionic Wrench to be directed to Sears' websites to purchase the Craftsman knock-off version of the Bionic Wrench, thereby trading on LoggerHead's goodwill and reputation.

67. In addition to confusing consumers and infringing LoggerHead's trademark, Sears falsely advertised for the Craftsman Max Axess Locking Wrench on its Sears.com website. Specifically, Sears' false ads declare that the Craftsman Max Axess Locking Wrench has a "Unique Design" because it "[a]dapts to a wide range of fastener sizes and grips fasteners on all sides to prevent rounding" – but the design Sears' ads describe is precisely the innovation found in LoggerHead's patented Bionic Wrench. Sears' false ads further contribute to consumer confusion and also erode the goodwill LoggerHead has built up in designing and selling its patented Bionic Wrench.

68. In furtherance of its unfair competition scheme, Sears also launched a television commercial for its Craftsman Max Axess Locking Wrench that is strikingly similar to LoggerHead's own Bionic Wrench commercials produced long before the Craftsman product even existed. Identical elements appear in both commercials. Both commercials feature demonstrations of the wrenches on a bicycle wheel to show ease of use, and both commercials

feature graphics emphasizing the unique “gripping” of the wrenches. LoggerHead’s commercial advertised the Bionic Wrench as a “one size fits all” and “fourteen wrenches all in one” tool. And Sears’ commercial for the “latest innovation from Craftsman” (a false statement) likewise claims their wrench “replaces fourteen wrenches into a single tool” with the graphic “1 Locking Wrench=14 Wrenches.” In short, Sears not only copied LoggerHead’s patented product – it copied the precise ways in which LoggerHead promoted its patented product.

69. Also in furtherance of Sears’ unfair competition scheme, Sears issued a press release on November 14, 2012, in an attempt to address the bad press it received after LoggerHead filed its Original Complaint. On the main landing page of its www.searsholdings.com website, Sears posted a press release entitled, “Statement Regarding Craftsman Max Axess Locking Wrench.” Attached as Exhibit D to this First Amended Complaint is Sears’ press release. That press release states that “the Craftsman Max Axess™ locking wrench operates in a different way” from the Bionic Wrench. That statement is knowingly false. The Craftsman wrench does not operate in a different way, a fact LoggerHead will establish at trial. The press release also states that the Craftsman wrench uses “a mechanism designed in the 1950s that Mr. Brown expressly argued to the patent office was different from his own design.” That statement is also false. The Craftsman wrench does not use the mechanism of the old patent cited by Sears. In fact, the Craftsman wrench is different from the cited prior art patent in a host of ways as a cursory review of the patent and the Craftsman wrench reveals. Finally, Sears’ press release is false and misleading because it suggests to the reader that the Craftsman Max Axess Locking Wrench is made in America when it is actually made in China. Sears’ press release never discloses that the Max Axess Locking Wrench is not made in America – to the contrary, it suggests to the reader precisely the opposite, stating that

“Craftsman sources all Craftsman Industrial hand tools here in the USA along with many other tools that bear the Craftsman name.” That statement is knowingly designed to mislead and counter LoggerHead’s primary comparative advantage when competing against Sears’ knock-off product.

70. Sears did not even bother to change the sizes of its knock-off version of the Bionic Wrench, instead releasing the exact two sizes of wrench that LoggerHead originally released. This fact also sows customer confusion – the very object of Sears’ scheme to unfairly compete against LoggerHead.

71. All of Sears’ acts of unfair competition were performed knowingly, in bad faith, and with the intent to deceive consumers and harm LoggerHead’s sales and goodwill.

**SEARS AND APEX CONSPIRED TO WILLFULLY
INFRINGE LOGGERHEAD’S BIONIC WRENCH PATENTS**

72. Sears has never manufactured Craftsman products itself, instead relying on other manufacturers to make the products for them and then apply the Craftsman brand name. Sometimes, the Craftsman-branded items include exclusive features or functions that separate them from the manufacturer's own brand or other brands that that manufacturer produces. Other times, Craftsman products are identical models to other brands with a different name badge on them.

73. Apex Tool Group is one of the largest suppliers of hand tools and power tools in the world. Apex has been supplying Sears with its Craftsman-branded tools for more than two decades.

74. Apex was formed in 2010 as a joint venture of Cooper Tools and Danaher's Tools and Components. In 1991, Danaher Corp. was cited as “the maker of Craftsman tools,” and

Sears also announced in 1991 that effective January 1, 1992, Sears would buy *all* its Craftsman Mechanics hand tools from Danaher going forward.

75. In October 2012, Bain Capital LLC, agreed to purchase Apex for \$1.6 billion. As the Washington Post reported on June 21, 2012, Bain is a private equity firm that has been widely criticized for “invest[ing] in a series of firms that specialize in relocating jobs done by American workers to new facilities in low-wage countries like China and India.” Fittingly, Apex’s and Sears’ business models intimately mesh with Bain’s expertise as “pioneers in the practice of shipping work from the United States.”

76. On December 21, 2012, six weeks after LoggerHead filed its Original Complaint, Apex filed an action in this District against LoggerHead for a declaratory judgment of non-infringement and invalidity of LoggerHead’s Bionic Wrench Patents. Apex’s complaint was dismissed. However, in its pleading, Apex admitted the following:

- In the first half of 2012, Apex began preparation for commercialization of the Max Axess Locking Wrench.
- In approximately September 2012, Apex began supplying Sears with the Max Axess Locking Wrench for sales in Sears’ retail stores and websites.
- The Max Axess Locking Wrench products that Apex sells to Sears are branded and marketed under Sears’ Craftsman line of products.
- In addition to its sales of Craftsman-branded Max Axess Locking Wrench products to Sears, Apex has developed plans to market and sell the Max Axess Locking Wrench under Apex’s own brands, such as its Crescent® line of products.

77. LoggerHead’s success at Sears with the Bionic Wrench did not sit well with either Apex – the manufacturer of Craftsman hand tools – or Sears’ employees responsible for

promoting the Craftsman brand. Apex and Craftsman were embarrassed that Sears' number one selling hand tool in 2011 was not even a Craftsman/Apex product.

78. Apex and Sears knowingly and willingly agreed and conspired to infringe LoggerHead's Bionic Wrench Patents. Apex and Sears were fully aware that the Bionic Wrench was patent-protected. In spite of this knowledge, Apex and Sears copied the Bionic Wrench, made incidental and cosmetic changes to it, and then manufactured a knock-off copy of the Bionic Wrench and called it the Craftsman Max Axess Locking Wrench.

79. Despite the incidental and cosmetic differences between Craftsman Max Axess Locking Wrench and the Bionic Wrench, Sears' and Apex's sales of the Max Axess Locking Wrench willfully infringe both of LoggerHead's Bionic Wrench patents.

80. Sears and Apex knew that the Max Axess Locking Wrench infringes LoggerHead's patents, yet proceeded to sell it anyway in reckless disregard for LoggerHead's patent rights.

81. Sears and Apex have publicly stated that the Max Axess Locking Wrench does not infringe the Bionic Wrench patents because it uses an old mechanism purportedly disclosed in a 1957 patent that has expired. Those public statements are false. The Max Axess Locking Wrench is much different than the tool disclosed in the 1957 patent relied upon by Sears and Apex. Sears and Apex did not copy a 1957 patent – they copied LoggerHead's Bionic Wrench and then concocted a baseless story about a 1957 patent because they had to come up with some answer to the charge of infringement.

82. In reality, Apex and Sears knew that the Max Axess Locking Wrench infringes LoggerHead's Bionic Wrench Patents – but they proceeded to sell it anyway because they concluded that the potential costs of infringement liability do not outweigh the benefits of selling

the Max Axess Locking Wrench in competition with the Bionic Wrench. One commentator has described this “efficient infringement” strategy:

America’s largest big tech corporations are now using a business technique called “efficient infringement,” which means that they calculate the benefits of stealing someone else’s patented technology against the possibility of getting caught, tried in court and being forced to pay damages and penalties. If the benefits exceed the costs, they steal. What makes patent theft so attractive is that infringement is not a criminal act and those found guilty face no jail time. Paying up is the worst that can happen to the infringer... The principal victims of these big corporations’ “efficient infringement” approach are America’s independent inventors, small businesses and universities – the source of most breakthrough innovations and the creators of two-thirds of all new jobs in America.

<http://efficientinfringement.factsreviews.com/>

83. Because they are large corporations with a substantial resource advantage relative to LoggerHead, Sears and Apex are betting that any protracted dispute will eventually exhaust a small company like LoggerHead.

84. Notably, Sears has a history of using small manufacturers to innovate and develop new products, and then stealing the innovations and making the product overseas as long as the future sales and profits are bigger than the court costs. Sears’ conduct exemplifies the challenge facing inventors and entrepreneurs in the U.S. Without adequate repercussion for deliberate wrongdoing, large corporations like Sears can remain profitable by stealing innovation, going offshore to manufacture products at a lower cost, and profiting from sales of misappropriated infringing products in the United States.

85. Sears' conduct with respect to LoggerHead is not the first time Sears has been accused of willfully misappropriating the inventions of an individual inventor or small company.

86. In 1960, Harold Jones and the Petersen Manufacturing Company filed a lawsuit against Sears for infringing its patent on an improvement to the plier-type toggle wrench or as Sears called it the "lever jaw wrench." While the basic technology for the toggle wrench was patented in 1924, Jones, as a part of Petersen, patented the "Jones Quick Release Lever" in 1950, making the wrench easier to use. Jones alleged that Sears infringed its patent by creating a wrench which was similar in design that accomplished the same task. Much like Sears and Apex have publicly stated in an attempt to defend their Max Axess Locking Wrench, Sears defended the Jones case by arguing that substantial differences existed between the two products and that the Sears' version was more like a prior art patent. In the Jones case, the court found Sears' product to infringe despite Sears' attempt to make incidental and cosmetic changes to the patented product it copied. In 1962 Sears appealed the decision but the Court upheld the judgment against Sears.

87. In 1963, Peter Roberts, a Sears' employee at the time, invented a revolutionary new type of socket wrench on his own time. Knowing the value of the invention, Sears played down the value of the invention to Roberts, paid him only \$10,000 for the rights to the invention and then made tens of millions of dollars off Roberts' invention. The court presiding over the case chided Sears for having argued that the Roberts patent was valueless when it had made every effort in its marketing to exploit its economic value. Roberts eventually received a settlement, but it took two decades of litigation.

88. More recently, in 2004, Robert Kopras, the founder of RotoZip, disclosed trade secrets to Sears in an attempt to get the store to carry a new version of a drywall cutting tool.

Sears proceeded to use the RotoZip's proprietary design to produce its own "All-in-One Cutting Tool" under the Craftsman label, while under-pricing the original RotoZip and preventing it from releasing its "next generation" tool in Sears' stores. Once again, Sears litigated against its smaller rival for years, and ultimately had to pay a \$25 million jury verdict to Koprass and RotoZip.

89. Sears' past acts as alleged above provide additional support for LoggerHead's allegations that Sears' purported "design-around" is nothing more than a pretext and a rehash of the same arguments it has trotted out before when sued for misappropriating the intellectual property of a small company that Sears thinks it can push around.

Count I
Willful Infringement of U.S. Patent No. 6,889,579
(Against Sears)

90. LoggerHead realleges and incorporates paragraphs 1-89 as though set forth fully herein.

91. Sears has directly infringed and is continuing to directly infringe, either literally or under the doctrine of equivalents, one or more claims of LoggerHead's '579 Patent by importing, making, using, selling and/or offering to sell in the United States wrenches disclosed and claimed in the '579 Patent, specifically including products known as a Craftsman Max Access Locking Wrench. Sears is thus liable for direct infringement of the '579 Patent pursuant to 35 U.S.C. § 271(a).

92. Sears has infringed and continues to infringe LoggerHead's '579 Patent with knowledge of LoggerHead's patent rights. Sears also has knowledge that its accused products infringe the '579 Patent. Sears' acts of infringement have been and continue to be willful, deliberate, and in reckless disregard of LoggerHead's patent rights.

93. LoggerHead has suffered and continues to suffer damages as a result of Sears' infringement of the '579 Patent. Pursuant to 35 U.S.C. § 284, LoggerHead is entitled to recover damages from Sears for its infringing acts in an amount subject to proof at trial, but no less than a reasonable royalty. LoggerHead is further entitled to enhanced damages for Sears' acts of willful patent infringement pursuant to 35 U.S.C. § 284.

94. Sears' infringement of the '579 Patent has damaged and will continue to damage LoggerHead, causing irreparable harm for which there is not adequate remedy at law, unless Sears is enjoined by this Court.

Count II
Willful Infringement of U.S. Patent No. 6,889,579
(Against Apex)

95. LoggerHead realleges and incorporates paragraphs 1-94 as though set forth fully herein.

96. Apex has directly infringed and is continuing to directly infringe, either literally or under the doctrine of equivalents, one or more claims of LoggerHead's '579 Patent by importing, making, using, selling and/or offering to sell in the United States wrenches disclosed and claimed in the '579 Patent, specifically including products known as a Craftsman Max Axess Locking Wrench. Apex is thus liable for direct infringement of the '579 Patent pursuant to 35 U.S.C. § 271(a).

97. Apex has infringed and continues to infringe LoggerHead's '579 Patent with knowledge of LoggerHead's patent rights. Apex also has knowledge that its accused products infringe the '579 Patent. Apex's acts of infringement have been and continue to be willful, deliberate, and in reckless disregard of LoggerHead's patent rights.

98. LoggerHead has suffered and continues to suffer damages as a result of Apex's infringement of the '579 Patent. Pursuant to 35 U.S.C. § 284, LoggerHead is entitled to recover

damages from Apex for its infringing acts in an amount subject to proof at trial, but no less than a reasonable royalty. LoggerHead is further entitled to enhanced damages for Apex's acts of willful patent infringement pursuant to 35 U.S.C. § 284.

99. Apex's infringement of the '579 Patent has damaged and will continue to damage LoggerHead, causing irreparable harm for which there is not adequate remedy at law, unless Apex is enjoined by this Court.

Count III
Willful Infringement of U.S. Patent No. 7,992,470
(Against Sears)

100. LoggerHead realleges and incorporates paragraphs 1-99 as though set forth fully herein.

101. Sears has directly infringed and is continuing to directly infringe, either literally or under the doctrine of equivalents, one or more claims of LoggerHead's '470 Patent by importing, making, using, selling and/or offering to sell in the United States wrenches disclosed and claimed in the '470 Patent, specifically including products known as a Craftsman Max Axess Locking Wrench. Sears is thus liable for direct infringement of the '470 Patent pursuant to 35 U.S.C. § 271(a).

102. Sears has infringed and continues to infringe LoggerHead's '470 Patent with knowledge of LoggerHead's patent rights. Sears also has knowledge that its accused products infringe the '470 Patent. Sears' acts of infringement have been and continue to be willful, deliberate, and in reckless disregard of LoggerHead's patent rights.

103. LoggerHead has suffered and continues to suffer damages as a result of Sears' infringement of the '470 Patent. Pursuant to 35 U.S.C. § 284, LoggerHead is entitled to recover damages from Sears for its infringing acts in an amount subject to proof at trial, but no less than

a reasonable royalty. LoggerHead is further entitled to enhanced damages for Sears' acts of willful patent infringement pursuant to 35 U.S.C. § 284.

104. Sears' infringement of the '470 Patent has damaged and will continue to damage LoggerHead, causing irreparable harm for which there is not adequate remedy at law, unless Sears is enjoined by this Court.

Count IV
Willful Infringement of U.S. Patent No. 7,992,470
(Against Apex)

105. LoggerHead realleges and incorporates paragraphs 1-104 as though set forth fully herein.

106. Apex has directly infringed and is continuing to directly infringe, either literally or under the doctrine of equivalents, one or more claims of LoggerHead's '470 Patent by importing, making, using, selling and/or offering to sell in the United States wrenches disclosed and claimed in the '470 Patent, specifically including products known as a Craftsman Max Axess Locking Wrench. Apex is thus liable for direct infringement of the '470 Patent pursuant to 35 U.S.C. § 271(a).

107. Apex has infringed and continues to infringe LoggerHead's '470 Patent with knowledge of LoggerHead's patent rights. Apex also has knowledge that its accused products infringe the '470 Patent. Apex's acts of infringement have been and continue to be willful, deliberate, and in reckless disregard of LoggerHead's patent rights.

108. LoggerHead has suffered and continues to suffer damages as a result of Apex's infringement of the '470 Patent. Pursuant to 35 U.S.C. § 284, LoggerHead is entitled to recover damages from Apex for its infringing acts in an amount subject to proof at trial, but no less than a reasonable royalty. LoggerHead is further entitled to enhanced damages for Apex's acts of willful patent infringement pursuant to 35 U.S.C. § 284.

109. Apex's infringement of the '470 Patent has damaged and will continue to damage LoggerHead, causing irreparable harm for which there is not adequate remedy at law, unless Apex is enjoined by this Court.

Count V
Trademark Infringement (Lanham Act §43(c))
(Against Sears)

110. LoggerHead realleges and incorporates paragraphs 1-109 as though set forth fully herein.

111. LoggerHead owns the valid and protectable federally registered trademark "Bionic Wrench®."

112. LoggerHead's certificate of registration is prima facie evidence of the validity, ownership and exclusive right to use the Bionic Wrench trademark.

113. Bionic Wrench has been continuously used in commerce for the sale and promotion of LoggerHead's wrench since 2005.

114. Sears has infringed LoggerHead's federally registered trademark "Bionic Wrench" by purchasing the keywords and meta-tags "Bionic Wrench" and "Craftsman Bionic Wrench" on various Internet advertising solution programs. For example, when a user searches Google, Bing, or Yahoo with the terms "Bionic Wrench," ads for Sears appear at the top, touting in bold "Craftsman Bionic Wrench at Sears."

115. Sears' unauthorized interstate use of LoggerHead's Bionic Wrench mark to sell, offer for sale and/or advertise their goods constitutes a reproduction, copying, and colorable imitation of Plaintiff's mark and is likely to cause confusion, mistake, and deception as to the identity and origin of Plaintiff's goods and services, causing injury, damage and loss to Plaintiff.

116. A likelihood of confusion is created by Sears' use of Bionic Wrench in its internet advertising because the public will falsely believe that Craftsman's Bionic Wrench is associated,

affiliated, authorized or sponsored by LoggerHead. This is especially true in light of the fact that Sears sold LoggerHead's Bionic Wrench for years prior to introducing the Craftsman Max Axess Locking Wrench in 2012.

117. Sears' unlawful use of LoggerHead's Bionic Wrench trademark is willful and deliberate and constitutes a knowing violation of LoggerHead's rights.

Count VI
False Designation of Origin (Lanham Act § 43(a))
(Against Sears)

118. LoggerHead realleges and incorporates paragraphs 1-117 as though set forth fully herein.

119. LoggerHead has spent substantial time and money to engineer and market its products under the Bionic Wrench mark and developing its reputation and goodwill. Consumers have come to identify the distinctive and protected Bionic Wrench mark with a high quality, American-made, easy to use hand tool.

120. Sears' use of the identical name "Bionic Wrench" in its ads and its purchase of keywords and/or meta-tags to trigger commercial advertising in search engine programs such as Google AdWords, Bing Ads, and Yahoo Advertising Solutions, deceive and cause confusion among consumers, as to the source or origin of the goods offered by Sears and constitutes the use of false descriptions or representations in interstate commerce.

121. Sears' use of "Bionic Wrench" and "Craftsman Bionic Wrench" is likely to also cause initial interest confusion because Sears' use of LoggerHead's mark on its ads lures consumers to its site and causes the consumer to initially believe that the products or advertisements are associated with LoggerHead. This constitutes unlawful trading on LoggerHead's goodwill.

122. As a direct and proximate result of Sears' unlawful activities, LoggerHead has incurred damages in an amount to be proven at trial, including, among other things, loss of profits, diversion of sales, and diminution in the value of its goodwill associated with the Bionic Wrench mark.

123. Sears' exploitation of LoggerHead's goodwill and reputation associated with Bionic Wrench is willful and intentional.

124. Sears' actions are in conscious disregard of LoggerHead's rights in the Bionic Wrench trademark and with the intent to trade off of LoggerHead's goodwill in its trademark.

Count VII
False Advertising (Lanham Act § 43(a))
(Against Sears)

125. LoggerHead realleges and incorporates paragraphs 1-124 as though set forth fully herein, with particular reference to paragraphs 61-71.

126. As described in the incorporated paragraphs, Sears made literally false and misleading statements of fact in commercial advertising and promotion about the Craftsman Maxx Axess Locking Wrench.

127. As alleged herein, Sears' false and misleading statements actually deceive or are likely to deceive a substantial number of consumers or companies seeking to purchase the Craftsman Max Axess Locking Wrench.

128. As alleged herein, Sears caused its false and misleading statements to enter interstate commerce.

129. As alleged herein, Sears' false and misleading statements were made willfully and in bad faith.

130. As alleged herein, LoggerHead has suffered actual or probable injury as a result of Sears' false and misleading statements.

Count VIII
Illinois Consumer Fraud and Deceptive Business Practices Act
(Against Sears)

131. LoggerHead realleges and incorporates paragraphs 1-130 as though set forth fully herein.

132. Sears' unauthorized, intentional, and willful use of LoggerHead's mark Bionic Wrench to promote, advertise, market and/or sell their goods and services in Illinois constitutes unfair competition within the meaning of the Illinois Consumer Fraud and Deceptive Business Practices Act.

133. Sears' use of "Bionic Wrench" in connection with the sales and promotion of its goods through its advertising online with Google, Yahoo, and Bing, and through its purchase and use of LoggerHead's mark in search engine advertising programs constitutes unfair competition and is likely to cause confusion among consumers as to the affiliation, connection, association and/or origin, sponsorship, or approval of Sears' goods by or with LoggerHead in violation of §510 et seq.

134. Sears' actions contributed to consumer confusion in other ways as well, including copying LoggerHead's commercials, issuing a false press release that misleadingly suggests that the Craftsman Max Axess Locking Wrench is made in America, and falsely stating that the Craftsman Max Axess has a "unique design," among other unlawful acts as alleged herein.

135. Notwithstanding Sears' actual knowledge of LoggerHead's ownership and prior use of the Bionic Wrench mark, Sears has willfully and in bad faith continued to use LoggerHead's mark in commerce without authorization to promote sale of its goods.

136. LoggerHead is entitled to injunctive relief to prevent Sears from using the name and mark "Bionic Wrench" or similar mark in connection with the advertising and/or sale of its

products or services and/or compensatory and statutory damages, punitive damages, plus costs and attorneys' fees.

Count IX
Uniform Deceptive Trade Practices Act (815 ILCS §510 et seq.)
(Against Sears)

137. LoggerHead realleges and incorporates paragraphs 1-136 as though set forth fully herein.

138. Sears' unauthorized, intentional, and willful use of LoggerHead's mark Bionic Wrench to promote, advertise, market and/or sell their goods and services in Illinois constitutes unfair competition within the meaning of the Illinois Deceptive Trade Practices Act.

139. Sears' use of "Bionic Wrench" in connection with the sales and promotion of its goods through its advertising online with Google, Yahoo, and Bing, and through its purchase and use of LoggerHead's mark in search engine advertising programs constitutes unfair competition and is likely to cause confusion among consumers as to the affiliation, connection, association and/or origin, sponsorship, or approval of Sears' goods by or with LoggerHead in violation of §510 et seq.

140. Sears' actions contributed to consumer confusion in other ways as well, including copying LoggerHead's commercials, issuing a false press release that misleadingly suggests that the Craftsman Max Axess Locking Wrench is made in America, and falsely stating that the Craftsman Max Axess has a "unique design," among other unlawful acts as alleged herein.

141. Notwithstanding Sears' actual knowledge of LoggerHead's ownership and prior use of the Bionic Wrench mark, Sears has willfully continued to use LoggerHead's mark in commerce without authorization to promote sale of its goods in violation of §510 et seq.

142. LoggerHead is entitled to injunctive relief to prevent Sears from using the name and mark “Bionic Wrench” or similar mark in connection with the advertising and/or sale of its products or services, plus costs and attorneys’ fees.

Count X
Illinois Common Law Trademark Violation
(Against Sears)

143. LoggerHead realleges and incorporates paragraphs 1-142 as though set forth fully herein.

144. LoggerHead has valid and protectable trademark rights in their distinctive and valuable mark, Bionic Wrench.

145. LoggerHead has used and continues to use its mark in the course of commerce and in conjunction with their legitimate business operations since 2005.

146. Sears’ illegal actions alleged herein create likelihood of confusion or likelihood of misunderstanding as to sponsorship, affiliation, connection, association, or certification of the infringing Craftsman Max Axess Locking Wrench.

147. Sears has intentionally engaged in conduct that creates a likelihood of confusion in bad faith and in reckless indifference towards the rights of LoggerHead.

148. LoggerHead has been substantially harmed by Sears’ infringement.

149. Because Sears’ conduct was intentional, the imposition of punitive damages is warranted.

Count XI
Common Law Fraud
(Against Sears)

150. LoggerHead realleges and incorporates paragraphs 1-149 as though set forth fully herein.

151. As alleged herein, Sears made a series of false statements of material facts and omissions that it had a duty to disclose during 2012 as alleged herein (particularly including without limitation Paragraph 37).

152. As alleged herein, Sears knew that the statements as alleged herein were false.

153. As alleged herein, Sears intended to induce LoggerHead to act on the basis of its false statements and omissions and intended for LoggerHead to rely on Sears' false statements and omissions.

154. As alleged herein, LoggerHead did reasonably rely upon the apparent truth of Sears' false statements and omissions to its detriment and has suffered damages resulting from its reasonable reliance on Sears' false statements and omissions.

Count XII
Fraud in the Inducement
(Against Sears)

155. LoggerHead realleges and incorporates paragraphs 1-154 as though set forth fully herein.

156. Sears made a series of false statements of material facts during 2012 as alleged herein (particularly including without limitation Paragraph 37), and further made promises to LoggerHead that it had no intention of performing. Sears knew that its statements were false and knew that it had no intention of performing the promises it made to LoggerHead regarding sales for the 2012 holiday season. Sears intended that its false statements, promises, and omissions would induce LoggerHead to act in reliance upon Sears' false statements and promises, and LoggerHead did reasonably rely upon the apparent truth of Sears' statements and promises to its detriment.

157. For the purposes of inducing LoggerHead to refrain from selling Bionic Wrenches to Sears' retail competitors, including without limitation Home Depot and Lowes – and to induce

LoggerHead to expend substantial resources preparing to manufacture Bionic Wrenches for Sears for the 2012 holiday season that Sears had no intention of purchasing – Sears engaged in a fraudulent scheme in the form of serial, knowing, and willful misrepresentations and omissions of both present facts known to Sears and Sears’ promises of future actions that it had no intention of performing, as well as concealing material facts from LoggerHead that Sears had a duty to disclose, including Sears’ plans to sell the Max Axess Locking Wrench in competition with and in place of LoggerHead’s Bionic Wrench during the 2012 holiday season.

158. LoggerHead was unaware of Sears’ misrepresentations of present and future facts and was unaware of Sears’ concealment of material facts, and was thereby induced by Sears to refrain from selling to Sears’ retail competitors, and was also induced to expend substantial resources preparing to manufacture Bionic Wrenches for Sears for the 2012 holiday season, all of which caused LoggerHead to suffer substantial monetary damages when Sears did not purchase the Bionic Wrenches that it had fraudulently led LoggerHead to believe it would purchase.

159. For the purposes of inducing LoggerHead to manufacture Bionic Wrenches that it believed Sears would purchase, Sears intentionally concealed their discussions with Apex and their agreement with Apex to begin manufacturing of the Max Axess Locking Wrenches in time for sales in Sears’ stores in 2012.

160. LoggerHead reasonably relied on Sears’ material misrepresentations and omissions of material facts to their detriment, causing LoggerHead to suffer substantial monetary damages.

Count XIII
Promissory Fraud
(Against Sears)

161. LoggerHead realleges and incorporates paragraphs 1-160 as though set forth fully herein.

162. Sears made false promises of future actions to LoggerHead including, without limitation, promises of purchasing as much as 300,000 units of LoggerHead's Bionic Wrench in 2012 and producing a Bionic Wrench DRTV program for the 2012 holiday season, with the intent to deceive LoggerHead into believing Sears would purchase 300,000 Bionic Wrench units and produce a Bionic Wrench DRTV program for the 2012 holiday season.

163. Sears made such false promises to induce LoggerHead to manufacture Bionic Wrenches for Sears.

164. Sears also made these false promises with the intent to prevent LoggerHead from selling to other retailers and to buy time for Sears to manufacture a competing product (the Craftsman Max Access Locking Wrench) that would not face competition from LoggerHead's Bionic Wrench.

165. LoggerHead reasonably relied on Sears' false promises.

166. LoggerHead has been damaged by its reliance on Sears' false promises.

167. Sears' promises of future conduct were part of an overall scheme to defraud LoggerHead.

168. But for Sears' false promises, LoggerHead would have diverted its resources into servicing its other customers and other potential customers. Instead, LoggerHead was led to believe Sears would become one of its largest customers when Sears was merely using LoggerHead to gain a market advantage.

Count XIV
Illinois Common Law Unfair Competition
(Against Sears)

169. LoggerHead realleges and incorporates paragraphs 1-168 as though set forth fully herein.

170. As alleged herein, Sears' willfully and maliciously engaged in a comprehensive scheme of unfair competition against LoggerHead. Sears misappropriated LoggerHead's Bionic Wrench and associated intellectual property in violation of federal, state, and common law.

171. As alleged herein, Sears' scheme of false advertising and copying of LoggerHead's product has caused customer confusion to LoggerHead's detriment.

172. As alleged herein, Sears engaged in the unauthorized, improper, and unlawful use of LoggerHead's property for a purpose other than that for which it was intended.

173. As alleged herein, LoggerHead has suffered damages as a direct and proximate result of Sears' unfair competition, and is therefore entitled to the best measure of the value of being deprived of the exclusive use of its property.

174. As alleged herein, LoggerHead created the Bionic Wrench through extensive time, labor, skill, and money.

175. As alleged herein, Sears' use of a knock-off version of the Bionic Wrench to directly compete against LoggerHead's Bionic Wrench has given Sears a special competitive advantage because it was burdened with little or none of the expense incurred by LoggerHead in the creation of the Bionic Wrench.

176. As alleged herein, Sears' unfair competition has caused commercial damage to LoggerHead.

Count XV
Tortious Interference With Business Relations
(Against Apex)

177. LoggerHead realleges and incorporates paragraphs 1-176 as though set forth fully herein.

178. LoggerHead had a reasonable expectation of a business relationship with Sears for DRTV advertising and sales of its Bionic Wrench during the 2012 holiday season.

179. Based on Apex's knowledge of publicly available facts regarding LoggerHead's business relationship with Sears and based on Apex's communications with Sears, Apex knew and was aware of LoggerHead's reasonable expectation of having a business relationship with Sears for the 2012 holiday season.

180. Apex purposefully and knowingly interfered with LoggerHead's business relationship with Sears and prevented LoggerHead's legitimate expectations from ripening when Apex manufactured and commercialized the Max Axess Locking Wrench to replace Sears' sales of LoggerHead's Bionic Wrench.

181. LoggerHead suffered damages in the form of lost sales, profits, and goodwill as a result of Apex's purposeful and knowing interference with LoggerHead's business relationship and expectancy with Sears.

Count XVI
Aiding and Abetting Wrongful Acts
(Against Apex)

182. LoggerHead realleges and incorporates paragraphs 1-181 as though set forth fully herein.

183. Sears performed wrongful acts causing injury to LoggerHead, including committing fraud, promissory fraud, fraud in the inducement, and statutory and common law unfair competition.

184. Apex possessed actual knowledge of Sears' wrongful acts and was aware of its role in aiding Sears' wrongful acts.

185. Apex knowingly and substantially assisted Sears' wrongful acts by, among other things, (1) soliciting Sears, in as early as the first half of 2012, to begin preparation for the commercialization of the Max Axess Locking Wrench to replace Sears' sales and promotion of LoggerHead's Bionic Wrench; (2) supplying Sears with the Max Axess Locking Wrench for sales in Sears's retail stores and websites in September 2012; (3) soliciting Sears to sell Max Axess Locking Wrench products to be branded and marketed under Sears' Craftsman line of products; and (4) participating in Sears' active concealment of Sears' intentions to stop purchasing and selling LoggerHead's Bionic Wrench in 2012.

186. As a result of Apex's knowing and substantial assistance of Sears' wrongful acts, LoggerHead has suffered substantial damages, based, in part, on its loss of sales and the lost value of its business.

187. Because Apex's conduct was intentional, the imposition of punitive damages is warranted.

Count XVII
Civil Conspiracy
(Against Sears and Apex)

188. LoggerHead realleges and incorporates paragraphs 1-187 as though set forth fully herein.

189. Sears and Apex knowingly and voluntarily entered into a common scheme and agreement for the purposes of accomplishing an unlawful purpose or a lawful purpose by unlawful means, and Sears and/or Apex committed at least one tortious act in furtherance of the common scheme and agreement.

190. First, Sears and Apex knowingly and voluntarily entered into a common scheme and agreement to maximize sales of the Max Axess Locking Wrench through unlawful willful infringement of LoggerHead's Bionic Wrench Patents. Sears committed at least the following tortious acts in furtherance of the agreement to maximize sales of the Max Axess Locking Wrench through unlawful willful infringement of LoggerHead's Bionic Wrench Patents: fraud, fraud in the inducement, promissory fraud, violations of the Lanham Act, violations of Illinois unfair competition statutes, and common law unfair competition. In addition, Apex committed at least the following tortious acts in furtherance of the agreement to maximize sales of the Max Axess Locking Wrench through unlawful willful infringement of LoggerHead's Bionic Wrench Patents: tortious interference with business relations and prospective advantage, and aiding and abetting wrongful acts.

191. Second, Sears and Apex knowingly and voluntarily entered into a common scheme and agreement to maximize sales of the Max Axess Locking Wrench by unlawfully committing fraud against LoggerHead. Sears committed at least the following tortious acts to maximize sales of the Max Axess Locking Wrench by unlawfully committing fraud against LoggerHead: patent infringement, violations of the Lanham Act, violations of Illinois unfair competition statutes and common law unfair competition. Apex committed at least the following tortious acts to maximize sales of the Max Axess Locking Wrench by unlawfully committing fraud against LoggerHead: tortious interference with business relations and prospective advantage, and aiding and abetting wrongful acts.

192. LoggerHead has suffered damages resulting from the independently tortious acts Sears and/or Apex committed in furtherance of the conspiracy.

PRAYER FOR RELIEF

WHEREFORE, LoggerHead respectfully requests this Court to enter judgment in its favor and against Defendants Sears and Apex, granting the following relief:

193. Judgment in LoggerHead's favor that Sears and Apex infringed and continue to infringe one or more claims of the '579 Patent and the '470 Patent.

194. An award to LoggerHead of damages adequate to compensate it for Sears' and Apex's acts of patent infringement, but in no event less than a reasonable royalty, together with interest and costs as fixed by the Court pursuant to 35 U.S.C. § 284.

195. An award to LoggerHead of enhanced damages, up to and including treble damages, pursuant to 35 U.S.C. § 284, for Sears' and Apex's acts of willful infringement.

196. A grant of permanent injunction pursuant to 35 U.S.C. § 283 against Sears and Apex, enjoining Defendants from further acts of patent infringement.

197. An award to LoggerHead of its costs of suit and reasonable attorneys' fees pursuant to 35 U.S.C. § 285 due to the exceptional nature of this case.

198. Order Defendants to account for, and turn over to Plaintiff, all monies received as a result of its infringement and other unlawful acts.

199. Permanently enjoin Sears and all others acting in concert or participation with Sears from using the name and mark "Bionic Wrench" or similar mark in connection with the advertising and/or sale of its products or services.

200. Permanently enjoin Sears and all others acting in concert or participation with Sears from using any reproduction, copy, or colorable imitation of the name and mark "Bionic Wrench" or any mark confusingly similar thereto in connection with the advertising and/or sale of its products or services.

201. Order Sears to remove from sale or display any and all labels, signs, prints, signage, Internet web pages, advertisements, including keywords or meta-tags utilized in Internet advertising programs and any other materials in their possession or control bearing any mark, name, or designation identical to or confusingly similar to LoggerHead's Bionic Wrench mark and/or branding.

202. Order Sears to forfeit and cancel all links and/or web content which utilize "Bionic Wrench."

203. Order Sears to pay Plaintiff's damages totaling three times the amount of compensatory damages as provided for by 15 U.S.C. §1117 and other applicable law.

204. Award LoggerHead compensatory damages resulting from Apex's aiding and abetting of Sears' wrongful acts.

205. Award LoggerHead Sears' gross profits for common law fraud.

206. Award LoggerHead reasonable attorneys' fees and costs for this action pursuant to 15 U.S.C. §1117(a).

207. Award LoggerHead pre-judgment and post-judgment interest on its damages.

208. Award LoggerHead punitive damages for Illinois Consumer Fraud and Deceptive Business Practices Act, Tortious Interference With Business Relations, False Designation of Origin (Lanham Act § 43(a)), and Illinois Common Law Trademark Violation.

209. Any further relief that this Court deems just and proper.

Dated: May 31, 2013

Respectfully submitted,

/s/ Paul J. Skiermont

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on May 31, 2013, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to registered parties.

/s/ Paul J. Skiermont
Paul J. Skiermont