

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

TINNUS ENTERPRISES, LLC,)
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and)
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ZURU LTD.,)
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and)
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ZURU INC.,)
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and)
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ZURU LLC,)
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and)
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ZURU PTY LTD.,)
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and)
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ZURU UK LTD.,)
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Plaintiffs,)
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v.)
)
TELEBRANDS CORP.,)
)
and)
)
BULBHEAD.COM, LLC,)
)
and)
)
BED BATH & BEYOND INC.,)
)
Defendants.)
)

Civ. Action No. 6:15-cv-551-RWS-JDL

JURY TRIAL DEMANDED

THIRD AMENDED COMPLAINT FOR PATENT INFRINGEMENT

Plaintiffs Tinnus Enterprises, LLC (“Tinnus”), ZURU Ltd., ZURU Inc., ZURU LLC, ZURU Pty Ltd., and ZURU UK Ltd. (sometimes hereinafter collectively referred to as “ZURU”), by counsel, file this third amended complaint against Telebrands Corporation (“Telebrands”), Bed Bath & Beyond Inc. (“BB&B”), and Bulbhead.com, LLC (“Bulbhead”) (collectively “Defendants”) and in support thereof, plaintiffs state as follows:

NATURE OF THE ACTION

1. Plaintiffs bring this action to enjoin the manufacture, importation, distribution, use, sales, and offers to sell by Defendants of certain products known as Balloon Bonanza, Battle Balloons, Battle Balloons Color Combat, and Battle Balloons Color Burst that infringe or contribute toward the infringement of a valid and enforceable U.S. Patent owned by Tinnus and licensed to ZURU, as well as for monetary damages for Defendants’ willful infringement.

THE PARTIES

2. Plaintiff Tinnus is a limited liability company organized under the laws of the State of Texas with its principal place of business at 3429 18th Street in Plano, Texas.

3. Plaintiff ZURU Ltd. is a company organized under the laws of Hong Kong with its principal place of business in Kowloon, Hong Kong. ZURU Ltd. seeks, among other things, injunctive relief and monetary damages in this action.

4. Plaintiff ZURU Inc. is a corporation organized under the laws of the British Virgin Islands with its principal place of business in Kowloon, Hong Kong. ZURU Inc. is a parent company that owns 100% of ZURU LLC, ZURU Ltd., ZURU Pty Ltd., and ZURU UK Limited. ZURU Inc. seeks, among other things, injunctive relief and monetary damages in this action.

5. Plaintiff ZURU LLC is a limited liability company organized under the laws of Oregon with offices in El Segundo, California. ZURU LLC is joining in this action only to seek

permanent injunctive relief against Defendants and does not intend to seek monetary damages in this action.

6. Plaintiff ZURU Pty Ltd. is a business organized under the laws of Australia with a registered address in Melbourne, Australia. ZURU Pty Ltd., which was incorporated on or around September 9, 2016, is joining in this action only to seek permanent injunctive relief against Defendants and does not intend to seek monetary damages in this action.

7. Plaintiff ZURU UK Ltd. is a business organized under the laws of the United Kingdom with a registered address in Bristol, England. ZURU UK Ltd., which was incorporated on or around September 13, 2016, is joining in this action only to seek permanent injunctive relief against Defendants and does not intend to seek monetary damages in this action.

8. Defendant Telebrands is a corporation organized under the laws of the State of New Jersey with its principal place of business at 79 Two Bridges Road in Fairfield, New Jersey.

9. Defendant BB&B is a corporation organized under the laws of the State of New York with its principal place of business at 650 Liberty Avenue in Union, New Jersey.

10. Defendant Bulbhead is a limited liability company organized under the laws of the State of Delaware with its principal place of business at 79 Two Bridges Road in Fairfield, New Jersey.

JURISDICTION AND VENUE

11. This is a civil action for patent infringement arising under the United States patent statutes, 35 U.S.C. § 1, et seq.

12. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331 and 1338(a).

13. Defendants are subject to this Court's personal jurisdiction because they do and have done substantial business in this judicial district, including selling and/or offering to sell infringing products in Texas and this judicial district. In addition, upon information and belief, Defendants (directly and/or through a distribution network) regularly place infringing products in the stream of commerce with the knowledge and/or understanding that such products will be sold in Texas and in this district. Defendants are subject to the general jurisdiction of this Court because they have regular and systematic contacts with this forum such that the exercise of jurisdiction over them would not offend traditional notions of fair play and substantial justice.

14. Venue is proper in this judicial district under 28 U.S.C. § 1391(b) and (c), as well as under 28 U.S.C. § 1400(b).

THE PATENT-IN-SUIT

15. On June 9, 2015, the United States Patent and Trademark Office ("USPTO") duly and legally issued United States Patent No. 9,051,066 ("’066 Patent," attached as **Exhibit A**), entitled "System and Method for Filling Containers with Fluids" to Tinnus.

16. Any required maintenance fees have been paid, and the ’066 Patent has not expired. Tinnus is the owner by assignment of the entire right, title and interest in the ’066 Patent. ZURU is the exclusive licensee of the ’066 Patent, and thus both plaintiffs have standing to sue for infringement of the ’066 Patent.

FACTS

17. Josh Malone ("Mr. Malone") is the founder and sole owner of Tinnus and the sole inventor of the ’066 patent.

18. By early 2014, Mr. Malone, a father of eight children and an inventor, had developed a revolutionary new toy product (a product that is now marketed as Bunch O Balloons), which would allow someone to fill as many as 100 water balloons in approximately 60 seconds.

19. The device includes a hose attachment with an opposite end that is fitted with multiple flexible tubes that connect to balloons. Versions of the device have included 35 or 37 balloons. When the hose is turned on, the balloons fill and are automatically sealed when released of the hose attachment assembly. A website advertising Mr. Malone's Bunch O Balloons product can be found at <http://www.bunchoballoons.com>.

20. On February 7, 2014, Mr. Malone filed a provisional patent application with the USPTO for his invention, which was assigned U.S. Patent Application No. 61/937,083. On February 20, 2014, Mr. Malone filed a further provisional application, U.S. Patent Application No. 61/942,193.

21. On September 22, 2014, Mr. Malone filed a non-provisional application, U.S. Patent Application No. 14/492,487 ("487 Application"), which claimed priority to the two provisional applications. Mr. Malone assigned the '487 Application to Tinnus. The '487 Application issued as the '066 Patent on June 9, 2015.

22. In March 2014, Mr. Malone, through Tinnus, began taking steps to manufacture the Bunch O Balloons product using certain Asian contractors. The first batch of product was manufactured in June 2014. Manufacturing of the Bunch O Balloons product has continued since that time.

23. To help raise funds for the manufacture and marketing of the Bunch O Balloons product, Mr. Malone, through Tinnus, launched a Kickstarter campaign on July 22, 2014.

24. Kickstarter is the world's largest Internet crowdsource funding platform for creative projects.

25. In less than 12 hours, the project was fully funded to its initial \$10,000 goal, and within five days, the project had received over a half of a million dollars in startup funding.

26. To date, that funding has reached nearly \$1 million, and the Kickstarter video featuring the Bunch O Balloons product has had approximately 2.9 million views.

27. The same day Mr. Malone launched the Kickstarter campaign, July 22, 2014, his Bunch O Balloons invention was featured in *Sports Illustrated's* on-line magazine.

28. Two days later, *Time* magazine ran a story about his novel product on its website.

29. That same day, July 24, 2014, Mr. Malone's invention was featured on a nationally-televised broadcast of *Good Morning America*.

30. Shortly thereafter on July 27, *People* magazine covered the Bunch O Balloons product on its website.

31. Then, on July 29, just a week after Mr. Malone began his Kickstarter campaign, Mr. Malone appeared on the *Today Show* with his unique invention during a nationally-televised broadcast.

32. Moreover, the Bunch O Balloons product went viral on the web, including one YouTube review of Mr. Malone's invention, which currently has approximately 9.6 million views.

33. On July 22, 2014, the same day Mr. Malone launched his Kickstarter campaign, he received his first orders from the public for the Bunch O Balloons product, which included 598 orders.

34. Mr. Malone sold out his initial production batch on the first day of his Kickstarter campaign.

35. Mr. Malone received those orders before Telebrands began offering its infringing products.

36. As the publicity surrounding Mr. Malone's invention increased, so too did the interest in his product.

37. On August 21, 2014, Tinnus launched its website, <http://bunchoballoons.com>, to accept increasing numbers of product orders.

38. That website has continually received orders since that time.

39. On August 29, 2014, Tinnus shipped its first batch of the Bunch O Balloons product to customers located in the U.S. and around the world. Shipping has continued since that time.

40. Also, in August 2014, ZURU and Tinnus began negotiations to partner with each other for the manufacture, marketing, and sale of the Bunch O Balloons product.

41. On August 19, 2014, Tinnus and ZURU entered into a license agreement wherein Tinnus granted ZURU an exclusive license to intellectual property rights, including patents, relating to the Bunch O Balloons product.

42. Following execution of the license agreement, ZURU immediately began heavily investing in the development, production, and marketing of the Bunch O Balloons product.

43. To date, ZURU has invested millions of dollars (U.S.) in production and facilities to ramp up the product output.

44. On information and belief, Telebrands, in conjunction with its product designer, engaged in a scheme to copy and mimic the extremely successful Bunch O Balloons product.

45. In late summer or early fall of 2014, Telebrands decided to sell a copy of Bunch O Balloons that infringes the '066 Patent.

46. Telebrands marketed and markets a copy of the Bunch O Balloons product.

47. Telebrands began marketing a copy of Bunch O Balloons in mid-December 2014—almost five months after Mr. Malone first introduced Bunch O Balloons to the public in his wildly successful Kickstarter campaign.

48. Telebrands is no stranger to litigation, including federal and state investigations and actions arising out of unfair competition and consumer fraud on the part of Telebrands. Public records indicate that since 1983, Telebrands has been sued more than 50 times for infringement of intellectual property rights.

49. Ajit Khubani is the CEO and founder of Telebrands. Mr. Khubani has been referred to as the “Knock-Off King” in the television infomercial industry. **Exhibit B** includes an excerpt from Ronald Grover, *Infomercial King AJ Khubani and his Telebrands Empire are Courting Inventors*, INVENTORS DIGEST, Feb. 2010, at 24.

50. In addition, Peter Bieler, the gentleman responsible for successfully marketing the ThighMaster, stated: “I was more than familiar with A. J. Khubani. He was a legend in his own time, a knock-off artist par excellence. He had a reputation in the infomercial [sic] business as someone who’d kill your direct response campaign by selling his copies to the retailers, who’d sell them for half the price. Your phones stopped ringing.” **Exhibit C** includes an excerpt from Bieler, Peter & Costas, Suzanne, *This Business Has Legs* 137 (1996).

51. Further, Mr. Remy Stern wrote: “Khubani’s greatest distinction . . . is that in [the infomercial] industry where almost every new product is a rehash of a previous product and there are precious few true inventions, he has carved out a reputation as one of the most shameless copycats in the business. . . . Creating cheaper versions of other people’s products has since become firmly embedded in Telebrands’ business plan.” **Exhibit D** includes an excerpt from Stern, Remy, *But Wait ... There’s More!* 90 (2009).

52. In addition, Telebrands has been accused of violating consumer protection laws, the latest being a suit by the New Jersey Attorney General and state Division of Consumer Affairs initiated in August 2014.

53. The nationally-recognized Better Business Bureau's ("BBB") Board of Directors revoked Telebrands's status as an "Accredited Business." On information and belief, the BBB Board did so because the BBB had received 1,397 complaints relating to Telebrands within the three years prior to the revocation. Exhibit E includes an excerpt from Better Business Bureau, Section on Business Reviews, *BBB Business Review*, <http://www.bbb.org/new-jersey/business-reviews/general-merchandise-retail/telebrands-in-fairfield-nj-19000531> (last visited June 4, 2015).

54. ZURU sent a cease and desist letter to Telebrands by e-mail on December 16, 2014 asking that Telebrands cease marketing of its copied Balloon Bonanza product.

55. Telebrands did not comply with the cease and desist letter.

56. Instead, on December 23, a week after ZURU had e-mailed the cease and desist letter to Telebrands, Telebrands's counsel replied, stating that they would be in touch.

57. Ms. Anna Mowbray, ZURU's COO, and Telebrands's Executive Vice President subsequently spoke by phone and agreed to meet at Telebrands's Hong Kong office on February 10, 2015 to try to resolve the matter. The meeting broke down when it became clear to Ms. Mowbray that Telebrands would not be willing to respect ZURU's intellectual property.

58. BB&B has offered to sell and has sold the infringing Balloon Bonanza product in its retail stores, including stores in this judicial district.

59. On information and belief, Telebrands began offering to sell its Battle Balloons, Battle Balloons Color Combat, and Battle Balloons Color Burst products sometime in either

December 2015 or January 2016 after Telebrands and BB&B had been enjoined from marketing and selling the Balloon Bonanza product.

60. Bulbhead is an affiliate of Telebrands. Sometime in 2016, Bulbhead began offering to sell Telebrands's Battle Balloons, Battle Balloons Color Combat, and/or Battle Balloons Color Burst products on its website, www.bulbhead.com.

61. Telebrands's Battle Balloons, Battle Balloons Color Combat, and Battle Balloons Color Burst products are colorable imitations of Telebrands's infringing Balloon Bonanza product.

62. Defendants have, among other things, manufactured, imported, used, sold, and/or offered to sell the Balloon Bonanza, Battle Balloons, Battle Balloons Color Combat, and/or Battle Balloons Color Burst products, all of which infringe the '066 Patent, and Defendants continue to do so, at least with respect to the Battle Balloons, Battle Balloons Color Combat, and Battle Balloons Color Burst products. Consequently, plaintiffs' right to relief arises out of the same transaction, occurrence, and/or series of transactions or occurrences relating to the making, using, offering for sale, and/or selling the same infringing products.

**COUNT I
INFRINGEMENT OF THE '066 PATENT**

63. Plaintiffs reallege and incorporate by reference paragraphs 1 through 62 of this complaint as if fully set forth herein.

64. Plaintiffs are the owner and exclusive licensee of the entire right, title, and interest in the '066 Patent.

65. On or about December 16, 2014, plaintiffs notified Telebrands that plaintiffs had a pending patent application.

66. On or about December 16, 2014, plaintiffs requested that Telebrands cease marketing the Balloon Bonanza product. Telebrands ignored that request, as Telebrands did not cease marketing the Balloon Bonanza product.

67. Defendants Telebrands and Bed Bath and Beyond have marketed, distributed, offered to sell, and sold in the United States the Balloon Bonanza product that infringes the '066 Patent. At least Telebrands is also marketing, distributing, offering to sell, and selling in the United States the Battle Balloons, Battle Balloons Color Combat, and Battle Balloons Color Burst products, which also infringe the '066 Patent. And Telebrands, through its affiliate Bulbhead, is currently marketing, distributing, offering to sell, and may be selling in the United States the Battle Balloons, Battle Balloons Color Combat, and/or Battle Balloons Color Burst products, which also infringe the '066 Patent.

68. Defendants have infringed and continue to infringe, one or more claims of the '066 Patent by making, using, importing, offering to sell, and/or selling within the United States the Balloon Bonanza, Battle Balloons, Battle Balloons Color Combat, and/or Battle Balloons Color Burst products.

69. Defendants' infringement of the '066 Patent has been willful.

70. Plaintiffs have been, and continue to be, damaged and irreparably harmed by Defendants' infringement, which will continue unless Defendants are enjoined by this Court.

REQUEST FOR RELIEF

WHEREFORE, plaintiffs respectfully request the following relief against Defendants:

- A. A judgment that the '066 Patent is duly and legally issued, valid, and enforceable;
- B. A judgment that the Battle Balloons, Battle Balloons Color Combat, and Battle Balloons Color Burst products are colorable imitations of Telebrands's infringing Balloon

Bonanza product;

C. A judgment holding Defendants liable for infringement of the '066 Patent;

D. A temporary restraining order, preliminary injunction, and permanent injunction against Defendants, their officers, agents, servants, employees, attorneys, parent and subsidiary corporations, assigns and successors in interest, and those persons in active concert or participation with them, enjoining them from continued acts of infringement of the '066 Patent, including without limitation, an injunction against offers for sale and future sales of the infringing products and colorable imitations thereof;

E. An accounting for damages and an award of compensatory damages resulting from Defendants' infringement of the '066 Patent, together with pre-judgment and post-judgment interest;

F. A judgment holding that Defendants' infringement of the '066 Patent is willful and a trebling of damages pursuant to 35 U.S.C. § 284;

G. A judgment holding that this action is an exceptional case and an award to plaintiffs for their attorney's fees and costs pursuant to 35 U.S.C. § 285 and other authority;

H. A judgment that plaintiffs be awarded their costs incurred herein; and

I. Such other relief as the Court deems just and equitable.

DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38, plaintiffs hereby demand trial by jury.

Dated: July 13, 2018

Respectfully submitted,

By: /s/ Eric H. Findlay

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that counsel of record who are deemed to have consented to electronic service are being served with a copy of the foregoing document via electronic mail and ECF on the 13th day of July 2018.

/s/ Eric H. Findlay
Eric H. Findlay