

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

**TINNUS ENTERPRISES, LLC, and
ZURU LTD.**

Plaintiffs,

v.

TELEBRANDS CORP., et al.,

Defendants.

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No. 6:15-cv-00551 RWS-JDL

JURY DEMANDED

**ORDER ADOPTING REPORT AND
RECOMMENDATION OF MAGISTRATE JUDGE**

The above entitled and numbered civil action was referred to United States Magistrate Judge John D. Love pursuant to 28 U.S.C. § 636. The Report and Recommendation of the Magistrate Judge (“R&R”), which contains his proposed findings of fact and recommendation, has been presented for consideration (Doc. No. 66). The Magistrate Judge recommended granting Plaintiffs’ Tinnus Enterprises (“Tinnus”) and ZURU Ltd. (“ZURU”) Motion for a preliminary injunction. Defendants’ Telebrands Corporation (“Telebrands”) and Bed Bath & Beyond (“Bed Bath”) (collectively “Defendants”) filed objections to the R&R (Doc. No. 70), to which Plaintiffs filed a response (Doc. No. 75). The Court reviews the Magistrate Judge’s findings *de novo*. 28 U.S.C. § 636 (A)-(C).

Defendants raise two primary objections to the Magistrate Judge’s findings: (1) that the recommendation does not include any claim construction and improperly shifts the burden of proof for likelihood of success to the Defendants; and (2) that the factual findings do not support a showing of irreparable harm. (Doc. No. 70, at 1.) With regard to claim construction, Defendants mischaracterize the Magistrate Judge’s findings by claiming no claim construction

analysis was conducted. From the papers and argument presented by the parties, the Magistrate Judge identified only two potential claim construction disputes regarding the terms “attached” and “connecting force,” both of which were untimely raised by Defendants for the first time in their sur-reply. (Doc. No. 66, at 7-9.) Regardless, the Magistrate Judge fully considered Defendants’ untimely arguments and accorded the term “attached” its plain and ordinary meaning at this stage, and found that regardless of the interpretation of the term “connecting force,” Plaintiffs were likely to prove infringement. (Doc. No. 66, at 8-9.) The Court agrees with the Magistrate Judge’s findings.

With regard to infringement, Defendants argue that the R&R relied on insufficient evidence of infringement set forth by Plaintiffs. (Doc. No. 70, at 2.) The Magistrate Judge expressly set forth that he reviewed a claim chart submitted by Plaintiffs that maps each and every limitation of at least independent claim 1, among other asserted claims, to the features of the Balloon Bonanza product. (Doc. No. 66, at 7.) Moreover, the Magistrate Judge considered the submissions of the actual Balloon Bonanza product and Plaintiffs’ DVD of the product in support. (Doc. No. 66, at 7.) The Magistrate Judge then carefully considered each non-infringement argument set forth by Defendants, and concluded that Plaintiffs were likely to prove infringement of at least the asserted independent claim 1 of the ’066 Patent. (Doc. No. 66, at 7-9.) Based on the evidence contained within Plaintiffs’ claim chart, the actual product, and the DVD tutorial, the Court agrees that Plaintiffs provided sufficient evidence to show that they were likely to prove infringement of at least the asserted independent claim 1 of the ’066 Patent.

The Magistrate Judge also did not improperly shift the burden to the Defendants. As explained with regard to infringement, the Magistrate Judge first considered Plaintiffs’ affirmative evidence, and, finding it sufficient, then carefully considered all of Defendants’ non-

infringement arguments. Upon thorough review of all the evidence, the Magistrate Judge determined Plaintiffs were likely to show claim 1 of the '066 Patent is infringed. Such an approach did not improperly shift the burden to Defendants. Nor did the Magistrate Judge improperly shift the burden on validity. The Magistrate Judge went through all of the prior art references cited by Defendants, which Plaintiffs contended were considered by the patent examiner during the prosecution of the '066 Patent and properly rejected. (Doc. No. 66, at 9-15.) Weighing all of that evidence, the Magistrate Judge found that Defendants were not likely to raise a substantial question as to the validity of the '066 Patent.¹ Moreover, the Magistrate Judge was not incorrect in rejecting Defendants' notion that secondary considerations will not be relevant to this case. Based on the testimony and evidence presented at the preliminary injunction hearing, the Magistrate Judge raised his concerns that indeed at least some secondary considerations were likely to be relevant. (Doc. No. 66, at 15.) The Court agrees that secondary considerations are likely to be relevant in this case, and ultimately agrees with the Magistrate Judge's findings.

Finally, the Court finds there is sufficient evidence of irreparable harm to support the Magistrate Judge's finding. Defendants argue that the R&R incorrectly relies solely on Plaintiffs' self-serving statements. However, the Magistrate Judge cited to declarations, emails, and other relevant documents submitted by the Plaintiffs in support of his finding. (Doc. No. 66, at 16-18.) Moreover, regarding the live testimony relied on by the Magistrate Judge, the Defendants do not attack the credibility of the witness testimony they argue was relied on in

¹ Notably, the Magistrate Judge went through a thorough analysis of each asserted combination of references set forth by the Defendants, despite the fact that they did not brief such arguments, or present them at the oral hearing, but simply submitted a 90-page Post Grant Review petition—with numerous attachments—for the Magistrate Judge to wholesale review. (Doc. No. 66, at 9-15.) Meanwhile, Plaintiffs maintained that the patent is presumed valid and that it had already survived review by the patent examiner, where he considered the prior art cited by Defendants and rejected it. (Doc. No. 34, at 2-3.)

error. (Doc. No. 70, at 4-5.) The testimony that Defendants cite by Mr. Malone to argue that Telebrands and ZURU are not direct competitors in a two-player market, does not support this contention. (Doc. No. 70, at 5; citing Tr. 41:1-12.) In that portion of his testimony, Mr. Malone agreed that he compared his Bunch O Balloons product to other water balloon products, and testified that he believed those products are still on the market. (Tr. 41:1-12.) However, Mr. Malone's testimony does not establish that those products are currently being sold by *direct retailers*, or that they were ever sold in a retail setting. Defendants provided no evidence that there were other competitors in this marketplace. Finally, the Court agrees it was permissible for the Magistrate Judge to consider the testimony provided at the hearing regarding customer reviews and customer calls to the ZURU call center. The testimony relied on by the Magistrate Judge was specifically allowed over Defendants' objections (Tr. at 55:9-11), and ultimately offered in part for demonstrative purposes (Tr. at 56:11-13). This testimony is consistent with the other evidence presented in the record and cited by the Magistrate Judge. (Doc. No. 66, at 17-19.)

All remaining arguments presented by the Defendants are either new arguments not presented in the original briefing, which the Court will not now consider, or those already properly considered by the Magistrate Judge. Therefore, the Court adopts the Report and Recommendation of the United States Magistrate Judge as the findings of this Court. All objections are **OVERRULED** and Plaintiffs' Motion for a Preliminary Injunction (Doc. No. 9) is **GRANTED**.

SIGNED this 2nd day of December, 2015.