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Water Balloon Patent Win Upped To \$24.5M Plus Atty Fees

By Dave Simpson

Law360 (March 27, 2019, 10:49 PM EDT) -- A Texas federal judge doubled a jury award to \$24.5 million and tacked on \$4.75 million in attorney fees and expenses for a toy company that won a case against Telebrands Corp. for infringing two patents on a water balloon device, finding the infringer's misconduct in the case wasted court resources.

In a 64-page redacted opinion issued earlier this month and unsealed Wednesday, U.S. District Judge Robert W. Schroeder III added to Tinnus Enterprises' **November 2017 trial victory** when a jury found that Tinnus deserved \$10.25 million in lost profits and \$2 million in royalties because of the infringement of two Tinnus' patents for its Bunch O Balloons product.

In doubling the award, adding the fees, and denying a motion for a new trial, Judge Schroeder slammed some of Telebrands' conduct in the case.

Telebrands tried to design around Tinnus' Bunch O Balloons invention, which allows the filling of dozens of water balloons simultaneously, the judge said.

"However, the 'design-around' was not a substantive alteration but a cosmetic change to a product that was enjoined," Judge Schroeder said. "Ultimately, although the court finds that this conduct does not merit a full trebling of damages, given defendants' continued litigation misconduct and other actions ... the court finds a significant enhancement is appropriate."

The two patents, which were issued in 2016 to Tinnus and then licensed to Zuru Ltd., are for "System and method for filling containers with fluids" and "Device for filling multiple water balloons." Zuru made a splash in the toy world with the Bunch O Balloons device.

In addition to finding that Telebrands infringed Tinnus' patents, the jury found in the plaintiffs' favor on validity, rejecting the defendants' contention that four claims across the two patents were invalid. The jury also found that both Telebrands' infringement and the infringement by retailers who sold the Telebrands products was willful.

Zuru and Tinnus have accused Telebrands of "serial infringement" through a series of variations on what they say is essentially a copy of their Bunch O Balloons product, each outfitted with subtle changes designed to skirt injunctions blocking sales of the previous product.

The companies claim Telebrands became aware of Bunch O Balloons through a Kickstarter page launched by inventor Josh Malone to fund production and marketing of the product and thought it was, according to court records, a "cool idea."

Telebrands then set out to make a series of copies of the product called Balloon Bonanza, Easy Einstein Balloons and Battle Balloons, each of which is currently subject to a federal injunction.

In deciding whether Telebrands' copying was deliberate, Judge Schroeder pointed to an exchange in the record from a Telebrands executive to an employee about the creation of the Balloon Bonanza product.

"So you know what the original actual product 'Bunch of Balloons' looks like," the executive said, according to court records. "Here is a pic below. [Includes picture of Plaintiffs' Bunch O Balloons product.] Here is our version below where we would just paint the cap and change out the balloons using the bands removed from their product, new BLUE balloons we loaded on, and a painted cap. [Includes picture of prototype.]"

Judge Schroeder noted that Balloon Bonanza is not an accused product in this particular case — this case focuses on Battle Balloons — but he said that the exchange is important because Battle Balloons is a modification of Balloon Bonanza that was designed after Balloon Bonanza was enjoined in a previous lawsuit.

"After Balloon Bonanza was enjoined, Telebrands only made superficial changes to the product's housing and renamed it Battle Balloons," he said. "In reality, Battle Balloons was functionally identical to Balloon Bonanza."

Judge Schroeder also took issue with Telebrands' behavior throughout the case.

In one instance, Telebrands filed an emergency motion to compel a response in a situation that a magistrate judge later found was not an emergency. The company also filed several other nonmeritorious motions, forcing the court and parties to expend excess resources, the judge said.

The company also dragged its feet in complying with discovery requests and, in what Judge Schroeder called "perhaps the most needless effort expended," it attempted to reargue issues that were already decided by the court, the judge said.

"Rather than offering new argument or evidence, defendants found creative ways to reassert their rejected positions," he said. "The magistrate judge warned that defendants' positions were preserved for appeal and that they need not continue to re-argue or disagree with the court."

At trial, the defendants "flagrantly ignored" the court's order that they weren't allowed to mention certain Patent Trial and Appeal Board and post-grant review proceedings in front of the jury, the judge said.

Judge Schroeder also agreed to up the damages because the case was not close.

"At the end of the six-day trial, the jury deliberated for just two-and-a-half hours before finding that defendants infringed the patents-in-suit, that the patents-in-suit were valid and that defendants' infringement was willful," he said.

Malone, who invented the Bunch O Balloons product, told Law360 that Telebrands is lucky the award wasn't tripled.

"But I do not expect them to pay," he said. "Telebrands and their retail cohorts have been stealing from inventors for 40 years and they never pay."

Counsel for Telebrands did not immediately respond to a request for comment Wednesday.

For many of the same reasons that he doubled the award, Judge Schroeder found that Tinnus' request for attorney fees and expenses was reasonable and ultimately awarded \$4.75 million on Wednesday.

Retailers Bed Bath & Beyond, Fry's Electronics, The Kroger Company, Sears Holding Corp. and Walgreen Co. were also named in the suit, and they are responsible for paying a small portion of the damages, according to court records.

The patents at issue are U.S. Patent Nos. 9,242,749 and 9,315,282.

Tinnus is represented by Eric Findlay and Debby Gunter of Findlay Craft PC, Thomas Dunlap, David Ludwig, Eric Olavson, Cortland Putbrese and Brian Koide of Dunlap Bennett & Ludwig PLLC and Kelly Kubasta of Ferguson Braswell & Fraser PC.

Telebrands is represented by Morgan Chu, Richard Birnholz, Molly Russell and Andreas Petasis of Irell & Manella LLP. Telebrands and the other defendants are represented by Gregory Love of Love Law Firm PC, Robert Maldonado of Cooper & Dunham LLP and Lance Lee.

The case is Tinnus et al. v. Telebrands et al., case number 6:16-cv-00033, in the U.S. District Court for the Eastern District of Texas.

--Additional reporting by Cara Salvatore. Editing by Jill Coffey.

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