UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 14-24517-CIV-MOORE/MCALILEY

EDGE SYSTEMS LLC, *et al.*,

Plaintiffs,

v.

RAFAEL NEWTON AGUILA, a/k/a RALPH AGUILA, d/b/a HYDRADERMABRASION SYSTEMS,

Defendants. /

REPORT AND RECOMMENDATIONS ON PLAINTIFF'S APPLICATION FOR PRELIMINARY INJUNCTION

Pending before the Court is Plaintiffs' Application for Preliminary Injunction, which the Honorable K. Michael Moore referred to me. [DE 13, 16].[1] The Court has carefully considered that Application, the Defendant's response [DE 35], and the evidence presented at a preliminary injunction hearing on December 19, 2014. To date, Defendant has represented himself in this matter, and did so at the hearing. For the reasons set forth below, I recommend that the Court grant Plaintiffs' Application for Preliminary Injunction.

I. Background

This is an action that seeks damages and injunctive relief for trademark, trade dress and patent infringement. Plaintiff Edge Systems LLC ("Edge") manufactures and

[1] Plaintiffs' Motion also sought entry of a temporary restraining order, which the Court granted. [DE 15].

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HydraFacial Ex. 2007

sells a hydradermabrasion machine known as the HydraFacial MD, referred to here as "Plaintiffs' Machine." This machine utilizes a "wet system" that exfoliates facial skin tissue by using an abrasive tip in combination with the application of serums, followed by a vacuum source to extract dead skin cells. Edge claims that it is the owner of three registered and eight common law trademarks, which protect the names of the serums, the company's logo and the company's name. Plaintiffs' Machine incorporates technology that is claimed in six U.S. patents, owned by Plaintiff Axia Medsciences LLC ("Axia") and exclusively licensed to Edge.[2]

Defendant Rafael Aguila sells a hydradermabrasion machine known as the HydraDerm MD or Hydradermabrasion MD ("Defendant's Machine"), which uses the same wet system, and trade dress, as Plaintiffs' Machine. Defendant's Machine incorporates the use of serums that have the same or very similar names as the serums used in Plaintiffs' Machine, and Defendant sells his machines using the same name as Plaintiff Edge – "Edge Systems" – and the same logo that Plaintiff Edge uses.

Plaintiffs seek a preliminary injunction to enjoin Defendant from infringing upon their trademarks and trade dress and from infringing a patent that covers an integral component of Plaintiffs' Machine.

Defendant concedes that he uses the same or nearly identical trademarks and trade dress as Plaintiffs, and that his Machine uses technology covered by Plaintiffs' patent.

[2] Plaintiff Axia's interest in this lawsuit appears to be confined to its claim of patent infringement, whereas Plaintiff Edge has claims of both patent and trademark infringement. For the sake of simplicity, I typically reference both Plaintiffs, rather than distinguish which Plaintiff is relevant to particular claims.

Defendant argues that Plaintiff's motion should be denied because he first used the trademarks and trade dress in dispute, and because Plaintiffs' patent is invalid. Defendant also argues that Plaintiffs' trademark infringement claim is barred by laches.

I analyze each of these arguments as I consider whether Plaintiffs have shown a likelihood of success on the merits; I then evaluate the remaining elements needed to issue a preliminary injunction. But first, I make findings of fact.

II. Findings of Fact

As an initial matter, I clarify the evidence I rely on here. The parties presented testimony and introduced documents into evidence at the preliminary injunction hearing. Before that, the parties filed declarations of various witnesses, some of whom later testified at the hearing. After the hearing, Plaintiffs identified authority for the notion that a court may rely on affidavits at the preliminary injunction stage if the evidence is "appropriate given the character and objectives of the injunctive proceeding." *Levi Strauss & Co. v. Sunrise Intern. Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995).

Indeed, the Court does have the discretion to consider declarations at such a hearing, but I elect not to do so here. The core issues in dispute – most significantly, who made first use of the disputed marks and trade dress – raise questions of credibility, which is best evaluated when presented with live testimony. Moreover, at the status conference I held before the hearing I told the parties that for matters in dispute, I expected them to present live witnesses, not affidavits. I believe the issues presented by Plaintiffs motion make reliance on affidavits inappropriate here and I thus decline to consider them.

Based upon the evidence introduced at the preliminary injunction hearing, I make the following findings of fact.

A. Edge Systems and the "E" Logo

1. Plaintiffs' Use

Roger Ignon and William Cohen founded Edge in 1997. Messrs. Ignon and Cohen testified at the hearing and I found their testimony credible. Edge designs, manufactures and sells hydradermabrasion machines. Since its inception in 1997, Edge has continuously operated under the trade name "Edge Systems", in which it claims a common law trademark, and continuously used that mark to promote and sell its products in interstate commerce. Since 1999, Edge has continuously used in interstate commerce variations of its chevron-styled "E" logo (the "E" Logo"), which is formed by three triangles, to identify the source of its products. Edge registered the mark The Edge System with the United States Patent and Trademark Office ("USPTO") in September 2005.[3] According to the registration, the mark is associated with "medical apparatus, namely, systems comprised primarily of a vacuum source and hand piece used for medical body treatments, microdermabrasion and massage therapy." Plaintiffs have not authorized any third party, to include Defendant, to use the name Edge Systems, The Edge System or the "E" Logo.

[3] I take judicial notice of the registered trademark The Edge System, proof of which is of record with the USPTO. *See* http://tmsearch.uspto.gov/bin/showfield?f=doc&state=4801:m73ktr.2.4; Fed. R. Evid. 201(b)(2) ("The court may judicially notice a fact that is not subject to reasonable dispute because it … can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."). If either party objects to the propriety of my taking judicial notice, it may do so in its objections to this Report and Recommendation. *See* Fed. R. Evid. 201(e).

2. Defendant's Claimed Prior Use

The Defendant testified that in 1996 he informally created a company named "Edge Systems" and that he designed the "E" Logo. He did not legally incorporate or otherwise formally establish this company. Defendant created the company to distribute microdermabrasion machines known as the DermisPeel. This machine, designed to exfoliate or otherwise rejuvenate skin, did not use liquids, and thus was a "dry system." At the time that Defendant says he founded Edge Systems, he was 19 years old and a student at the University of Florida. [DE 55, pp. 310].

Defendant did not introduce any evidence to corroborate his testimony that he used the name Edge Systems and the "E" Logo in 1996.[4] In fact, the first evidence of Defendant's use of these marks is from in or about October 2014. At that time, Defendant applied for a Fictitious Business Name with the Florida Department of State for the name Edge Systems. He also acquired the domain name, www.edge-systems.com, where he established a website which displays the "E" Logo and states "Welcome to Edge Systems' new website." [DE 50-32, p. 2]. The website promotes the sale of a hydradermabrasion machine named HydraDerm MD or Hydradermabrasion MD (i.e., Defendant's Machine), described as Edge Systems' "newest device [which] is a medical-grade upgrade of Edge Systems' previous device." [DE 50-32 at p. 2]. The "E" Logo and words "Edge Systems" are displayed on the front of that machine.

[4] Defendant attempted to submit corroborating evidence two weeks after the hearing, when he filed a Supplemental Declaration. I discuss this untimely Supplemental Declaration *infra*, and my reasons for finding it, and the evidence attached thereto, unreliable.

On November 1, 2014, just before Plaintiffs filed this lawsuit, Defendant filed an application with the USPTO to register the mark "Edge Systems" in connection with goods identified as microdermabrasion apparatus. [DE 50-3]. Notably, in that application, Defendant claims a first use date of 1996. *Id.*

I did not find Defendant's claim that he was the first to use the disputed marks credible. As between Plaintiffs and Defendant, I am persuaded that Plaintiffs are the owners of and were the first to use the trademarks Edge Systems, The Edge System and the chevron "E" logo, and that Defendant was not authorized to use these marks.

B. Plaintiffs' Machine and Accompanying Serums

1. Plaintiffs' Machine

Plaintiffs' Machine incorporates technology claimed in six U.S. patents, numbered 6,299,620; 6,641,591; 7,678,120; 7,789,886; 8,066,716 and 8,337,513. I limit my analysis to patent 6,299,620 (the "'620 Patent") and, in particular, Claim 1 of that patent, because Plaintiffs have confined their motion for a preliminary injunction for patent infringement to their claim that Defendant infringed Claim 1 of the '620 Patent. [DE 13, p. 26]. As stated above, Plaintiff Axia owns the '620 Patent and exclusively licensed it to Edge. The '620 Patent was filed with the USPTO on December 30, 1999.[5] [DE 1-4, p.1]. Claim 1 of the '620 Patent is described as "[a] system for treating surface layers of a patient's skin, comprising (a) an instrument body with a distal working end for

[5] I take judicial notice of the '620 Patent, which is on file with the USPTO. *See* http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO1&Sect2=HITOFF&d=PALL&p=1&u=%2Fnetahtml%2FPTO%2Fsrchnum.htm&r=1&f=G&l=50&s1=6,299,620.PN.&OS=PN/6,299,620&RS=PN/6,299,620; Fed. R. Evid. 201(b)(2). Plaintiffs also attached a copy of the '620 Patent as an exhibit to the Complaint. [DE 1-4].

engaging a skin surface; (b) a skin interface portion of the working end comprising an abrasive fragment composition secured thereto; (c) at least one inflow aperture in said skin interface in fluid communication with a fluid reservoir; and (d) at least one outflow aperture in said skin interface in communication with a negative pressurization source." [DE 1-4, p. 18].

In 2004, Plaintiffs began to manufacture the HydraFacial MD, which incorporates the technology described in Claim 1 of the '620 Patent. Plaintiffs' Machine is assembled as a tower, consisting of a light grey body with a translucent blue cover over the serum bottles, a darker grey base, a touch screen monitor on top of the tower and four wheels at the corners of the base. The terms "HydraFacial" and "Edge Systems" are labeled on the translucent blue cover door. The trade dress of Plaintiffs' Machine has remained the same since Edge began selling the device in 2005.

2. Plaintiffs' Serums

In 2006, Edge began to use the names Activ-4, Antiox-6 and Beta-HD to identify serums used with Plaintiffs' Machine. Edge has continuously used these marks in interstate commerce in connection with the advertisement and sale of its products. In 2010, Edge began to offer serums under the names DermaBuilder and Glysal, and has continuously used these marks in interstate commerce since that time in connection with the advertisement and sale of these products. Edge expanded its selection of serums by

offering Vortex-Fusion, a mark it registered with the USPTO in 2012.[6] In 2013, Edge first offered a serum named Antiox+ and has since continuously used this mark in interstate commerce to advertise and sell that product.

In addition to Plaintiffs' Machine and related serums, Edge offers a skin resurfacing product named HydroPeel. Edge registered the HydroPeel mark with the USPTO in September 2008, and has continuously used this mark in interstate commerce to advertise and sell that product.[7] The registration is associated with goods described as "medical apparatus and instruments for resurfacing and nourishing tissue."

Plaintiffs have not authorized any third party, to include Defendant, to use the names HydroPeel, Activ-4, Antiox-6, Beta-HD, DermaBuilder, Glysal, Vortex-Fusion and Antiox+, or the trade dress of Plaintiffs' Machine.

3. Plaintiffs' Sales and Marketing Efforts

Plaintiffs' Machine has become Edge's best-selling product, and has generated $64 million dollars in U.S. sales over the past five years. The average sales price of Plaintiffs' Machine is $24,000.00. The machine is well-known in the aesthetic industry and has been recognized with awards. Edge extensively advertises Plaintiffs' Machine and related products in consumer and trade magazines, at trade shows and on the Internet. Edge has continuously operated a website since 1999 where it displays its trademarks in

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[6] I take judicial notice of the registered trademark Vortex Fusion, which is on file with the USPTO. *See* http://tmsearch.uspto.gov/bin/showfield?f=doc&state=4801:m73ktr.3.1; Fed. R. Evid. 201(b)(2).

[7] I take judicial notice of the registered trademark HydroPeel, which is on file with the USPTO. *See* http://tmsearch.uspto.gov/bin/showfield?f=doc&state=4801:m73ktr.4.1; Fed. R. Evid. 201(b)(2).

connection with sales and promotion of its products. Edge spent $1.4 million dollars in advertising last year and has 60 sales representatives that sell Plaintiffs' Machine in all 50 states.

C. Defendant's Infringement

1. Defendants' Machines and Serums

In October 2006, Plaintiffs became aware that Defendant, through a company he operated named DiamondSkin Systems, Inc., was selling a device that Plaintiffs thought exfoliated skin using a liquid system, and thus potentially infringed patents governing Plaintiffs' Machine. Defendant responded to an inquiry from Plaintiffs, with an email to Mr. Cohen that explained that his DiamondSkin machine exfoliates using oxygen and did not have the capability to use liquids; that is, it was a dry system. [DE 50-27]. With that information, Plaintiffs concluded that Defendant's DiamondSkin system did not infringe their patents and they took no further action.

Later, in January 2010, Plaintiffs believed that Defendant, again through DiamondSkin Systems, was infringing certain of its trademarks. On January 26, 2010, Edge sent Defendant a cease and desist letter demanding that DiamondSkin Systems stop using the marks GlySal, Activ-4, DermaBuilder and Antiox-6 in connection with treatment topicals, because Edge had established common law rights in these marks. Edge also demanded that DiamondSkin Systems stop selling a product named HydroPeel because it infringed on Edge's registered trademark HydraPeel. Defendant did not respond to the cease and desist letter, but less than two months later, he filed Articles of Dissolution with the Florida Secretary of State dissolving DiamondSkin Systems, Inc.

Aware of that company's dissolution, Edge believed that Defendant's company ceased selling the infringing products and it considered the matter closed.

In October 2014, Edge learned that Defendant was selling a hydradermabrasion machine that looked nearly identical to Plaintiffs' Machine. The only apparent difference was the names Defendant gave those machines, HydraDerm MD and Hydradermabrasion MD (as opposed to Plaintiff's name, HydraFacial MD). Defendant displayed these names on the translucent blue door cover and monitor screen next to the "E" Logo and words "Edge Systems."

Edge sent Defendant a cease and desist letter on October 27, 2014 demanding that he stop marketing and selling Defendant's Machine because it infringed on Edge's intellectual property rights. Defendant responded to Edge's cease and desist letter raising other matters, but did not dispute Edge's infringement allegations, [DE 50-20], and Plaintiffs filed this lawsuit November 26, 2014.

2. Defendant's Claimed Prior Use

At the preliminary injunction hearing, Defendant asserted that he was the first to develop the technology claimed in the '620 Patent and the first to use the disputed marks. Defendant testified that in 2003, he developed a liquid based microdermabrasion system that is essentially the same system as Plaintiffs' Machine. Defendant further testified that he began selling these hydradermabrasion machines in 2004 using the names HydraDerm, Hydradermabrasion and HydraPeel. He testified that he offered these machines on his DiamondSkin website and designed the HydraDerm machine in 2004 as a mobile unit with a touch screen monitor and four wheels. Defendant also claims to

have begun using the Activ-4, Antiox-6, Beta-HD, DermaBuilder, GlySal and Antiox+ marks in 2004 to identify the serums that are used with Defendants' Machine. Defendant contends that it is Plaintiffs who copied his products, not the other way around.

Defendant did not offer any evidence to corroborate his testimony that he used the Activ-4, Antiox-6, Beta-HD, DermaBuilder, GlySal and Antiox-Plus marks in 2004 before Plaintiffs did so.[8] The only evidence of Defendant's use of these marks is from October 2014, when Defendant's website www.edge-sytems.com offered for sale serums and solutions under the same names that Plaintiffs use: Activ-4, Beta-HD, Antiox-6, Antiox-Plus, DermaBuilder and GlySal. [DE 50-33, pp. 1, 6].

Defendant conceded the lack of evidence, beyond his own testimony, that he was the first to design the trade dress used on Plaintiffs' Machine. [DE 55, p. 317]. In an effort to corroborate this claim, Defendant presented a screen shot of DiamondSkin's website in September 2004. [*Id.*; DE 73, p. 2]. This document, however, does not include any images of Defendant's Machine, nor does it describe the appearance of those machines. Defendant offered no independent proof, such as photographs, to establish that the trade dress of his machine pre-existed Plaintiffs' Machine.

Defendant brought a number of other documents to the preliminary injunction hearing and moved them into evidence, yet he claims he did not offer photographic evidence of his products because he thought this would be inadmissible hearsay, [DE 55, p. 318], a claim I do not find credible.

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[8] Defendant attempted to submit corroborating evidence after the hearing when he filed a Supplemental Declaration that attached two purported invoices. For reasons I explain later, I do not consider that evidence.

The Defendant's credibility was undermined by the evidence in a number of ways.

First, the screenshot of Defendant's 2004 website contradicts his claim that he was the first to develop the technology claimed in the '620 Patent, as this webpage makes no mention of a liquid based system. [DE 73, p. 2]. Rather, it states that the machine uses "oxygen infusion technology" – the same description Defendant later provided Edge in 2006 to persuade Edge that Defendant was not then infringing its patents. [DE 73, p. 2; DE 50-27]. This webpage also contradicts Defendant's testimony because it makes no mention of the disputed trademarks that Defendant claimed he was using at the time: Activ-4, Antiox-6, Beta-HD, DermaBuilder, GlySal and Antiox-Plus.

Second, the screenshot of Defendant's website in July 2006 similarly fails to substantiate Defendant's claims. Like the screenshot of his 2004 website, this webpage does not mention a liquid based system or any of the disputed trademarks. [DE 50-34].

Third, in an email to Defendant in 2006, Edge explained that it understood Defendant was selling a liquid based microdermabrasion system and specifically asked him "[a]re you telling me that is not the case?" [DE 50-27]. Defendant responded "[t]hat is correct. We apply Oxygen air as a separate treatment...our wands do not have the capability of using liquids...." [*Id.*] Defendant's clear denial of selling a liquid based system in 2006 directly contradicts his testimony that he developed a liquid based microdermabrasion system as early as 2003 and began selling such machines in 2004.

Fourth, the manner in which Defendant responded to Edge's allegations of infringement each time that he received a cease and desist letter, gives more reason to doubt his testimony. As for Edge's 2010 cease and desist letter, the Defendant did not

respond at all. Defendant did respond to Edge's 2014 cease and desist letter, but did so without ever addressing the question of his own infringing conduct. Specifically, Defendant sent Edge two letters that accused Edge employees of stealing Defendant's identifying information, and engaging in fraud and unfair competition by excessively clicking on Defendant's Google Adwords advertisements, and he suggested in those letters that he would pursue criminal charges against Edge and its employees. [DE 50-18, 50-20]. Notably absent from these letters is any claim on Defendant's part that he made prior use of Plaintiffs' claimed intellectual property.

As noted, Plaintiffs established that they founded their company, Edge Systems, in 1997; adopted the "E" Logo in 1999, began to manufacture Plaintiffs' Machine in 2004; and in 2006 they began to use certain product names in which they claim a common law trademark. If Defendant is to be believed, not long before Plaintiffs did so, he adopted the same company name and logo (i.e., 1996). Further, shortly before Plaintiffs (i.e., 2004), he began selling the same machine and using the very names Plaintiff adopted in 2006. These marks and logo are not descriptive of the products. On this record, that Defendant stumbled upon the same unusual names and logo for the same or highly similar products just before Plaintiffs did cannot be believed.

In sum, Plaintiffs have certainly met their burden of proof, and have established that they developed and used the HydraFacial MD, the HydraFacial MD trade dress, and the marks HydroPeel, Activ-4, Antiox-6, Beta-HD, DermaBuilder, Glysal, Vortex-Fusion and Antiox+, well before Defendant, and that Defendant made unauthorized use of Plaintiff's trademarks and trade dress.

D. Customer Confusion

As set forth above, Defendant uses marks that are identical, and nearly identical, to Plaintiffs' marks; further, the trade dress of Defendant's Machine is virtually indistinguishable from the trade dress of Plaintiff's Machine. To state the obvious, the use of the same names and trade dress on what is essentially the same product is without doubt confusing.

Plaintiffs also presented evidence at the hearing that establishes that Defendant's conduct caused actual consumer confusion. Dr. Elliott Duboys, a plastic surgeon who recently purchased one of Defendant's Machines, testified. Defendant admitted that he sold Dr. Duboys a hydradermabrasion machine that resembles Plaintiffs' Machine for $7,650.00. [DE 55, p. 145].

Dr. Duboys testified that, relying on the recommendation of several aestheticians, he had wanted to purchase Plaintiffs' Machine for use in his medical spas, and thought that the machine he purchased from Defendant was in fact Plaintiffs' Machine. [DE 55, pp. 133-35]. After he received the product, Dr. Duboys contacted Defendant's company, Edge Systems, to question why the machine was labeled HydraDerm MD instead of HydraFacial MD. Defendant's representative told Dr. Duboys that the HydraDerm MD was the newest version of Edge System's medical-grade machine and that was being sold in Europe.

Upon receipt of the Defendant's Machine, Dr. Duboys identified problems with it, to include chips, scratches, missing components, missing serums and dirt inside the machine. [DE 55, pp. 146-49]. He tried to complain via Defendant's website,

www.edge-systems.com and Defendant's phone number, but they were not operational. After further research, Dr. Duboys found Plaintiffs' website and, after contacting them to complain, came to learn that he had not purchased Plaintiffs' Machine. Dr. Duboys testified that he would not use Defendant's Machine on his patients because he does not know the origin of the device, and thus considers it unreliable. [DE 55, p. 152].

On this record, Plaintiffs have clearly established that Defendant's unauthorized use of Plaintiffs' trademarks and trade dress have caused and are likely to cause confusion.

Having made my findings of fact, I now turn to my conclusions of law.

III. Analysis

Plaintiffs ask this Court to preliminarily enjoin Defendant from infringing their trademarks, trade dress and patent. Title 15 U.S.C. section 1116(a) provides the Court "shall have power to grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable, to prevent the violation of any right of the registrant of a mark registered in the Patent and Trademark Office or to prevent a violation under subsection (a), (c), or (d) of section 1125 of this title." 15 U.S.C. § 1116(a). Injunctive relief is also available under section 1116(a) for a violation of section 1114(1)(a). *See* 15 U.S.C. § 1116(d)(1)(A). With respect to Plaintiffs' claim for patent infringement, Title 35 U.S.C. section 283 provides that the Court "may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable." 35 U.S.C. § 283.

To obtain a preliminary injunction, Plaintiffs must demonstrate "(1) a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *McDonald's Corp. v. Robertson*, 147 F. 3d 1301, 1306 (11th Cir. 1998). Plaintiffs bear the burden of persuasion to establish all four elements. *Id.* at 1306.

The evidence submitted at the preliminary injunction hearing supports the following conclusions of law.

A. Likelihood of Success on Plaintiffs' Claims for Trademark Infringement

As noted, Plaintiffs claim Defendant has infringed Plaintiffs' protected trademarks. Section 43 of the Lanham Act prohibits "unfair trade practices involving infringement of … trademarks, even in the absence of federal registration." *Custom Mfg. and Engineering, Inc. v. Midway Services, Inc.*, 508 F. 3d 641, 647 (11th Cir. 2007). Edge claims trademark rights in its registered marks The Edge System, HydroPeel and Vortex-Fusion, and claims common law rights in the remaining marks in dispute. To prevail on each of their claims of trademark infringement, Plaintiffs must establish (1) ownership of a valid and protectable mark and (2) that defendant's unauthorized use is likely to cause confusion. *Id.* at 647.

Defendant does not dispute that his use of Plaintiffs' marks is likely to cause confusion. What he does claim is that he was the first to use the trademarks in dispute,

and that Plaintiffs therefore cannot claim ownership of those marks, thus putting at issue the first element Plaintiffs must prove to establish trademark infringement.

Plaintiffs must establish their ownership of the trademarks by a preponderance of the evidence. *SM Licensing Corp. v. U.S. Medical Care Holdings, LLC*, No. 07-20293-CIV, 2007 WL 2051009, at *9 (S.D. Fla. 2007). As noted, Edge registered three of its marks (The Edge System, HydroPeel and Vortex-Fusion) with the USPTO. A certificate of registration is prima facie evidence of the mark's validity and of the registrant's ownership of and exclusive right to use the trademark in connection with the goods or services specified in the registration. 15 U.S.C. § 1115(a). This presumption may be overcome by any legal or equitable defense that might have been asserted if the marks were not registered. *Id.*

Two of those marks (The Edge System and HydroPeel) are entitled to an additional layer of protection: they are incontestable because Edge has continuously used them in interstate commerce for at least five consecutive years since registration. 15 U.S.C. § 1065. Incontestable status is conclusive evidence of the validity of the registered mark, the registrant's ownership of the mark and the registrant's exclusive right to use the mark in commerce, subject only to the defenses enumerated in the Lanham Act. 15 U.S.C. § 1115(b).

Edge asserts a common law right to the remaining eight marks: (1) Edge Systems, (2) the "E" Logo, (3) Activ-4, (4) Antiox-6, (5) Beta-HD, (6) DermaBuilder, (7) Glysal and (8) Antiox+. Unlike registered marks, common law marks are not clothed with a presumption of validity, ownership or exclusive use. To establish common law rights in

a mark, a party must show that: (1) it is the prior user of the mark, and (2) it acquired a protectable interest in the mark because the mark is inherently distinctive or has acquired a secondary meaning. *Pandora Jewelers 1995, Inc. v. Pandora Jewelry LLC*, 703 F.Supp.2d 1307, 1312 (S.D. Fla. 2010) (citing *Investacorp, Inc. v. Arabian Inv. Banking Corp.*, 931 F. 2d 1519, 1522 (11th Cir. 1991)). Defendant does not dispute that these common law marks are inherently distinctive or have acquired secondary meaning. Instead, Defendant argues that Plaintiffs cannot enforce their trademark rights because he was the first to use the contested marks.

The parties' dispute therefore centers on prior use.

1. Prior Use

"The party that first adopts and uses the trademark in association with its goods or services, sufficient to form an association between the two in the public mind, establishes its common law right to the mark." *SM Licensing Corp.*, 2007 WL 2051009 at *10. A defendant's prior use is a defense not only to common law marks, but also to registered and incontestable marks. 15 U.S.C. § 1115(b)(5). In this case, the evidence firmly establishes that Plaintiffs were the first to use the trademarks in dispute.

Edge introduced credible evidence that it has continuously identified its company and hydradermabrasion products using the name Edge Systems since 1997, the "E" Logo since 1999 and The Edge System since 2005, and continuously identified its hydradermabrasion products using the marks Activ-4, Antiox-6 and Beta-HD since 2006; the mark HydroPeel since 2008, the marks DermaBuilder and Glysal since 2010; and the

mark Antiox+ since 2013.[9] Mr. Cohen persuasively testified that Edge continuously used these marks in association with products that generate millions of dollars in yearly sales, including extensive advertising of its products using these marks. Plaintiffs' customer, Dr. Duboys, provided direct evidence that members of the consuming public associate Plaintiffs' marks with its hydradermabrasion products.

Defendant attempted to counter this evidence with his own testimony that he used the name "Edge Systems" and the E-logo since 1996 (one year before Plaintiffs), and the name HydraPeel since 2003, all in connection with his sales of microdermabrasion and hydradermabrasion machines. Defendant further testified that he used the serum names Activ-4, Antiox-6, Beta-HD, DermaBuilder, Glysal and Antiox+ since 2004, that is, before Plaintiffs used those marks.

As already noted, Defendant produced no evidence to corroborate his claim. Moreover, his only evidence was a screenshot of a page of his company's website from September 2004 – a website Defendant created – that makes no mention of any of the disputed trademarks. [DE 73, p. 2; DE 55, p. 328]. If Defendant was in fact making continuous use of the disputed marks Edge Systems, HydraPeel and the E-logo from times before 2004, one would expect to see mention of them on Defendant's website.

Weeks after the evidentiary hearing Defendant filed a Supplemental Declaration and attached to it two invoices – one ostensibly authored in 1996, and the other in 2004 – which he claims are contemporaneous proof of his use Edge Systems, E-logo, and the

[9] Defendant does not assert a prior use defense with respect to the registered VORTEX-FUSION mark.

disputed trade dress, for his Machine, at those times. [DE 63]. The quality of the purported invoices is extremely poor, and Defendant states in his declaration that the originals are at his office in Germany. Defendant also states that he did not present these invoices at the preliminary injunction hearing because he "did not believe that an invoice could be introduced into evidence due to [his] lack of experience in evidentiary rules." [DE 63, ¶ 9].

I do not find Defendant's explanations for his after-the-fact submissions of these documents credible. I held a telephonic status conference with the parties on December 5, 2014, in anticipation of the preliminary injunction hearing. The Defendant said he was in Germany at the time. I consulted the parties regarding the date for the upcoming hearing and made clear that I expected them to present all their evidence that bore on any issues in dispute at that hearing. Defendant came to the hearing knowing that his entire defense rests on his claim that he was the one to originate the trademarks and trade dress that Plaintiffs' claim. That Defendant would have to provide proof of this, beyond his own word, was entirely predictable. At the hearing Defendant did introduce into evidence a number of exhibits, he made reasonable challenges to evidence Plaintiffs sought to introduce, and generally displayed familiarity with the rules of evidence. Mr. Aguila is intelligent and he displayed a level of sophistication in representing himself well beyond that typical of *pro se* parties. Moreover, he has previously been involved in defending other infringement lawsuits. [DE 55, pp. 326-28]. On this record it simply is not credible that Defendant would choose to leave at home the documents that directly bear on his defense. As for his claim, in his declaration, that the original documents are

in Germany, Defendant traveled from Germany to Miami for the hearing and could have brought the original, legible, invoices with him.

Simple notions of fairness counsel to not accept these two documents after both parties rested their case and the hearing concluded. There is nothing inherent about the documents to suggest they are authentic. I would not have admitted these documents into evidence at the hearing without first having the Defendant questioned, under oath, about their creation and preservation. To do otherwise now, for documents that go to the heart of the issue in dispute, would effectively nullify the purpose of holding an evidentiary hearing.

In sum, I conclude that Edge has clearly met its burden of proof, to establish by a preponderance of the evidence, that it adopted and used the marks The Edge System, HydroPeel, Vortex-Fusion, Edge Systems, Activ-4, Antiox-6, Beta-HD, DermaBuilder, Glysal, Antiox+ and the E-logo in connection with U.S. sales of its hydradermabrasion products well before Defendant used these marks.[10]

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[10] Defendant argues that Edge abandoned the mark The Edge System, [DE 35, p. 14], but he did not introduce any evidence to establish abandonment. Defendant also argues that the marks HydroPeel and Vortex-Fusion are not entitled to protection because they are generic and descriptive, respectively. [DE 35, pp. 14-15]. These marks are registered, which entitles Edge to a presumption that the marks are "not merely descriptive or generic, or, if merely descriptive, is accorded secondary meaning." *Deltona Transformer Corp. v. Wal-Mart Stores, Inc.*, 115 F. Supp. 2d 1361, 1365 (M.D. Fla. 2000). Defendant must overcome this presumption with evidence that the marks are generic or descriptive. He introduced no such evidence. I conclude that the HydroPeel mark is not generic and the Vortex-Fusion mark is not descriptive or, if descriptive, has acquired secondary meaning. I also conclude that Edge has not abandoned the mark The Edge System.

2. Laches

Defendant also asserts that Plaintiffs' trademark infringement claim is barred by laches. [DE 35, pp. 20-21]. Laches is a defense to both common law and registered marks, even if incontestable. 15 U.S.C. § 1115(b)(9). Defendant bears the burden of proving the affirmative defense of laches. *Conagra, Inc. v. Singleton*, 743 F.2d 1508, 1516 (11th Cir. 1984). To do so, he must establish that: (1) Plaintiffs delayed in enforcing their trademark rights; (2) the delay was not excusable; and (3) the delay caused him undue prejudice. *Id.* at 1517. Delay is measured from when Plaintiffs knew or should have known that they had a provable claim for infringement, and in this regard Plaintiffs were not obligated to sue Defendant until the likelihood of confusion "loom[ed] large." *Buccellati Holding Italia SPA v. Laura Buccellati, LLC*, 5 F.Supp.3d 1368, 1374-75 (S.D. Fla. 2014) (citations omitted). When evaluating prejudice, the court weighs the prejudice to defendant against the public interest in avoiding confusion. *Conagra*, 743 F.2d at 1517.

Defendant bases his laches defense on the cease and desist letter that Plaintiffs sent him in January 2010. In that letter, Plaintiffs demanded that Defendant's company, DiamondSkin Systems, stop selling products bearing the names GlySal, Activ-4, DermaBuilder, Antiox-6 and HydroPeel because they infringed Plaintiffs' trademarks. [DE 50-31]. Shortly after this cease and desist letter, Defendant formally dissolved DiamondSkin Systems by filing Articles of Dissolution with the Florida Secretary of State. [DE 50-28].

Defendant contends that Plaintiffs unreasonably delayed enforcing their trademark rights because he did not stop selling the infringing products after the 2010 cease and desist letter. [DE 55, p. 313]. Defendant did not offer any contemporaneous evidence that he continued sales between 2010 and 2014, nor did he demonstrate that Plaintiffs knew or should have known of such ongoing infringement years before they filed this suit. Even had Defendant shown that Plaintiffs delayed in enforcing their rights, he still would not have met his burden of proving laches, because Plaintiffs established that any delay was excusable. Specifically, Mr. Cohen testified that Plaintiffs took no further action after the 2010 cease and desist letter because they believed the matter closed once Defendant dissolved DiamondSkin Systems, the company through which he was selling the infringing products. I find this explanation credible and a reasonable response to learning that the possibly infringing business had been dissolved.[11]

In sum, I conclude that Plaintiffs are likely to succeed on the merits of their claim for trademark infringement.

B. Likelihood of Success on the Merits of Plaintiffs' Claim for Trade Dress Infringement

Section 43(a) of the Lanham Act creates a federal cause of action for trade dress infringement. *AmBrit, Inc. v. Kraft, Inc.*, 812 F. 2d 1531, 1535 (11th Cir. 1983) citing *John Harland co. v. Clark Checks, Inc.*, 711 F.2d 966 (11th Cir. 1983). Trade dress involves "the total image of a product and may include features such as size, shape, color or color combinations, texture, graphics or particular sales techniques." *Id.* To prevail on

[11] Defendant also argues that Plaintiffs' infringement claims are barred by unclean hands, but he introduced no such evidence at the preliminary injunction hearing. I therefore find that Defendant has failed to show he is likely to succeed on the affirmative defense of unclean hands.

a claim for trade dress infringement, a plaintiff must prove that its trade dress (1) is inherently distinctive or has acquired secondary meaning, (2) is primarily non-functional and (3) that the defendant's trade dress is confusingly similar. *Id.* at 1535.

Defendant does not dispute that his use of essentially the same trade dress as Plaintiffs' Machine is likely to cause confusion. Nor does he dispute that the contested trade dress is inherently distinctive or has acquired secondary meaning and is primarily nonfunctional.[12] Defendant's only challenge to trade dress infringement is that he was the first to use the trade dress in dispute.

Defendant's defense does not directly challenge any of the elements of trade dress infringement. I note however, that in circumstances quite distinguishable from those before this Court, courts in this Circuit have considered third party use of a contested trade dress in the context of the first element of proof of a protected trade dress: whether it is inherently distinctive. *Ambrit*, 812 F.2d at 1536-37; *Callaway Gold Co. v. Gold Clean, Inc.* 915 F. Supp. 1206, 1212 (M.D. Fla. 1995). I do not undertake such an analysis here because, the only evidence that Defendant was the first to make use of the trade dress was his uncorroborated testimony, and for the reasons stated above, I did not believe that testimony.

In sum, I conclude that Plaintiffs have established by a preponderance of the evidence that Edge was the first to use the trade dress of Plaintiffs' Machine, and that Plaintiffs are likely to prevail on the merits of their claim for trade dress infringement.

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[12] Although this is not in dispute, it is worth noting that Mr. Ignon credibly testified that the HydraFacial MD trade dress is primarily nonfunctional and distinctive.

C. Likelihood of Success on Plaintiffs' Claim for Patent Infringement

To establish that it is likely to succeed on the merits of a patent infringement claim, the patentee must demonstrate that it will likely prove infringement of one or more claims of the patent-in-suit ("infringement"), and that at least one of those allegedly infringed claims will also likely withstand the validity challenges presented by the accused infringer ("validity"). *AstraZeneca LP v. Apotex, Inc.*, 633 F.3d 1042, 1050 (Fed. Cir. 2011). The same burdens and presumptions that govern at trial apply at the preliminary injunction stage. *Id.* In evaluating infringement, the court first determines the scope and meaning of the asserted claims and second, it compares the properly construed claims to the allegedly infringing product. *Mass-Hamilton Group v. LaGard, Inc.*, 156 F.3d 1206, 1211 (Fed. Cir. 1998).

1. Claim 1 of the '620 Patent

The claims of a patent "define the invention to which the patentee is entitled the right to exclude." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed.Cir. 2005). A court construes asserted claims by examining the language used and giving the words their ordinary and customary meaning. *Id.* at 1312-13. For a claim term this "is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention." *Id.* at 1313.

In their motion for preliminary injunction, Plaintiffs assert that Defendant infringed Claim 1 of their '620 Patent. Defendant does not dispute the scope and meaning of Claim 1. Accordingly, and consistent with the ordinary and customary meaning of the terms used, I construe Claim 1 to mean:

1. A system for treating surface layers of a patient's skin, comprising:

(a) an instrument body with a distal working end for engaging a skin surface;

(b) a skin interface portion of the working end comprising an abrasive fragment composition secured thereto;

(c) at least one inflow aperture in said skin interface in fluid communication with a fluid reservoir; and

(d) at least one outflow aperture in said skin interface in communication with a negative pressurization source.

[DE 1-4, p. 18] Defendant also does not dispute that his HydraDerm MD and Hydradermabrasion MD machines perform every element of Claim 1. As for that Claim, Plaintiffs have established the element of infringement.

2. Validity of the '620 Patent

Defendant does dispute that the '620 Patent is valid. Defendant argues that a pre-existing patent constitutes prior art that anticipates Claim 1 of the '620 Patent, rendering that Patent invalid. [DE 35, p. 17]. A patent is invalid for anticipation only if the pre-existing patent discloses each and every element of the claim.[13] *Virnetx, Inc. v. Cisco Systems, Inc.*, 767 F. 3d 1308, 1323 (Fed. Cir. 2014) (citing *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2242 (2011)); 35 U.S.C. § 102(e). A patent is presumed valid,

[13] The anticipation defense had been codified at 35 U.S.C. § 102(e) and, following statutory revisions which took effect on March 16, 2013, is now set forth in § 102(a). Under both versions of the statute, anticipation requires complete identity between the prior art and the later claim. *See Spansion, Inc. v. International Trade Comm'n*, 629 F.3d 1331, 1356 (Fed. Cir. 2010) (applying § 102(e)); *Emblaze Ltd. v. Apple, Inc.*, No. 5:11-cv-01079, 2014 WL 1652226, at *4 (N.D. Cal. April 24, 2014) (applying § 102(a)).

and the party challenging validity bears the burden of proving invalidity by clear and convincing evidence. *Mass-Hamilton Group*, 156 F.3d at 1216. This presumption of patent validity applies at the preliminary injunction stage. *Canon Computer Sys., Inc. v. Nu-Kote Int'l, Inc.*, 134 F.3d 1085, 1088 (Fed. Cir. 1998).

To support his anticipation defense, Defendant introduced into evidence U.S. Patent 6,241,739 (the "'739 Patent"), which was filed with the USPTO on November 12, 1999, approximately six weeks before Plaintiffs filed the '620 Patent. [DE 73, pp. 4-14]. Defendant offered no testimony or other evidence to demonstrate how the '739 Patent anticipates the '620 Patent. Defendant's introduction of the '739 Patent is not sufficient to establish the invalidity of the '620 Patent.

"Typically, testimony concerning anticipation must be testimony from one skilled in the art and must identify each claim element, state the witnesses' interpretation of the claim element, and explain *in detail* how each claim is disclosed in the prior art reference." *Schumer v. Lab. Computer Sys., Inc.*, 308 F.3d 1304, 1315 (Fed. Cir. 2002) (emphasis added). Merely entering the prior patent into evidence, or providing general and conclusory testimony, is insufficient evidence of invalidity. *Koito Manufacturing Co. v. Turn-Key-Tech, LLC*, 381 F.3d 1142, 1152 (Fed. Cir. 2004). Defendant has not come close to showing that he will likely establish anticipation by clear and convincing evidence at trial.[14] Defendant has failed to rebut the presumption of patent validity and, therefore, I find that Plaintiffs have made a strong showing that the '620 Patent is valid.

[14] The Court need not address Plaintiffs' rebuttal argument, that Defendant's anticipation defense fails because Plaintiffs conceived and reduced to practice the technology described in Claim 1

In sum, I conclude that Plaintiffs are likely to succeed on their claim that Defendants' Machines infringe Claim 1 of the '620 Patent, and are likely to withstand Defendant's validity challenge.

Having determined that Plaintiffs have established their likelihood of success on the merits on all their claims (trademark, trade dress and patent infringement), I turn to the remaining three elements Plaintiffs must prove before the Court can enter a preliminary injunction.

D. Irreparable Injury

Plaintiffs must establish that, unless the court issues a preliminary injunction, Defendant's conduct will cause Plaintiffs irreparable injury. Plaintiffs' loss of control of reputation, loss of trade, loss of goodwill and the possibility of confusion can all be evidence of irreparable harm. *Ferrellgas Partners, LP v. Barrow*, 143 Fed. Appx. 180, 190-91 (11th Cir. 2005). Plaintiffs need not show that the infringing product is inferior; the relevant inquiry is whether Plaintiffs can control the quality of goods that Defendant offers. *T-Mobile US, Inc. v. AIO Wireless LLC*, 991 F.Supp.2d 888, 929 (S.D. Tex. 2014). Irreparable injury can also be shown through price erosion. *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012). To establish their right to a preliminary injunction for patent infringement, Plaintiffs must show a strong causal nexus between the alleged irreparable harm and the alleged infringement. *Apple Inc. v.*

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before the '739 Patent was filed (i.e., the first-to-invent rule), because Defendant has not met his threshold burden of establishing a *prima facie* case of invalidity. *Mass-Hamilton Group,* 156 F.3d at 1216; *Canon Computer Sys., Inc.,* 134 F.3d at 1088 (at preliminary injunction stage, patentee was under no obligation to substantiate validity of patent because challenger failed to identify any persuasive evidence of invalidity.)

Samsung Elecs. Co., 695 F.3d 1370, 1374 (Fed. Cir. 2012). Plaintiffs have met their burden.[15]

Here, the obvious and undisputed confusion caused by the parties' use of identical, and nearly identical, trademarks, trade dress and machines, is a strong indicator of irreparable injury. Dr. Cohen's testimony was a clear example of how that confusion can harm Plaintiff's market, reputation and good will. In particular, Dr. Cohen had numerous complaints with the quality of Defendant's Machine, and first attributed these deficiencies to Edge. Plaintiffs, of course, do not control the quality of Defendant's Machine. They have spent millions of dollars developing a reputation for their products. This reputation and goodwill will be at risk if Defendant continues to sell his copycat machine and serums.

Plaintiffs have further shown that their goodwill will be threatened by price erosion. The average sales price of Plaintiffs' Machine is $24,000.00. Dr. Cohen purchased Defendant's Machine for far less: $7,500.00. This substantial difference is very likely to cause Plaintiffs to lose sales and customer loyalty. Courts routinely recognize that, as here, potential damage to Plaintiffs' reputation and customer goodwill cannot be fully remedied through money damages. *Bentley Motors Ltd. Corp. v. McEntegart*, 899 F.Supp.2d 1291, 1303 (M.D. Fla. 2012) (citations omitted).

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[15] Historically, the Eleventh Circuit had applied a presumption of irreparable harm in trademark infringement cases once a plaintiff established a likelihood of success on the merits. In *North America Medical Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211 (11th Cir. 2008) the Eleventh Circuit concluded that the Supreme Court's decision in *eBay v. MercExchange, LLC,* 547 U.S. 388 (2006), cast doubt on the applicability of that presumption. This Court need not resolve that issue because, without the application of that presumption, Plaintiffs have demonstrated that they will suffer irreparable harm if a preliminary injunction is not entered.

On this record, Plaintiffs have established that they will be irreparably harmed if Defendant is not preliminarily enjoined from infringing their trademarks, trade dress and the '620 Patent.

E. Balance of Hardships

Defendant does not argue that he will be harmed if forced to stop using Plaintiffs' trademarks; indeed, Defendant concedes that he has "come up with many names" and therefore could do so again. [DE 55, p. 325]. Defendant focuses his hardship argument on Plaintiff's trade dress and patent infringement claims. Defendant claims he will lose his sole source of income and will have to declare bankruptcy if he cannot continue selling Defendant's Machine. [DE 55, p. 319]. Such potential harm is insufficient because "[o]ne who elects to build a business on a product found to infringe cannot be heard to complain if an injunction against continuing infringement destroys the business so selected." *Windsurfing Int'l Inc. v. AMF, Inc.*, 782 F.2d 995, 1003 n. 12 (Fed. Cir. 1986).

Defendant's assertions of harm are also undermined by the evidence. Defendant has sold microdermabrasion machines using a "dry system" since 1997. [DE 55, p. 323]. A preliminary injunction would not prevent Defendant from continuing to make these sales or remain in the microdermabrasion industry. Defendant testified that he sold just 30 or 40 hydradermabrasion (i.e., wet system) machines over the last six years, each for approximately $4,000.00. [DE 55, p. 340]. Given the availability of alternative products to sell, coupled with his minimal sales of the infringing machine, I find that Defendant has failed to introduce sufficient evidence of hardship.

For its part, Edge has invested considerable time, effort and expense to develop and market Plaintiffs' Machine, which has received recognition in both trade and consumer publications. According to Defendant, he has not manufactured any hydradermabrasion machines since 2006, and is simply selling his old inventory. [DE 55, p. 326]. It is unclear whether Defendant has incurred any meaningful manufacturing expense at all. The evidence showed that, at least with respect to the machine that Dr. Duboys purchased, Defendant did not manufacture the machine from scratch but, rather, obtained an early version of Plaintiffs' Machine, peeled off Plaintiffs' plastic "HydraFacial MD" logo, and then modified the machine to be compatible with his serums. [DE 55, pp. 85-86, 146].

The harm in allowing Defendant to continue exploiting Plaintiffs' investment, coupled with the probable loss of consumer goodwill and damage to Plaintiffs' reputation, outweighs the harm to Defendant if a preliminary injunction is entered. Therefore, I conclude that the balance of hardships weighs in favor of Plaintiffs.

F. Public Interest

It is well established that "the public interest is served by preventing consumer confusion in the marketplace." *Bentley Motors Ltd. Corp.*, 899 F.Supp.2d at 1304 (internal citation omitted). I conclude that a preliminary injunction would protect consumers from being misled regarding the source of Defendant's Machine and accompanying serums.

G. Bond

The temporary restraining order issued in this case currently requires Plaintiffs to post a bond of $10,000.00. [DE 15, p. 7]. The purpose of a bond is to provide security to the enjoined party in the event that the injunction was wrongly issued. *Bellsouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc.*, 425 F.3d 964, 970-71 (11th Cir. 2005). The amount of this security is within the discretion of the court, and is generally "an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). However, the court has discretion "to require no security at all." *AFC Enterprises, Inc. v. THG Restaurant Group, LLC*, 416 Fed. Appx. 898 (11th Cir. 2011).

Having the benefit of a more complete record than that before the Court when it issued the temporary restraining order, I recommend that the amount of the bond be increased. Defendant testified that he sells approximately five Machines a year, each for approximately $4,000.00. I believe a $20,000.00 bond would reasonably protect Defendant from a wrongfully issued injunction.

IV. Recommendation and Order

Based on the foregoing, I RECOMMEND that Plaintiffs' Application for Preliminary Injunction [DE 13] be **GRANTED**.

V. Objections

The parties may file written objections to this Report and Recommendation with the Honorable K. Michael Moore **no later than February 12, 2015**. Failure to timely file objections shall bar the parties from attacking on appeal any factual findings contained

herein. *RTC v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993); *LoConte v. Dugger*, 847 F.2d 745, 749-50 (11th Cir. 1988).

RESPECTFULLY RECOMMENDED in chambers in Miami, Florida this 29th day of January, 2015.

CHRIS McALILEY
UNITED STATES MAGISTRATE JUDGE

cc:
The Honorable K. Michael Moore
Counsel of record
Rafael Aguila