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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92074504
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UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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Hyper Ice, Inc.	)	
	)	Cancellation No. 92074504
Petitioner,	)	
Theravolt,	)	
Registrant.	)	

PETITIONER'S MOTION TO STRIKE OR DEEM ADMITTED SECTIONS OF REGISTRANT'S ANSWER

Pursuant to Federal Rule of Civil Procedure 12(f) and Sections 506.01 and 506.02 of the Trademark Trial and Appeals Board Manual Procedure ("TBMP"), Petitioner Hyper Inc. ("Petitioner") respectfully requests that the Trademark Trial and Appeals Board (the "Board") enter an order to strike and deem admitted in part Registrant Theravolt's ("Registrant") answers to Paragraphs 15, 16, 18, 19-22, and 24 of the Amended Petition. [TTABVUE 6, Exhibit A] ("Petition").

I. INTRODUCTION & BRIEF OVERVIEW OF THE RELEVANT ALLEGATIONS

Petitioner filed its Amended Petition for Cancellation on August 20, 2020, pleading, among other grounds for cancellation, fraud based on Registrant's Statement of Use ("Statement"), and in particular, Registrant's falsified specimen of use attached to that Statement. *See* Amended Petition, ¶¶ 15-24.

Registrant's Answer obfuscates and contorts the issues in order to avoid admitting the obvious—its specimen of use is based on intentionally falsified photographs of Petitioner's Hypervolt product (the

"Hypervolt"). Registrant's Answer includes numerous improper responses to the Subject Paragraphs. These formulaic "answers" exhibit some combination of the following *seven* improper, defective statements:

(1) Registrant's response, stating: "Petitioner's allegations of law do not require an admission or denial." Answer, ¶¶ 15, 16, 18, 19, 21-22, and 24.

(2) Registrant's argumentative non-response, stating:

> Registrant denies that photographs are a mandatory requirement for a website-based specimen of use and denies that any photographs contained in Registrant's website display specimen were necessary to show use of THERAVOLT in commerce in light of Registrant's specimen's textual description of the goods (*e.g.* "Theravolt…The quietest, most advanced percussion massage device between 1800-4200 r/min to tame any knots and sore spots.") and a means for ordering via an "Add to Cart" button. *Id.* at ¶¶ 15, 16, 18, 19-22, and 24.

(3) Registrant's nonresponsive denial of "any reliance on any photographs in Registrant's specimen to show use in commerce of THERAVOLT." *Id.* at ¶¶ 19-22, 24.

(4) Registrant's odd Answer that "Petitioner never used Registrant's THERAVOLT registered mark to sell Petitioner's massage product." *Id.* at ¶ 20.

(5) Registrant's improperly qualified response, stating:

> Registrant lacks sufficient knowledge and information to enable it to admit or deny remaining allegations of paragraph 18 of the Amended Petition regarding "a series of photographs owned" by Petitioner and, on that basis, denies those allegations. Registrant denies any remaining material allegations in paragraph 18. *Id.* at ¶ 18.

(6) Registrant's equivocal "catch-all" denial of "any remaining material allegations in paragraph [X] of the Amended Petition." *Id.* at ¶¶ 18, 20-21.

(7) Registrant's statement that "it lacks sufficient knowledge and information to enable it to admit or deny any remaining allegations of paragraph 21 (*sic*) [22] of the Amended Petition regarding any ownership by Petitioner in any photographs." *Id.* at ¶ 22.

Each of the foregoing, at best, is a calculated attempt by Registrant to avoid providing a *clear* admission or denial of the allegations asserted as required by Fed. R. Civ. P., Rule 8 ("Rule 8"). As set

forth in Part II, *infra*, these "answers" are expressly prohibited by the Federal Rules of Civil Procedure and must be stricken.

II. ARGUMENT

The Board may strike "from a pleading any…redundant, immaterial, impertinent, or scandalous matter." TBMP § 506.01; Fed. R. Civ. P. 12(f). Although not favored, motions to strike will be granted if a pleading's contents "clearly [have] no bearing upon the issues in the case." TBMP § 506.01. "The primary purpose of pleadings, under the Federal Rules of Civil Procedure, is to give fair notice of the claims or defenses asserted." *Id.*

Here, Registrant's "answers" to the Subject Paragraphs fall short. Registrant's refusal to respond to "allegations of law" and its nonresponsive denials of facts that were *not alleged* in the Petition are improper and must be stricken. Due to these defects, along with other improper qualified denials, as illustrated in Part II.C., *infra*, Registrant has failed to admit or deny numerous allegations, effecting an admission of each.

A. Registrant Erroneously Refuses to Respond to "Allegations of Law"

Registrant improperly asserts that it cannot admit or deny the allegations in paragraphs 15,16, 18, 19, 21, 22, and 24 because they call for legal conclusions. Rule 8 provides, "[i]n responding to a pleading, a party must: (A) state in short and plain terms its defenses to *eac*h claim asserted against it; and (B) admit or deny the allegations asserted against it by an opposing party." Fed. R. Civ. P. 8(b)(1) (Emphasis added.) "Responses…that allegations are legal conclusions do not comply with rule 8(b)'s requirements." *Lane v. Page*, 272 F.R.D. 581, 602-03 (D.N.M. 2011); *Bruce v Anthem Ins. Co.*, No. 3:15-CV-0353-D, 2015 U.S. Dist. LEXIS 53278 *6 (N.D. Tex. April 23, 2015) (it is "insufficient" under Rule 8(b) to deny an allegation on the basis that it is a legal conclusion."); *Donnelly v. Frank Shirey Cadillac, Inc.*, No. 05 C 3520, 2005 U.S. Dist. LEXIS 22158, 2005 WL 2445902, at *2 (N.D. Ill. Sept. 29, 2005) (Refusing to answer an allegation because it calls for legal conclusions "flies in the face of the

established doctrine that legal conclusions are a proper part of a federal pleading, to which Rule 8(b) also compels a response.").

Registrant consistently improperly repeats: "Petitioner's allegations of law do not require an admission or denial." *See* Answer, ¶¶15,16,18, 19, 21, 22, 24[1]. The foregoing authority unequivocally deems such responses improper, *per se*. Allegations containing legal conclusions *must* still be admitted or denied.

B. Registrant Improperly Attempts to Rebut or Change Alleged Facts in the Petition

In further disregard of Rule 8(b)'s requirements, Registrant improperly responds to facts not contained in the Subject Paragraphs. However, "a denial of an allegation should fairly meet the substance of the allegation denied." TBMP § 311.02(a); Fed. R. Civ. P. 8(b)(2). The responding party "should not argue the merits of the allegations in a complaint but rather should state, as to each of the allegations contained in the complaint, that the allegation is either admitted or denied." TBMP § 311.02(a); *Turner Entertainment Co. v. Ken Nelson*, 38 USPQ2d 1942, 1943 (TTAB 1996) (applicant's answers were argumentative and nonresponsive and Board was ultimately forced to interpret the answer); *National Football League v. Jasper Alliance Corp.*, 16 USPQ2d 1212, 1214 n.2 (TTAB 1990) (applicant's answer was more in the nature of argument than answer.) Registrant has failed to respond to the specific allegations regarding: (1) Registrant's intentional use of falsified photographs of the Hypervolt, as addressed in paragraphs 15 and 16; and (2) the specific facts giving rise to an inference of Registrant's bad faith as outlined in paragraphs 18-22 and 24.

Registrant totally avoids admitting intentional submission to the Office of falsified photographs in its registration application by, instead, denying extraneous facts regarding the ultimate legal consequences of its actions. In paragraph 15, Registrant needed to admit or deny whether it filed "in bad

[1] Confusingly, Registrant fails to identify which, if any, of the allegations in the corresponding paragraphs are legal conclusions.

faith with an intent to deceive, and fraudulently through the use of photographs of Hyper Ice's HYPERVOLT product to evidence use of the THERAVOLT mark." Petition, ¶15. Paragraph 16 similarly alleged that Registrant "misused its mark to misrepresent the source of its goods by using modifications of Hyper Ice's photographs for the specimen of use for THERAVOLT…" *Id.* at ¶ 16. To each of these paragraphs, Registrant included the following improper and irrelevant response:

> Registrant denies that photographs are a mandatory requirement for a website-based specimen of use and denies that any photographs contained in Registrant's website display specimen were necessary to show use of THERAVOLT in commerce in light of Registrant's specimen's textual description of the goods (e.g. "Theravolt…The quietest, most advanced percussion massage device between 1800-4200 r/min to tame any knots and sore spots.") and a means for ordering via an "Add to Cart" button.

Answer, ¶¶15, 16. *Neither* of these allegations, however, stated the photographs were "a mandatory requirement" for a specimen of use or were "necessary" to show commercial use. Registrant's denial, therefore, fails to "fairly meet the substance of the allegation denied" and should be stricken, and the allegations deemed admitted.

Registrant's "responses" to the allegations delineating *specific* facts about the subject photographs, and Registrant's actions evidencing bad faith, contain similar defects. For example, paragraph 18 alleged Registrant's "subjective intent to deceive…may be inferred from…" its inclusion of photographs owned by Hyper Ice in its specimen of use without Petitioner's permission, its intentional replacement of the HYPERVOLT mark with the THERAVOLT mark in photographs owned by the Petitioner, including submission with a signed declaration verifying validity. Petition, ¶ 18. Paragraph 19 alleged Registrant's specimen of use "could not have been used on or in connection with the goods exhibited in the specimen because the goods in the specimen are NOT those of THERAVOLT. They are [Petitoner's] HYPERVOLT product that originally displayed the HYPERVOLT mark." *Id.* at ¶ 19. Paragraph 20 stated, "other than in the doctored photograph created by THERAVOLT, the

HYPERVOLT never displayed the THERAVOLT mark." *Id.* at ¶ 20. There are similar averments in paragraphs 21-22 and 24[2].

Registrant responded to each of these with the same narrative regarding the "necessity" of the Hypervolt photographs to its specimen of use, albeit this time inserting another nonresponsive denial of "any reliance on any photographs in Registrant's specimen to show *use in commerce* of THERAVOLT." Answer, ¶¶18-22, and 24 (Emphasis added). In Registrant's response to paragraph 20, it also – confusingly – denied "that Petitioner never used Registrant's THERAVOLT registered mark to sell" the Hypervolt. *Id.* at ¶ 20.

Paragraphs 18-22 and 24 as set forth in the Petition, however, neither inquire as to whether the photographs were legally necessary to Registrant's application, nor do they seek Registrant's "explanatory" denial of reliance. Whether Registrant *could* legally rely on misappropriated photographs of a competitor's product (masquerading as the Registrant's) to obtain Registrant's registration is not alleged. Rather, the facts requiring admission or denial are the specific facts and actions taken by

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[2] The text of paragraphs 21, 22, 24 are as follows:

- ***Allegation 21:*** The fraudulently manipulated HYPER ICE photographs that THERAVOLT submitted as specimens to the USPTO were intentionally reworked, modified and falsified to remove the HYPERVOLT trademark and replace that mark with the THERAVOLT mark. Upon information and belief, this alteration, done with Photoshop or a similar technology or software, and could not have been accomplished by mistake. By its very nature, it must have been done knowingly and with an intent to deceive. Petition, ¶ 21.
- ***Allegation 22:*** HYPER ICE alleges upon information and belief that THERAVOLT knew the abovementioned specimens and statements attesting to their veracity to be false specifically because: (a) THERAVOLT knowingly obtained HYPER ICE's photographs that originally displayed the HYPERVOLT mark on the HYPERVOLT product; (b) THERAVOLT knowingly modified the images in those photographs to remove the HYPERVOLT mark from the HYPERVOLT product, and rebrand that same product with the THERAVOLT mark; and (c) THERAVOLT knowingly engaged in the foregoing conduct specifically to create a false specimen of use for submission to the USPTO. *Id.* at ¶ 22.
- ***Allegation 24:*** Given that the HYPERVOLT product shown in THERAVOLT's specimen of use was never branded by HYPER ICE with the THERAVOLT mark, HYPER ICE alleges, on information and belief, that THERAVOLT had no actual use in commerce of the THERAVOLT on the product shown in THERAVOLT's specimen of use as of the date THERAVOLT filed it, along with its registration application. *Id.* at ¶ 24.

Registrant in creating and submitting its specimen, which, as established *infra*, are ignored and not addressed.

Paragraph 20 was intended to explain that Registrant must have doctored the photographs because Hyper Ice would never have had reason to display the THERAVOLT mark on its own product. Registrant's answer to that allegation was evasive and nonresponsive. Registrant confusingly suggested, without foundational support, that Hyper Ice somehow used the THERAVOLT mark to sell the Hypervolt. That answer ignores the foundational allegation that these photographs never displayed the THERAVOLT mark *until* they were doctored by Registrant. Registrant seemingly asserts these extraneous "answers" in order to avoid having to admit its fraudulent conduct. However, established case law, founded on sound public policy, prohibits adding argumentative context to an answer and requires that irrelevant denials be stricken.

C. Numerous Allegations in the Subjective Paragraphs Remain Unaddressed

In light of the impropriety of the foregoing allegations, Registrant's remaining answers fail to address all of the matters contained in the Subject Paragraphs since: (1) Registrant's remaining statements with regard to paragraphs 15, 16, 19, and 24 do not specifically admit or deny all of the allegations contained therein and (2) Registrant's qualified admissions or denials are meaningless and should be stricken.

1. Registrant Fails to Explicitly Deny Specific Allegations in Paragraphs 15, 16, 19, and 24.

Where a party "does not intend to deny all" of the pleading's allegations, that party "must either specifically deny designated allegations or generally deny all except those specifically admitted." Fed. R. Civ. P. 8(b)(3); TBMP § 311.02(a). "An answer that fails to deny a portion of an allegation may be deemed admitted as to that portion." TBMP § 311.02(a); Fed. R. Civ. P. 8(b)(6). Here, several allegations in paragraphs 15, 16, 19, and 24 remain unaddressed in the Answer. As established in Part II.A. and II.B., *supra*, Registrant's refusal to address any "allegations of law" and its numerous irrelevant

denials do not admit or deny the allegations made in any of these paragraphs. As illustrated below, what remains are limited denials which fail to respond to *all* of the allegations in each of these paragraphs.

Paragraph 15 :

Allegation: Registrant's THERAVOLT application was filed "in bad faith, with an intent to deceive, and fraudulently" *and* was done "through the use of" the Hypervolt photographs "to evidence use of the THERAVOLT mark." Petition, ¶15.

Registrant's only relevant response reads, "Petitioner denies any remaining allegations of paragraph 15 of the Amended Petition regarding 'bad faith,' 'an intent to deceive' or that its THERAVOLT registration was filed 'fraudulently.'" Answer, ¶15. Registrant failed to admit or deny, however, that its registration used photographs of the Hypervolt to evidence use of Registrant's THERAVOLT mark, rendering it admitted.

Paragraph16

Allegation: Registrant "misused its mark to misrepresent the source of its goods" by using modifications of Petitioner's photographs for its specimen of use. Petition, ¶16.

Registrant's only related response to this allegation is its denial of "the remaining allegations that Registrant misused its mark to misrepresent the source of its goods." Answer, ¶16. Again, Registrant notably failed to specifically address whether it used modifications of the Hypervolt photographs in its application's specimen of use. Its failure to do so deems these allegations admitted.

Paragraph 19

Allegation: Registrant must admit or deny that the specimen of use contained in its subject registration could not have been used in relation to its own goods because the product displayed in its specimen is actually that of Petitioner and originally exhibited Petitioner's HYPERVOLT mark. Petition, ¶19. This is a simple, purely factual allegation.

Registrant fails to admit or deny this allegation with any proper, relevant response, reciting instead the same boilerplate objections to "allegations of law" and the nonresponsive denial of the

necessity of the Hypervolt photographs to evidence commercial use of its mark. Thus, the allegations contained in paragraph 19 should be deemed admitted *in their entirety.*

Paragraph 24

Allegation: Because the Hypervolt displayed in Registrant's specimen of use "was never branded by HYPER ICE with the THERAVOLT mark," Petitioner alleges "that THERAVOLT had no actual use in commerce of the THERAVOLT on the product shown in THERAVOLT's specimen of use as of the date THERAVOLT filed it…" Petition, ¶24.

Registrant's only relevant, remaining response was its admission that the photographs in its specimen "show a mockup" of its "old massage product" and its denial "that THERAVOLT had no actual use in commerce as of the date Registrant filed its registration application." Answer, ¶ 24. Because Registrant failed to address whether the product displayed in its specimen was ever branded with Registrant's mark, this allegation should be deemed admitted. These incomplete responses are obvious and poorly veiled attempts to further Registrant's avoidance of uncomplimentary admissions. Such chicanery violates Rule 8's mandate that *all* allegations must be admitted or denied. For this reason, the foregoing unaddressed portions of paragraphs 15, 16, 19, and 24 should be deemed admitted[3].

2. Registrant's Qualified Denials in Paragraphs 18, 20-22 Should be Rendered Admissions

Registrant's answers to paragraphs 18, 20-22 are also replete with qualified, equivocal admissions and denials that should render them admitted. "An answer which attempts to evade the pleading requirements of Rule 8 by the tactic of an equivocal admission or denial is an admission." *Lipton Indus. v. Ralston Purina Co.*, 670 F.2d 1024, 1030, 213 USPQ 185, 190 (CCPA 1982). If a party must give a qualified answer, it must "admit the part that is true and deny the rest." Fed. R. Civ. P. 8(b)(4); *see Reis Robotics USA, Inc. v. Concept Indus., Inc.*, 462 F. Supp. 2d 897, 907 (N.D. Ill. Nov. 6,

[3] At minimum, Registrant must be ordered to amend its responses to include corresponding admissions or denials to *each* of the unaddressed allegations in paragraphs 15, 16, 19, and 24.

2006) (striking defendant's answer where defendant began with the phrase "to the extent that" and then denied the remaining allegations, finding it was an impermissible "qualified answer.") The following discussion establishes Registrant's remaining "answers" to paragraphs 18 and 20-22 are deficient because they contain improperly qualified denials.

Paragraph 18:

Allegation: Registrant's "subjective intent to deceive…may be inferred" from Registrant's inclusion of "a series of photographs" of the Hypervolt in its specimen of use; Registrant's modification of these photograph by replacing the HYPERVOLT mark with Registrant's THERAVOLT mark, and Registrant's submission of a signed declaration falsely verifying its specimen. Petition, ¶ 18.

Registrant's responses merely denied "any subjective intent to deceive the USPTO," that "Registrant's website-display specimen of use was a "series of photographs," and that "Petitioner's references to 'photographs' creates any inference of a subjective intent to deceive the USPTO." Answer, ¶18. Tagging behind these specific denials was the following qualified, cryptic disclaimer:

> Registrant lacks sufficient knowledge and information to enable it to admit or deny remaining allegations of paragraph 18 of the Amended Petition *regarding "a series of photographs owned" by Petitioner* and, on that basis, denies those allegations. Registrant denies any remaining *material* allegations in paragraph 18…

Id. (Emphasis added.)

Registrant improperly qualified its "catch-all" denial with the phrases "allegations…regarding a series of photographs" and "material allegations" without identifying which of the various factual allegations falls into these categories. *See Do It Best Corp. v. Heinen Hardware, LLC*, No. 1:13-cv-69, 2013 U.S. Dist. LEXIS 94567 *14-15 (N.D. Ind. July 8, 2013) ("…By responding to only the material allegations contained in a specific paragraph, Defendants "fail to provide adequate substantive guidance to the Plaintiff as to the Defendant[s'] position on the allegations in that respective paragraph.") Registrant's answer, therefore, begs the question, which of the various factual allegations, according to

Registrant, are material and/or refer to the series of photographs? Such evasive, incomplete answers, should be stricken or rendered unqualified admissions to all matters not specifically addressed.

Paragraphs 20-22:

Allegations: Registrant intentionally modified and falsified the subject photographs, the originals of which never displayed the THERAVOLT mark, replaced the HYPERVOLT mark exhibited in these photographs with the THERAVOLT mark, and subsequently submitted them to the USPTO as specimens of use. Petition, ¶¶ 20-22.

Registrant's relevant responses included its admission that its specimen of use contained photographs of a mockup of its old massage product and that its product never displayed the HYPERVOLT mark. Answer, ¶¶20-22. Yet, Registrant failed to specifically address the factual allegations vis-à-vis the Hypervolt photographs, Registrant's replacement of the HYPERVOLT mark with the THERAVOLT mark in these photographs, and the specific steps that were necessary for Registrant to take to modify and submit them to the Office as its specimen[4]. Registrant avoided this admission by packing its answers with the same qualified denials of all "material" allegations (paragraphs 20, 21) and "allegations of a false verification and false specimen regarding trademark use" (paragraph 22), and its inability to admit or deny "any remaining allegations …regarding any ownership by Petitioner in any photographs" (paragraph 22). Answer, ¶¶ 20-22. Again, such elusive responses are disingenuous and meaningless without providing any explanation as to which specific averments fall into the broad categories of allegations denied. Thus, Registrant's answers to paragraphs 20-22 likewise violate Rule 8(b), and accordingly all these unaddressed averments should be deemed admitted.

[4] While Registrant specifically denied "acting 'fraudulently'" and with an "intent to deceive," in response to paragraph 21, it failed to specifically address the numerous other facts regarding its intentional manipulation and submission of doctored versions of the Hypervolt photographs and its deliberate use of Photoshop or other software to alter the photographs (presumably in hopes that the trademark examiner would accept those modified images as genuine specimens of use). Answer, ¶21.

Registrant cannot salvage its "responses" to paragraphs 18-22 via "catch-all" denials of broad categories of allegations - such evasive responses fail as a matter of law, and the law requires that they be deemed admissions of all allegations not explicitly admitted or denied.

III. CONCLUSION

The Petition to Cancel sets forth clear assertions regarding Registrant's fraudulent registration through the submission of a falsified specimen. Registrant's Answer largely continues this behavior, and should not be tolerated by the Board, by avoiding direct confrontation with the truth - that it intentionally submitted and verified a fraudulent specimen of use. Therefore, the Board should strike these non-responsive statements forming in part Registrant's Answer to the Amended Petition [TTABVUE 13] and deem admitted all unanswered allegations in paragraphs 15, 16, 18, 19, 20-22, and 24 of the Amended Petition.

Respectfully submitted,
Hyper Ice, Inc.

Dated: January 19, 2021

By /s/ *Jonathan Pink*

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PROOF OF SERVICE

I, Jonathan S. Pink, do hereby certify that on the 19th day of January, 2021, the foregoing PETITIONER'S MOTION TO STRIKE OR DEEM ADMITTED SECTIONS OF REGISTRANT'S ANSWER was served upon the following counsel by E-Mail:

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