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

Proceeding	92074504
Party	Defendant Theravolt
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Date	09/09/2020
Attachments	Registrant Opp to Leave to Amend.final.pdf(72614 bytes)

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8 **IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**
9 **TRADEMARK TRIAL AND APPEAL BOARD**

10 HYPER ICE, INC.,
11 Petitioner,
12 v.
13 THERAVOLT,
14 Registrant.
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16 Cancellation No. 92074504
17 Registration No. 6068295
18 Serial No. 88/670,960
19 Mark: Theravolt

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**REGISTRANT'S OPPOSITION TO
PETITIONER'S MOTION(S) FOR
LEAVE TO FILE ITS FIRST AMENDED
PETITION**

1 Registrant Jason So dba Theravolt (“Registrant”) submits the following
2 opposition to the motion(s) for leave to file a First Amended Petition by
3 Petitioner Hyper Ice, Inc. (“Petitioner”).

4 **I. PETITIONER’S MOTIONS FOR LEAVE TO AMEND SHOULD BE
5 DENIED OR CONDITIONALLY GRANTED**

6 Petitioner filed two separate motions for leave to file a First Amended
7 Petition. *Compare* TTABVUE 5 (filed 8/18/20 - 126 pages) *with* TTABVUE 6
8 (filed 8/20/20- 215 pages). One or both of Petitioner’s motions to amend should
9 be denied.

10 Petitioner’s TTABVUE 5 motion filed August 18, 2020 does not include a
11 proof of service and was not served on August 18, 2020 when it was filed.
12 Petitioner’s TTABVUE 5 motion is only 126 pages, so perhaps it was filed in
13 error.

14 Petitioner’s TTABVUE 6 motion filed August 20, 2020 does include a
15 proof of service for the motion inserted before Exhibits A and B of the proposed
16 Amended Petition. Petitioner’s TTABVUE 6 motion is substantially longer at
17 215 pages, so perhaps it is a corrected motion.

18 Under either motion, it appears that “Petitioner seeks to plead an additional
19 ground for cancellation explicitly based on fraud.” [TTABVUE 6, at pdf 3;
20 TTABVUE 5, at 3]. Petitioner’s proposed Amended Petition, however, fails to
21 include a separate cause of action for fraud but rather lumps its purported grounds
22 in a hodgepodge pleading.

23 Thus, if leave to amend is granted, it should be conditioned on Petitioner
24 asserting each ground for cancellation in a separate cause of action supported by
25 allegations it contends are sufficient, so that Registrant can challenge one or more
26 of Petitioner’s grounds by a motion to dismiss. “To survive a motion to dismiss, a
27 complaint must ‘state a claim to relief that is plausible on its face.’ In particular,
28 the claimant must allege well-pleaded factual matter and more than ‘[t]hreadbare

1 recitals of the elements of a cause of action, supported by mere conclusory
2 statements.” TBMP §503.02

3 “Fraud ‘must be proved to the hilt.’” *L. & J.G. Stickley, Inc. v. Cosser* , 2007
4 TTAB LEXIS 2, *43 (Trademark Trial & App. Bd. January 11, 2007) *quoting*
5 *Carefirst of Maryland Inc. v. FirstHealth of the Carolinas Inc.*, 77 USPQ2d 1492,
6 1502 n.11 (TTAB 2005). Petitioner’s proposed Amended Petition makes it
7 unclear what specific allegations support its proposed new fraud claims.
8 “However, where the moving party seeks to add a new claim or defense, and the
9 proposed pleading thereof is legally insufficient, or would serve no useful
10 purpose, the Board normally will deny the motion for leave to amend.” TBMP
11 §507.02. Registrant, of course, reserves the right to move to dismiss any allowed
12 fraud cause of action (assuming one is separately stated).

13 **II. CONCLUSION**

14 At least one of Petitioner’s separate motions to amend [TTABVUE 5 & 6]
15 should be denied as duplicative and/or confusing.

16 The Board has no obligation to allow an amended pleading adding a
17 deficient fraud claim lumped in with Petitioner’s other ground(s) for cancellation.
18 Accordingly, the Board should deny leave to file the Amended Petition contained
19 in TTABVUE 5 and/or in TTABVUE 6.

20 If the Board is inclined to allow Petitioner to file a new Amended Petition, it
21 should be conditioned on Petitioner alleging each ground for cancellation in a
22 separate cause of action to facilitate review for sufficiency in connection with any
23 future motion to dismiss by Registrant.

24 Dated: September 9, 2020

Respectfully submitted by:

26 LAW OFFICES OF DARREN J. QUINN

27 DARREN J. QUINN

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s/s Darren J. Quinn

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Attorneys for Registrant THERAVOLT

1 CERTIFICATE OF SERVICE

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4 I hereby certify that a true and complete copy of the foregoing has been

5 served on counsel for Applicant on September 9, 2020, by e-mail.

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