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THERABODY, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

THERABODY, INC.,
Plaintiff,
v.
HYPER ICE, INC.,
Defendant.

Case No. 8:24-cv-00378-MEMF-(DFMx)

FIRST AMENDED COMPLAINT FOR:
(1) Product Disparagement and Trade Libel (Lanham Act);
(2) False Advertising (Cal. Bus. & Prof. Code);
(3) Defamation (Common Law);
(4) Trade Libel (Common Law); and
(5) Tortious Interference with Existing and Prospective Economic Advantage (Common Law)

JURY TRIAL REQUESTED

Pursuant to Federal Rule of Civil Procedure 15(a)(1)(B), plaintiff THERABODY, INC. ("Therabody") files this First Amended Complaint for its claims for relief against defendant HYPER ICE, INC. ("Hyper Ice") and alleges as follows:

Therabody EX2008
Hyper Ice v. Therabody
PGR2026-00051

I. NATURE OF ACTION

1. Therabody is a pioneering health and wellness company, known for its cutting-edge performance and recovery technology. This action arises out of defendant Hyper Ice's maliciously false and misleading statements impugning Therabody's products and reputation. Through these false and misleading statements, and motivated by animus toward its chief competitor, Hyper Ice intended to cause and has caused damage to Therabody's business and business prospects. As a result, Therabody now asserts claims for product disparagement and trade libel under the Lanham Act, 15 U.S.C. § 1125(a), false advertising under Cal. Bus. & Prof. Code § 17500 *et seq.*, and common law defamation, trade libel, and tortious interference with existing and prospective economic advantage, as described below.

II. PARTIES

2. Therabody is a corporation duly organized and existing under the laws of the State of Delaware, having its principal place of business at 1640 South Sepulveda Boulevard, Suite 300, Los Angeles, California 90025.

3. On information and belief, Hyper Ice is a corporation organized and existing under the laws of the State of California, claiming to have its principal place of business at 525 Technology Drive, Suite 100, Irvine, California 92618.

III. JURISDICTION AND VENUE

4. This Complaint arises under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), as amended, the law of the State of California, and the common law.

5. This Court has subject matter jurisdiction over the federal cause of action under 28 U.S.C. § 1331. This Court has subject matter jurisdiction over the state and common law causes of action under 28 U.S.C. § 1367(a) because these claims are so related to the federal claim within the original jurisdiction of this Court that they form part of the same case or controversy.

6. This Court has personal jurisdiction over Hyper Ice because it resides in this District. Moreover, this Court has personal jurisdiction over Hyper Ice because it conducts business in this District; has purposefully availed itself of the rights and benefits of California law; and has substantial, continuous, and systematic contacts with the State of California and this District.

7. Venue is proper under 28 U.S.C. § 1391(b)–(d) because Hyper Ice resides in this District. In addition, Therabody is located in this District. Because Hyper Ice's libelous press release and other tortious conduct has caused substantial harm to Therabody, that harm has occurred in this District. Assignment of this case to the Southern Division is proper pursuant to General Order 23-15, filed November 29, 2023, because Hyper Ice, the only defendant, resides in the Southern Division.

IV. FACTUAL BACKGROUND

Therabody's History of Innovation

8. In the fall of 2007, Therabody founder Dr. Jason Wersland was involved in a traumatic motorcycle accident that severely damaged his soft tissue. Dr. Wersland, now a trained chiropractor, surveyed the health and wellness market in search of some technique or product to alleviate his debilitating pain. He found nothing.

9. Dr. Wersland decided to take matters into his own hands. Curious about the potential ameliorative effects of vibration on the body, Dr. Wersland began deconstructing common tools and developed an experimental device that used a jigsaw as a base motor. By 2008, Dr. Wersland had created a makeshift percussive therapy device that worked—it relieved the pain that had made his everyday tasks a struggle. Dr. Wersland knew that his innovative device had the potential to change the health and wellness industry and help people live better, healthier lives. The homemade device, which Dr. Wersland began using with his own clients, received rave reviews and produced tremendous therapeutic results. This device would eventually become the first "Theragun" product.

10. As Dr. Wersland continued to experiment with his innovative device, he discovered that certain depths and speeds of percussion were incredibly effective at easing muscle pain. In 2016, after numerous prototypes and almost a decade after Dr. Wersland developed the first version of his innovative percussive therapy device, the Theragun G1 hit the market. By 2019, Dr. Wersland's percussive therapy devices were used by more than 250 sports teams, as well as physical therapists, trainers, and everyday people worldwide.

11. Today, Therabody is a leading wellness technology pioneer that empowers people around the world to live healthier lives. Theragun, the category-defining percussive therapy device, was just the start for Therabody. Therabody has created other innovative, science-backed wellness solutions involving pneumatic compression, electrical stimulation, and vibration therapy.

12. To protect these innovations in wellness technology, Therabody has applied for and been issued nearly 600 utility and design patents in the United States and throughout the world, and holds numerous trademark and copyright registrations. Among Therabody's large intellectual property portfolio are multiple utility patents covering novel connector systems for percussive massage devices, including U.S. Patent No. 10,428,850, issued on October 1, 2019 (the "'850 Patent"), and U.S. Patent No. 10,557,490, issued on February 11, 2020 (the "'490 Patent").

Hyper Ice's Bad Faith, Defamatory Press Release

13. Hyper Ice is a Therabody competitor. On information and belief, Hyper Ice released its first massage therapy device for the consumer market—the "Hypervolt" product—in 2018, two years after the Theragun was introduced into the market.

14. On January 3, 2024, in a blatant, malicious attempt to harm its biggest competitor, Hyper Ice published a knowingly false and misleading press release that disparaged the quality of Therabody's products and baselessly accused Therabody of copying Hyper Ice's products. The press release specifically stated:

> Hyperice made national headlines in 2018, launching the Hypervolt, the world's first "modern-day" massage gun, featuring a brushless motor system, variable speed settings, and QuietGlide® technology. ***The success and rapid scale of the Hypervolt led to an influx of massage gun brands entering the market to replicate this technology, including Therabody***.
>
> . . .
>
> "In 2018, when we launched the Hypervolt at a more consumer-friendly price point, our business accelerated rapidly – so much so that we began to see an extraordinary amount of ***Hypervolt knockoffs and imitators*** enter the market," said Jim Huether, CEO of Hyperice. . . . "We will use the legal system aggressively ***to clean up the percussion market from imitators and knockoffs who we believe are using Hyperice's IP in their devices***."
>
> . . .
>
> "We will aggressively defend our intellectual property rights and take all appropriate steps to ensure that our innovative products and technology are not ***misappropriated by opportunists seeking to knock us off***," said Jon Howell, General Counsel at Hyperice.

Hyper Ice's January 3, 2024 press release (the "Press Release") is attached hereto as Exhibit 1 and incorporated herein (emphasis added in above excerpt). These statements and others in the Press Release were knowingly false and misleading for multiple reasons.

15. First, Hyper Ice's statement that "[t]he success and rapid scale of the Hypervolt" led Therabody to "enter[ ] the market to replicate this technology" is necessarily false. Hyper Ice states in the Press Release that it did not release the Hypervolt until 2018. And, as Hyper Ice was well aware when it published the Press Release, Therabody entered the massage device market and was selling the Theragun G1 to the public by July 2016—long before the Hypervolt was released in 2018—making Hyper Ice, if anyone, the "imitator."

16. Second, there is no factual basis for Hyper Ice's preposterous claim that Therabody's products are "Hypervolt knockoffs and imitators" that were introduced to the market after the Hypervolt was launched in 2018. The Theragun product line predates the 2018 release of the Hypervolt, and while the 2018 version of the

Hypervolt used vibration technology, Therabody's devices have always used percussion technology. Moreover, Hyper Ice's characterizations of Therabody's products as "Hypervolt knockoffs" and imitations of the Hypervolt are knowingly false because there has never been any physical or visual similarity between Therabody's percussive massagers and Hyper Ice's massagers, as demonstrated below:

Theragun G1 (released in 2016)

Theragun PRO (released in 2022)

Hypervolt (released in 2018)

Hypervolt 2 (released in 2021)

17. Third, the Press Release's statements that Therabody is an "imitator" of Hyper Ice and an "opportunist[ ] seeking to knock [Hyper Ice] off" are demonstrably false because, as discussed above, Therabody launched its Theragun product line in 2016, two years before Hyper Ice released the first Hypervolt product.

18. Fourth, the connectors used to secure the massage head to the device body in the Therabody products that are said to be "knockoffs" of the Hypervolt devices use completely different mechanisms than the Hypervolt devices.

19. And fifth, the Hyper Ice patent described in the Press Release was issued just ***one day before*** the Press Release; there is no evidence that Therabody was even aware of the patent before the Press Release, making it impossible for Therabody to have "misappropriated" Hyper Ice's allegedly "innovative technology." In fact, Therabody was issued the '850 Patent, the '490 Patent, and other intellectual property rights long before Hyper Ice obtained its patent, and Therabody filed applications leading to those patents before Hyper Ice began selling its first Hypervolt product.

20. Hyper Ice widely distributed the Press Release to the media. For example, the Press Release appeared on Business Wire, Fitt Insider, Athletech News, and Yahoo! Finance. Its dissemination was nationwide, including within the State of California.

21. The wide dissemination, including within the State of California, of Hyper Ice's false and misleading accusations against Therabody achieved Hyper Ice's intended purpose of damaging Therabody's business, including its business reputation, the reputation of its products, and its existing and prospective business relationships. The brunt of the injury suffered by Therabody occurred in California. Hyper Ice was well aware that this would be the case, considering California is where Therabody is incorporated and maintains its principal place of business.

Hyper Ice's Other Bad Faith Conduct

22. In January 2024, Hyper Ice maliciously made false, misleading, and defamatory statements to Fleet Feet, a Therabody customer, about Therabody and its

products, including that Therabody is an "opportunist seeking to knock [Hyper Ice] off," that Therabody's percussive massagers are "knockoffs" of the Hypervolt, and using language similar if not identical to that contained in the Press Release.

23. On or about January 27, 2024, at the Boston Run Show trade exposition, Hyper Ice maliciously made false, misleading, and defamatory statements to Therabody customers and potential customers about Therabody and its products. For example, Hyper Ice representatives approached numerous retailers—customers and potential customers of Therabody—and made false and misleading statements effectively accusing Therabody of imitating and knocking off Hyper Ice's products, using language similar if not identical to that contained in the Press Release. Hyper Ice representatives also made statements to retailers exhibiting at the exposition that the market "is going to get a lot smaller soon," implying that Therabody, which Hyper Ice falsely characterized as an alleged imitator that supplied products purported to be knockoffs, would not continue in the market.

24. On information and belief, the above communications are only individual examples of a larger concerted campaign by Hyper Ice to directly contact Therabody customers and prospective customers with false, disparaging comments about Therabody and its products (including sending copies of the Press Release directly to such customers and prospective customers) for the purpose of injuring Therabody's existing and prospective business relationships, and therefore benefit Hyper Ice in conducting its competing business.

25. The injury to Therabody as a result of Hyper Ice's false and misleading statements as alleged herein is and will continue to be substantial. For example, on information and belief, Hyper Ice's false and misleading statements were the proximate cause of Therabody's long-time customer DICK'S Sporting Goods' decision to terminate its ongoing relationship with Therabody—resulting in a projected loss to Therabody of over $1,000,000 in yearly revenue—in order to use Hyper Ice as its sole supplier. Moreover, Hyper Ice's Press Release recognizes the

significance of this and other injuries to Therabody, as it states that, "[i]n 2023, the massage gun market has been valued at USD 542.6 million and is expected to reach well over USD 1 billion over the coming years." *See* Exhibit 1. Hyper Ice's efforts to gain market share from Therabody, its chief competitor, through the malicious and knowingly false and misleading statements in the Press Release and as communicated directly to Therabody customers and prospective customers, are indisputably calculated to benefit Hyper Ice at the expense of Therabody.

V. CLAIMS FOR RELIEF

COUNT ONE – Product Disparagement and Trade Libel (15 U.S.C. § 1125(a))

26. This is a claim for product disparagement and trade libel under 15 U.S.C. § 1125(a). The allegations of Paragraphs 1 through 25 above are repeated and realleged as though fully set forth herein.

27. In its commercial advertising, including the Press Release, Hyper Ice has made, in bad faith, false and misleading representations of fact regarding Therabody's products.

28. In making such false and misleading representations, Hyper Ice acted intentionally, with knowledge of, and in willful and conscious disregard of Therabody's rights.

29. These misleading and false representations tended to and/or actually deceived a substantial portion of the intended audience and were material in that these misrepresentations have likely influenced, and will in the future likely influence, Therabody's customers' purchasing decisions.

30. Hyper Ice caused its false and misleading representations to enter interstate commerce.

31. As a direct and proximate result of the foregoing, Therabody has been and is likely to be further injured by both a diversion of sales from itself to Hyper Ice and by a lessening of the goodwill associated with Therabody's business and its products. The extent of Therabody's injuries are to be determined at trial.

32. The damage to Therabody's business, goodwill, and reputation is such as to warrant the trebling of damages under 15 U.S.C. § 1117(a) in order to provide just compensation.

COUNT TWO – False Advertising (Cal. Bus. & Prof. Code § 17500 *et seq.*)

33. This is a claim for false advertising under § 17500 *et seq.* of the California Business and Professions Code. The allegations of Paragraphs 1 through 32 above are repeated and realleged as though fully set forth herein.

34. In its commercial advertising, including the Press Release, Hyper Ice has made, in bad faith, misleading and untrue representations of fact regarding Therabody's business and products.

35. These misleading and untrue representations tended to and/or actually deceived a substantial portion of the intended audience.

36. On information and belief, Hyper Ice made its misleading and untrue representations from the State of California and caused these misleading and untrue representations to be disseminated before the public of the State of California.

37. Hyper Ice knew, or by the exercise of reasonable care should have known, that its representations regarding Therabody's business and products were misleading and untrue.

38. As a direct and proximate result of the foregoing, Therabody has sustained and will continue to sustain substantial injury to its business and reputation. Therabody is entitled to restitution in an amount to be determined at trial.

COUNT THREE – Defamation (Common Law)

39. This is a claim for defamation. The allegations of Paragraphs 1 through 38 above are repeated and realleged as though fully set forth herein.

40. On January 3, 2024, Hyper Ice maliciously published false, misleading, and defamatory statements about Therabody and its products as set forth above. Hyper Ice published its defamatory statements to third parties including Business Wire, Fitt Insider, Athletech News, and Yahoo! Finance.

41. In January 2024, Hyper Ice maliciously made false, misleading, and defamatory statements to Fleet Feet, a Therabody customer, about Therabody and its products as set forth above.

42. On or about January 27, 2024, at the Boston Run Show trade exposition, Hyper Ice maliciously made false, misleading, and defamatory statements to Therabody customers and potential customers about Therabody and its products as set forth above.

43. Hyper Ice's statements were defamatory in that they injured Therabody in the conduct of its business and deterred prospective customers of Therabody from doing business with Therabody.

44. Hyper Ice's defamatory statements impugned Therabody's business reputation and its ability to do business, and therefore constitute defamation *per se*.

45. As a direct and proximate result of Hyper Ice's defamatory statements, Therabody has sustained and will continue to sustain substantial injury to its business and reputation. The amount of Therabody's damages are to be determined at trial.

46. Hyper Ice's defamatory conduct is and has been willful, wanton, malicious, oppressive, and in conscious disregard of Therabody's rights, justifying the imposition of punitive and exemplary damages under California Civil Code § 3294.

COUNT FOUR – Trade Libel (Common Law)

47. This is a claim for trade libel. The allegations of Paragraphs 1 through 46 above are repeated and realleged as though fully set forth herein.

48. On January 3, 2024, Hyper Ice maliciously published false and misleading statements about Therabody as set forth above. Hyper Ice published its false and misleading statements to third parties including Business Wire, Fitt Insider, Athletech News, and Yahoo! Finance.

49. In January 2024, Hyper Ice maliciously made false and misleading statements to Fleet Feet, a Therabody customer, about Therabody and its products as set forth above.

50. On or about January 27, 2024, at the Boston Run Show trade exposition, Hyper Ice maliciously made false and misleading statements to Therabody customers and potential customers about Therabody and its products as set forth above.

51. Hyper Ice's false and misleading statements have financially harmed Therabody in the conduct of its business and deterred prospective customers of Therabody from doing business with it.

52. As a direct and proximate result of the foregoing, Therabody has already been injured in its business and property, including a projected loss to Therabody of over $1,000,000 in yearly revenue from DICK'S Sporting Goods and a proportional amount of the massage gun market that Hyper Ice states "is expected to reach well over USD 1 billion over the coming years." These losses were the natural and probable result of Hyper Ice's false and misleading statements as alleged herein, in that those statements were intended to, and did, disparage Therabody's products in comparison to Hyper Ice's competing products. The exact amount of injury to Therabody's business and property will be determined at trial.

53. Hyper Ice's conduct is and has been willful, wanton, malicious, oppressive, and in conscious disregard of Therabody's rights, justifying the imposition of punitive and exemplary damages under California Civil Code § 3294.

COUNT FIVE – Tortious Interference with Existing and Prospective Economic Advantage (Common Law)

54. This is a claim for tortious interference with existing and prospective economic advantage. The allegations of Paragraphs 1 through 53 above are repeated and realleged as though fully set forth herein.

55. Therabody has economic relationships with various companies in the health and wellness industry, such as DICK'S Sporting Goods, that provide

Therabody with the probability of future economic benefit. With knowledge of these relationships and the intent to disrupt them, Hyper Ice wrongfully published and made false and misleading statements against Therabody in violation of 15 U.S.C. § 1125(a), Cal. Bus. & Prof. Code § 17500 *et seq.*, and the common law of the State of California as set forth herein. Hyper Ice's false and misleading statements caused the actual disruption of these relationships and, as a result, economic harm to Therabody.

56. As a direct and proximate result of Hyper Ice's intentional interference with Therabody's existing and prospective economic advantage, Therabody has sustained and will continue to sustain substantial injury to its economic relationships with various companies in the health and wellness industry, including a projected loss to Therabody of over $1,000,000 in yearly revenue from DICK'S Sporting Goods and a proportional amount of the massage gun market that Hyper Ice states "is expected to reach well over USD 1 billion over the coming years." These losses were the natural and probable result of Hyper Ice's false and misleading statements as alleged herein, in that those statements were intended to, and did, disparage Therabody's products in comparison to Hyper Ice's competing products. The exact amount of Therabody's damages are to be determined at trial.

57. Hyper Ice's conduct is and has been willful, wanton, malicious, oppressive, and in conscious disregard of Therabody's rights, justifying the imposition of punitive and exemplary damages under California Civil Code § 3294.

WHEREFORE, Therabody prays for judgment against Hyper Ice as follows:

1. As to Count One, an award of damages, including Therabody's lost profits, and disgorgement of Hyper Ice's profits, in an amount to be determined at trial, trebled pursuant to 15 U.S.C. § 1117(a);
2. As to Count Two, restitution in an amount to be determined at trial;

3. As to Counts Three, Four, and Five, an award of compensatory damages, and punitive and exemplary damages pursuant to California Civil Code § 3294, in an amount to be determined at trial;

4. An award of attorneys' fees and costs incurred in bringing this action; and

5. Such other and further relief as may be just and proper under the circumstances.

Dated: May 30, 2024

BRETT J. WILLIAMSON
CAMERON W. WESTIN
O'MELVENY & MYERS LLP

By: /s/ *Brett J. Williamson*

Brett J. Williamson
Attorneys for Plaintiff
THERABODY, INC.

REQUEST FOR JURY TRIAL

Pursuant to Fed. R. Civ. P. 38(b), Plaintiff Therabody, Inc. hereby requests a trial by jury on all issues so triable.

Dated: May 30, 2024

BRETT J. WILLIAMSON
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