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

Proceeding	91270550
Party	Plaintiff Hiller, LLC
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Attachments	Hiller Reply in Support of Motion to Strike.pdf(125142 bytes )

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

In the Matter of Application Serial No. 88/946,386



For the Trademark: (‘‘HAPPY MONEY PROMISE IF YOU’RE NOT  
HAPPY, YOU DON’T PAY and Design’’)

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HILLER, LLC,	)	
	)	
Opposer,	)	
	)	
v.	)	OPPOSITION NO. 91270550
	)	
SERVICE CHAMPIONS, LLC,	)	
	)	
Applicant.	)	
	)	

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**REPLY IN SUPPORT OF OPPOSER’S MOTION TO STRIKE**

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Opposer Hiller, LLC (‘‘Hiller’’) submits this reply in support of its motion to strike the entirety of ‘‘Count III: Cancellation of Registration No. 5,362,969 – Failure to Police’’ (‘‘Count III’’) alleged in the Answer to Notice of Opposition, Affirmative Defenses, and Counter Claim filed by Service Champions, LLC (‘‘Applicant’’) and in the alternative, Hiller moves to strike the reference to ‘‘failure to function’’ in Count III.

**First**, a motion to strike is the proper vehicle to attack Applicant’s counterclaims. Indeed, Hiller’s motion repeatedly asserted that Applicant’s counterclaims represented insufficient or impermissible defenses and were redundant, as contemplated by TBMP 506.01 and Federal Rule of Civil Procedure 12(f). *See* 6 TTABVUE 3–6. Applicant asserts that Hiller’s motion should be denied because it is, in effect, a motion to dismiss for failure to state a claim. 10 TTABVUE 3.

While Hiller disagrees with this characterization, it makes no material difference, as both the Board and federal district courts around the country have construed motions to strike as motions to dismiss if more appropriate. *See, e.g., Wells Fargo & Co. v. Lundeen & Associates*, Opposition No. 84,203, 20 U.S.P.Q.2d 1156, (T.T.A.B. 1991) (“Inasmuch as applicant’s motion attacks, in essence, the sufficiency of one of opposer’s grounds for opposition, applicant’s motion will be construed as one to dismiss under Fed. R. Civ. P. 12(b)(6).” (citing 5A Wright and Miller, Federal Practice and Procedure 1380 (2nd ed. 1990))); *Granger v. Lowe’s Home Centers, LLC*, No. 1:14-CV-01212-KJM, 2014 WL 4976134, at \*1 (E.D. Cal. Oct. 3, 2014) (“[T]he court construes the defendants’ motion to strike as a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).”); *Save Our Springs All., Inc. v. Texas Dep’t of Transportation*, No. 1:19-CV-762-RP, 2020 WL 3490383, at \*2 (W.D. Tex. June 26, 2020) (“When Fifth Circuit district courts considering motions to strike under Rule 12(f) find that they that are more akin to ... motion[s] to dismiss under Rule 12(b)(6), the courts tend to construe the motions as the latter.” (internal quotations omitted)). Thus, even if the Board determines that Hiller’s motion is more akin to a motion to dismiss, it can still construe it as such and evaluate the merits as it would otherwise.

**Second**, the bulk of Applicant’s Response simply reiterates what Applicant’s counterclaims already stated. What Applicant’s Response does *not* do is respond to the missing elements of the counterclaims Hiller raised in its motion. For example, Hiller asserted that Applicant did not plead the legal standard for genericness. *See* 6 TTABVUE 5. Applicant responded by (again) using the word generic, but never actually addressed how its pleading meets the standard. *See* 10 TTABVUE 3–5. Similarly, Hiller noted in its motion that Applicant failed to plead a claim under abandonment’s statutory definition. *See* 6 TTABVUE 4. Again, Applicant does not meaningfully respond but instead discusses this definition broadly before repeating the

same vague assertions from its counterclaim (which *still* do not state a statutory ground for abandonment). *See* 10 TTABVUE 4–5.

**CONCLUSION**

For the foregoing reasons, as well as those in Hiller’s motion to strike, Hiller respectfully requests the Board issue an order striking Count III of Applicant’s Counterclaim. In the alternative, Hiller respectfully requests the Board issue an order striking reference to “failure to function” in Count III of Applicant’s Counterclaim.

Dated: October 27, 2021

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of the foregoing REPLY IN SUPPORT OF OPPOSER'S MOTION TO STRIKE has been served on SERVICE CHAMPIONS, LLC and its correspondent of record by forwarding said copy on October 27, 2021, via email to:

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