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

Proceeding	91251530
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Serial Number 88/279,118  
Trademark: CLUSTER OF CLUSTERS

Alexandria Real Estate Equities, Inc.,  Opposer,  v.  Bugsby Property LLC,  Applicant.	Opposition No.: 91251530  <b>APPLICANT’S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM</b>
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**APPLICANT’S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Trademark Trial and Appeal Board Manual of Procedure § 503, Bugsby Property LLC (“Applicant”) requests that the Board dismiss Opposition No. 91251530 filed by Alexandria Real Estate Equities, Inc. (“Opposer”) against Applicant’s application Serial No. 88/279,118 for the mark CLUSTER OF CLUSTERS in Class 42 for failure to state a claim upon which relief may be granted.

**I.     INTRODUCTION**

On January 28, 2019, Applicant filed its application to register the CLUSTER OF CLUSTERS standard character mark on the Principal Register for “Rental and leasing of information technology (IT) computer hardware systems, of computer software, and of laboratory apparatus and instruments; Computer services, namely, creating an on-line community for registered users to participate in discussions, get feedback from their peers, form virtual communities, and engage in business and social networking; providing a web hosting platform

for customers to participate in business and social networking, engage in virtual communities, manage membership in a co-working and private office facilities service, request and manage office and laboratory assignments, reserve conference rooms and equipment, control employees' user access, order printing services, and sign up and pay for vendor services; computer services, namely, hosting on-line web facilities for others for organizing and conducting online introductions, meetings, gatherings and interactive discussions; computer services, namely, cloud hosting provider services; computer services, namely, on- site and remote management of IT systems of others; installation, updating and maintenance of computer software; rental of web servers; server hosting, namely, developing and hosting a server on a global computer network for the purpose of facilitating e-commerce via such a server; technical support services, namely, troubleshooting of computer software problems; technical support services, namely, troubleshooting in the nature of diagnosing computer hardware and software problems” in International Class 42. The CLUSTER OF CLUSTERS mark was published for opposition in the Official Gazette of Trademarks on June 11, 2019, as required by statute. Opposer filed its Opposition on October 9, 2019, claiming that it will be damaged by the registration of Applicant’s mark as its right “to refer to its ‘cluster model’ may be improperly cast into doubt.” See Opposer’s Notice of Opposition (“Opp.”) at 6. Opposer alleges that Applicant’s CLUSTER OF CLUSTERS mark “does not function as a trademark as defined by 15 U.S.C. § 1127 because it is simply a generic phrase to refer to geographic or virtual “clusters” grouped together in a large metropolitan area and thus cannot identify and distinguish any services of one entity from those offered by others.” Opp. at 5. In the alternative, Opposer alleges that the registration of Applicant’s CLUSTER OF CLUSTERS mark should be refused as the mark “is merely descriptive” and as such “is not registrable under 15 U.S.C. § 1052(e).” Opp. at 5. Opposer has

failed to properly plead sufficient facts to allege that Applicant's CLUSTER OF CLUSTERS mark is either generic or merely descriptive of the specific services Applicant has identified in its application. Opposer has simply provided vague conclusory statements and inapposite third-party references regarding the general use of the word "cluster" and the phrase "cluster of clusters." *See* Opp. at 2 - 5. This commentary demonstrates no connection, however, to Applicant's specific rental and leasing of information technology (IT) computer hardware systems or computer services, nor does it allege how the terms "cluster," or the unique phrase CLUSTER OF CLUSTERS is merely descriptive or generic for such services. Accordingly, Opposer has failed to plead facts sufficient to support its claims for relief.

## **II. ARGUMENT**

### **A. Legal Standard for a Motion to Dismiss.**

To withstand a motion to dismiss, a Plaintiff must allege sufficient factual content that, if proved, would allow the Board to conclude that (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists for denying the registration sought or for cancelling the involved registration. *See Doyle v. Al Johnson's Swedish Restaurant & Butik Inc.*, 101 USPQ2d 1780, 1782 (TTAB 2012). An opposition before the TTAB "must set forth a short and plain statement showing why the opposer believes it would be damaged by the registration of the opposed mark and state the grounds for opposition." *See* 37 C.F.R. § 2.104(a). Further, an opposition, like any complaint, "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

**B. Opposer Fails to Plead that Applicant’s CLUSTER OF CLUSTERS Mark is Generic for Applicant’s Identified Services.**

To sufficiently plead a claim that a mark is the generic name or adjective for the identified services, an opposer must allege that (i) the wording at issue is widely used generically to identify the genus of goods or services identified in the opposed application, and that (ii) consumers primarily understand the wording to be the generic name or identifier of or adjective for the genus of goods or services. *See H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986); *see also Royal Crown Co., Inc. v. The Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1047 (Fed. Cir. 2018). Opposer has failed to allege either of these two requirements in its notice of opposition. Instead, Opposer has merely provided several references to third-party articles which mention or make use of the word “cluster” or the phrase “cluster of clusters.” Opp. at 3-5. Notably, the articles provided by Opposer contain no references to the CLUSTER OF CLUSTERS mark being used in connection with Applicant’s identified services, which are rental and leasing of information technology (IT) computer hardware systems and computer services, much less any evidence to support the contention that consumers understand CLUSTER OF CLUSTERS to be the generic name for the genus of Applicant’s services.

A proper genericness inquiry “focuses on the description of services [or goods] set forth in the [application or] certificate of registration.” *See Magic Wand, Inc. v. RDB, Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991). Opposer’s opposition, however, fails to allege that Applicant’s CLUSTER OF CLUSTERS mark is widely used generically to identify the services specifically identified in Applicant’s description of services - rental and leasing of information technology (IT) computer hardware systems and computer services. Opposer

proffers that “the phrase ‘cluster of clusters’ does not function as a trademark as defined by 15 U.S.C. § 1127 because it is a “generic phrase to refer to geographic or virtual ‘clusters’ grouped together in a large metropolitan area and thus cannot identify and distinguish any services of one entity from those offered by others.” Opp. at 5. This statement is not sufficient to allege a claim of genericism. To wit, Opposer provides no allegations that Applicant’s mark, CLUSTER OF CLUSTERS, is widely used generically to identify the genus of goods or services identified in Applicant’s application, nor has Opposer alleged that consumers primarily understand CLUSTER OF CLUSTERS to be the generic name or identifier of or adjective for the genus of Applicant’s services. As such, Opposer has failed to properly plead a claim of genericness.

Furthermore, Opposer has failed to allege any well-pleaded factual matter to support its claim that the mark CLUSTER OF CLUSTERS is generic. Properly pleaded claims must allege more than “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.” *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Opposer gives a definition of the word “cluster” as a term “used to describe a geographic concentration of related businesses or entities” and notes that the word was “popularized by Michael Porter in an article titled ‘The Competitive Advantage of Nations,’ published in 1990 in the Harvard Business Review.” Opp. at 3. Neither of these statements make any reference to Applicant’s specifically identified services or suggest that CLUSTER OF CLUSTERS – the term as filed – is generic by definition. Opposer also states that a “search of news items from recent years revealed several unrelated third parties using and continuing to use the term “cluster” to refer to geographic or virtual locations, facilities and complementary services that support collaboration, innovation, research and development between various business entities” and that the phrase “cluster of clusters” is used in a similar manner to refer to “geographic or virtual locations as may be found

in large metropolitan areas or in virtual systems.” Opp. at 3. Opposer then goes on to provide references to seven third party news articles which refer to the phrase “cluster of clusters.” Opp. at 3 – 5. These articles, however, do not show use of the phrase CLUSTER OF CLUSTERS to identify Applicant’s specific services, namely, rental and leasing of information technology (IT) computer hardware systems and computer services. As such, they cannot provide support for the allegation that Applicant’s mark is generic as they lack any reference or connection to the specific services Applicant has identified in its recitation. As Opposer’s evidence fails to show that Applicant’s mark, CLUSTER OF CLUSTERS, is either widely used generically to identify the genus of the services identified in Applicant’s application or that consumers primarily understand CLUSTER OF CLUSTERS to be the generic name or identifier of or adjective for the genus of Applicant’s services, Opposer has failed to allege sufficient facts to support its claim that the mark CLUSTER OF CLUSTERS is generic.

**C. Opposer Fails to Plead that Applicant’s CLUSTER OF CLUSTERS Mark is Merely Descriptive for Applicant’s Identified Services.**

In order to sufficiently plead a claim that a mark is merely descriptive, an opposer must “allege that the involved wording is merely descriptive of the identified goods or services.” *See M. Polaner Inc. v. The J.M. Smucker Co.*, 24 USPQ2d 1059, 1060 (TTAB 1992). The Board has previously held that for an opposition to be properly pleaded on merely descriptiveness grounds it must set forth “allegations that indicate its mere descriptiveness claim is plausible,” such as by providing “various data concerning [o]pposer's and third-party use of the wording . . . to describe the goods identified in the opposed application and/or goods and services related thereto.” *See Am. Massage Therapy Ass'n*, 2017 WL 5624668, at \*6 (Nov. 11, 2017). Opposer has failed to properly allege that Applicant’s CLUSTER OF CLUSTERS mark is merely descriptive as

Opposer's opposition fails to allege that Applicant's CLUSTER OF CLUSTERS mark merely describes the specific services identified in Applicant's application, which are rental and leasing of information technology (IT) computer hardware systems and computer services.

Opposer alleges that registration of Applicant's CLUSTER OF CLUSTERS mark should be refused because the CLUSTER OF CLUSTERS mark "is merely descriptive of Applicant's services. As such, Applicant's Mark is not registrable under 15 U.S.C. § 1052(e)." Opp. at 5. Yet Opposer offers no further evidence or arguments to back its claim that Applicant's Mark merely describes a feature or component of Applicant's identified services except for this unsupported legal conclusion. Simply stating that the phrase "cluster of clusters" "describes a grouping of businesses or services, such the geographical or virtual grouping of businesses in the same industry" is not sufficient to allege that Applicant's Mark is actually merely descriptive to consumers of the services offered. *See* Opp. at 5. Opposer does not provide any facts to plausibly support a claim that the mark CLUSTER OF CLUSTERS is merely descriptive of Applicant's identified services. As such, Opposer has also failed to properly plead a claim that Applicant's Mark is merely descriptive of the services offered.

### **III. CONCLUSION**

Based on all of the foregoing arguments, Applicant respectfully requests that the Board dismiss Opposer's opposition with prejudice.



Respectfully submitted,

ORRICK, HERRINGTON & SUTCLIFFE LLP

Dated: November 18, 2019

By: /s/ Kristin S. Cornuelle

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**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing **APPLICANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM** is being served upon counsel for Opposer on this 18<sup>th</sup> day of November to the below email address:

pto-oc@gibsondunn.com

By:  /s/ chris civil  
Chris Civil