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

Proceeding	91251530
Party	Plaintiff Alexandria Real Estate Equities, Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of application Serial No. 88/279,118
For the Trademark CLUSTER OF CLUSTERS
Published in the Official Gazette on June 11, 2019

Alexandria Real Estate Equities, Inc.)	
)	
Opposer,)	
)	Opposition No. 91251530
v.)	
)	
Bugsby Property LLC)	
)	
Applicant.)	
_____)	

**ALEXANDRIA REAL ESTATE EQUITIES, INC.’S MEMORANDUM OF LAW IN
OPPOSITION TO MOTION TO DISMISS**

I. INTRODUCTION

Opposer Alexandria Real Estate Equities, Inc. (“Alexandria”) respectfully submits this Memorandum of Law in Opposition to Applicant Bugsby Property LLC’s (“Applicant”) Motion to Dismiss for Failure to State a Claim (“Motion”). Because the terms “cluster” and “cluster of clusters” are used so extensively—not only by Alexandria but also by many other third parties—they are incapable of serving a source-identifying function, and thus should not be allowed to be appropriated for exclusive use by one entity.

Alexandria brings this opposition proceeding to prevent Applicant’s attempt to monopolize these generic and descriptive terms. In particular, companies like the parties here often market specific real estate properties and computer services with reference to a “cluster” of related businesses, facilities, computer networks, IT systems, and complementary services within or in close proximity to the properties. This is a desirable feature of the properties used to house such

services because the ability to cluster such services supports collaboration, innovation, research and development among business entities. Further, the term “cluster of clusters” is often used in the industry to describe a confluence of such business or service clusters, especially in the life sciences and biotech industry, where businesses may seek to locate facilities within clusters that include multiple different characteristics useful or desirable for the ongoing operation of the business. As Applicant’s services relate specifically to marketing services to companies in the life sciences and biotech industry, it would be particularly dangerous to allow Applicant to monopolize the term “cluster of clusters.” Alexandria’s Petition (1 TTABVue 6-7, the “Petition” or “Pet.”) lays this out in great detail and also points out that the parties here are engaged in other disputes and litigation matters. As a result, Applicant will have significant incentive to use a registration purportedly giving it prima facie exclusive rights to the term “cluster of clusters” to attempt to prevent Alexandria from using the terms and thus impeding Alexandria’s marketing of its properties. The Petition also provides illustrative examples of industry marketing players that also use these terms and would be threatened if this registration is granted to Applicant.

Under the plain rules of these proceedings, moreover, it is improper to question these well-pled allegations at this stage, where these factual allegations must be presumed true. As a matter of black-letter law, Opposer’s burden is only to provide “(1) a short and plain statement of the reason(s) why opposer believes it would be damaged by the registration of the opposed mark (i.e., opposer’s standing to maintain the proceeding) and (2) a short and plain statement of one or more grounds for opposition.” Trademark Trial and Appeal Board Manual of Procedure § 309.03(a)(2) (“TBMP”). Alexandria’s Notice of Opposition more than meets this burden by providing specific allegations as to how it will be damaged by the registration. Applicant’s Motion is nothing more

than an improper attempt to slow this proceeding down. For the reasons set forth in greater detail below, Applicant's Motion to Dismiss should be denied.

II. BACKGROUND

Alexandria Real Estate Equities is a leading publicly-traded real estate investment trust that provides, among other services, an array of real estate, IT, and other and business support services to scientific, medical, and technology companies and institutions throughout the United States. Pet. ¶ 21. Founded over two decades ago, Alexandria pioneered the market for dedicated scientific and technology properties and collaborative business campuses designed to foster communication and exchange among its client tenants. *Id.* As stated in its Notice of Opposition, Alexandria has referred to its business model as a “**cluster model**” and pursued an “**urban cluster campus strategy**,” for over a decade. *See id.* ¶ 22 & Ex. 9. Alexandria's “cluster model” approach “focuses on identifying locations for its facilities and business activities by targeting specific geographic locations where companies, institutions and organizations sharing a particular field of business, study or discipline are located” and the company “uses the generic term ‘cluster’ to promote its services, which revolve around its many cluster locations in large metropolitan areas which are generally each considered to be a “cluster of clusters.” *Id.* ¶ 23-24.

Applicant, on the other hand, is a comparatively new company founded by Steven Marcus, the son of Alexandria's owner, Joel Marcus. Steven Marcus learned about Alexandria's cluster model primarily from his family relationship. As the Petition specifically alleges, “the parties and their affiliates are engaged in other business dispute and litigation matters.” *Id.* ¶ 29. There are numerous factual and equitable issues that underlie this allegation. In brief, however, Applicant's owner learned of the concept of marketing “clusters” from Alexandria and seeks to appropriate it for himself.

On January 28, 2019, Applicant applied to register CLUSTER OF CLUSTERS for use in connection with services related to the clustering of computer and technological facilities under Serial No. 88/279,118 (the “Application”). *Id.* ¶ 2. The Application published for opposition in the Official Gazette of the United States Patent and Trademark Office on June 11, 2019. *Id.* ¶ 3.

As the Petition alleges, “[i]f Applicant is able to register the generic (or descriptive) phrase ‘cluster of clusters,’ Applicant could use the registration against Alexandria in an attempt to prevent Alexandria from using the generic term ‘cluster’ in connection with its business.” *Id.* ¶ 28.

The Petition explains in great detail why the concept of “clusters” and “clusters of clusters” cannot be exclusive to one company. “The term ‘cluster’ is a generic term used to describe a geographic or virtual concentration of related businesses or entities.” *Id.* ¶ 5. “The term was popularized by Michael Porter in an article titled ‘The Competitive Advantage of Nations,’ published in 1990 in the Harvard Business Review.” *Id.* ¶ 6. A copy of that article is attached as Exhibit 1 to the Petition. The Petition specifically alleges that “use of the word ‘cluster’ is widespread throughout the life sciences and biotech industry (*id.* ¶ 8), and it provides a number of illustrative examples showing that the term “cluster” is used generically to describe groupings of scientific and technological offices, laboratories, and workspaces, where services can be shared among participants in the industry and the effect caused by the clustering of such businesses, geographically or virtually. *Id.* ¶¶ 9-11, 14-5 & Exs. 2-4, 7-8.

More particularly, the Petition attaches two illustrative third party sources that describe geographic regions that contain multiple “clusters” as a “cluster of clusters.” *Id.* ¶¶ 12-13 & Exs. 5-6. Importantly, however, Alexandria does *not* claim that these articles are the extent of its evidence. The Petition simply uses these illustrations to demonstrate that “‘cluster of clusters’ does not function as a trademark . . . because it is simply a generic phrase to refer to geographic

‘clusters’ grouped together in a large metropolitan area and thus cannot identify and distinguish any services of one entity from those offered by others” (*id.* ¶16), or that “[i]n the alternative,” the term “is merely descriptive of Applicant’s Services.” *Id.* ¶ 17; *see also id.* ¶ 18 (“The phrase ‘cluster of clusters’ simply describes a grouping of businesses or services, such as the geographical or virtual grouping of businesses in the same industry”); ¶ 19 (“Applicant has not acquired distinctiveness in the mark”).

To prevent Applicant from appropriating a term commonly used in the industry by Alexandria and others, Alexandria filed a Notice of Opposition on October 9, 2019, alleging that the term “cluster of clusters” is generic or descriptive and on November 18, 2019, Applicant moved to dismiss Alexandria’s claims.

III. LEGAL STANDARD ON A MOTION TO DISMISS

Applicant’s motion to dismiss must be denied as long as Alexandria included allegations of fact that, if proved, would allow the Board to conclude, or to draw a reasonable inference, that (1) the petitioner has standing, and (2) a valid ground for opposition or cancellation exists. *See, e.g., Corporacion Habanos S.A. v. Rodriguez*, 99 U.S.P.Q. 2d 1873, 2011 WL 3871952 (T.T.A.B. 2011); TBMP § 503.02. Critically, in assessing a motion to dismiss, the Board must “accept as true all of the petitioner’s well-pleaded allegations” and “must construe the complaint in the light most favorable to the petitioner.” *Corporacion Habanos S.A.*, 99 U.S.P.Q. 2d at 1874 (citation omitted). *See also The Scotch Whisky Assoc. v. U.S. Distilled Prods. Co.*, 952, F.2d 1317, 1319 (Fed. Cir. 1991) (reversing dismissal of cancellation proceeding where the Board failed to recognize that “[i]f the pleaded facts are proved, petitioner will be entitled to have the registration cancelled”). Here, Applicant cannot meet its burden.

IV. ARGUMENT

A. Alexandria Has Sufficiently Alleged Standing to Oppose Applicant's Mark

The Petition more than sufficiently alleges the details of its claim to standing because Alexandria will be damaged if Applicant's mark registers. As set forth in the Petition, Alexandria has a real interest in this case due to its cluster business model. *See* Pet. ¶¶ 20-24. If the mark registers, Alexandria will be damaged as Applicant would obtain at least a *prima facie* exclusive right to use the mark, to the exclusion of Alexandria. *Id.* ¶¶ 25-27. Because the parties offer "services that are highly related or overlap," and "are engaged in other business dispute and litigation matters," this is no theoretical issue. *Id.* ¶¶ 28-29.

Under the clear black-letter rules of this Board, Alexandria has standing to proceed past a motion to dismiss. *See* TBMP § 309.03(b) ("plaintiff may plead (and later prove) its standing by alleging that it is engaged in the sale of the same or related products or services (or that the product or service in question is within the normal expansion of plaintiff's business) and that the plaintiff has an interest in using the term descriptively in its business. (That is, plaintiff may plead that it is a competitor.)" (citing *Grote Industries, Inc. v. Truck-Lite Co., LLC*, 126 U.S.P.Q.2d 1197, 1201 (T.T.A.B. 2018) (standing established because parties are competitors) (additional citations omitted)). In any event, Applicant has not challenged standing in its Motion to Dismiss. *See* Motion, *passim*.

B. Alexandria Has Sufficiently Alleged That "Cluster of Cluster" Is Generic For Applicant's Services

The thrust of Applicant's argument is that this Opposition must be dismissed because the cited examples of third party use of clusters of clusters "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 systems." Motion at 6.

But Applicant has misstated the test. It is not Alexandria's burden to provide all evidence that shows genericness at this stage. Rather, to sustain its burden at this stage, Alexandria only needs to have alleged that (1) the mark at issue is used "to refer to the genus of goods or services" identified in the opposed application, and that (2) "the term sought to be registered ...[is] understood by the relevant public primarily to refer to that genus of goods or services." *In re Cordua Restaurants, Inc.*, 823 F.3d 594, 599 (Fed. Cir. 2016) (citing *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 989 (Fed. Cir. 1986)).

The well-pled allegations of the Petition easily pass this test by providing reasonably detailed notice as to how Applicant's mark identify or describe the genus of services in the Application. Alexandria alleges, *inter alia*, the following:

Applicant's Mark, however, is simply the generic term "cluster of clusters" in standard type font and conveys no commercial impression apart from the plain meaning of the term "cluster" and the grouping of "clusters." Pet. ¶ 4.

The term "cluster" is a generic term used to describe a geographic or virtual concentration of related businesses or entities. *Id.* ¶ 5.

The phrase "cluster of clusters" is also used in this context. *Id.* ¶ 7.

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 the phrase "cluster of clusters" to refer to such geographic or virtual locations as may be found in larger areas or in virtual systems. Indeed, use of the word "cluster" is widespread throughout the life sciences and biotech industry. *Id.* ¶ 8.

As a result, the phrase "cluster of clusters" 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. *Id.* ¶ 16.

These allegations must be accepted as true for purposes of the instant motion. *Corporacion Habanos, S.A.*, 99 U.S.P.Q. 2d at 1874.

In fact, the Petition provides even more detailed explanation of the supporting facts. Alexandria alleges that the word “cluster” refers to a “geographic or virtual concentration of related businesses or entities” (Pet. ¶ 5) and that Applicant’s services in the opposed application include, *inter alia*, “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....” Pet. ¶ 2.

The Petition then provides illustrative uses of the terms “cluster” and “cluster of clusters” to demonstrate that third parties, in fact, use the term generically. In particular, the Petition explains that “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 the phrase ‘cluster of clusters’ to refer to such geographic locations as may be found in larger cities.” (Pet. ¶ 8.) Alexandria goes on to provide specific examples from various publications in the business community ranging from *Harvard Business Review* to *LA Biomed* (*id.* ¶¶ 6, 8-15; *see also id.* Ex. 1-8).

Recent decisions of this Board amply demonstrate why this Motion should be denied. For example, in *American Massage Therapy Assoc. v. Implus Footcare, LLC*, Opp. No. 91234785,

2017 WL 5624668 (T.T.A.B. Nov. 11, 2017) (not precedential), the Board concluded that an opposer had sufficiently alleged that “Triggerpoint” was generic for fitness DVDs and books, because it alleged that a “trigger point” is a sensitive area of the body and a type of therapy, and thus the mark was generic for books and DVDs that existed as a subcategory of fitness-related instructional materials that discuss “trigger points.” *Id.* at *4. As the Board noted, the allegations were sufficient to state a claim that the consuming public used the wording “trigger point” to “identify or describe the subcategory of the genus of goods identified in the opposed application,” because “a term can be generic for a genus of goods or services if the relevant public...understands the term to refer to a key aspect of that genus....” *Id.*

Even if the Board were inclined to examine the merits at this stage, Alexandria has alleged sufficient facts that, if taken as true, show that Applicant’s Mark is generic for at least a subset of business services that Applicant offers in connection with its cluster model. *See, e.g., In re Northland Aluminum Prods. Inc.*, 777 F.2d 1556, 227 U.S.P.Q. 961, 963-64 (Fed. Cir. 1985) (holding BUNDT generic for “ring cake mix” where BUNDT was a common descriptive name for a type of ring cake). In much the same way “Bundt” is generic for cake mix for use in Bundt pans, even though there are other possible uses of “ring cake mix,” “cluster of clusters” is generic for business support services offered in an area where businesses or entities are grouped together in close physical or virtual proximity, even if those business support services could also be offered in other contexts. As such, the term “cluster of clusters” cannot serve as a source indicator and Applicant must not be allowed to appropriate it through registration.

Importantly, Applicant seeks a monopoly in use of the term “cluster of clusters” (or presumably any confusingly similar variant) in the field of “providing a web hosting platform for customers to participate in business and social networking [and] engage in virtual communities,”

that is, the development of virtual workspace that can be shared by related businesses in a virtual concentration. The Application therefore describes genus or general category of Applicant's anticipated services, as pointed out by Alexandria in the Petition. Pet. ¶ 14. As a result, the Motion is not well founded. *See, e.g., In re Central Sprinkler Co.*, 49 U.S.P.Q.2d 1194, 1199 (T.T.A.B. 1998) (holding ATTIC generic for "automatic sprinklers for fire protection" because even though the product may be in more than one category, the "applicant's goods also fall within the narrower category of sprinklers for fire protection of attics" and therefore "the term 'attic' would be understood by the relevant public as referring to that category of goods.").

C. Alexandria Has Sufficiently Alleged That "Cluster of Clusters" Is Merely Descriptive of Applicant's Services

Alternatively, even if the Board were inclined to decide the genericness issue at this stage, there is still no reasonable doubt that the Petition has sufficiently alleged sufficient facts to state a claim that "cluster of clusters" is descriptive when used in connection with Applicant's services.

To show that registration would be inappropriate on descriptiveness grounds, an opposer need only "allege that the respondent's [Applicant's] mark is merely descriptive" of the identified goods or services listed in the application. *M. Polaner Inc. v. The J.M. Smucker Co.*, 24 U.S.P.Q.2d 1059, 1060 (T.T.A.B. 1992). "It is not necessary that a term describe all of the purposes, functions, characteristics, or features of a product to be considered merely descriptive; it is enough if the term describes one significant function, attribute, or property." Trademark Manual of Examining Procedure § 1209.01(b) ("TMEP") (citing *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 1300, 102 U.S.P.Q.2d 1217, 1219 (Fed. Cir. 2012)). "Similarly, the mark need not describe all the goods and services identified, as long as it merely describes one of them." TMEP § 1209.01(b) (citing *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1173, 71 U.S.P.Q.2d 1370, 1371 (Fed. Cir. 2004)).

Here, Alexandria has alleged, in addition to the specific third party uses of “cluster” and “cluster of clusters” noted above, that the mark simply describes an aspect of the services listed in the Application. In particular, Alexandria has alleged the following:

The term “cluster” is a generic term used to describe a geographic or virtual concentration of related businesses or entities. Pet. ¶ 5.

The term was popularized by Michael Porter in an article titled “The Competitive Advantage of Nations,” published in 1990 in the Harvard Business Review. Attached hereto as Exhibit 1 is a true and correct copy of the online version of that article, available at <https://hbr.org/1990/03/the-competitive-advantage-of-nations>. *Id.* ¶ 6.

The phrase “cluster of clusters” is also used in this context. *Id.* ¶ 7.

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 the phrase “cluster of clusters” to refer to such geographic or virtual locations as may be found in larger metropolitan areas or in virtual systems. Indeed, use of the word “cluster” is widespread throughout the life sciences and biotech industry. *Id.* ¶ 8.

[I]f Applicant’s Mark “CLUSTER OF CLUSTERS” is not found to be generic, registration should be refused because “CLUSTER OF CLUSTERS” is merely descriptive of Applicant’s Services. As such, Applicant’s Mark is not registrable under 15 U.S.C. § 1052(e). *Id.* ¶ 17.

The phrase “cluster of clusters” simply describes a grouping of businesses or services, such as a geographical or virtual grouping of businesses in the same industry. *Id.* ¶ 18.

Upon information and belief and assuming arguendo that acquired distinctiveness could be established in Applicant’s Mark, Applicant has not acquired distinctiveness in the mark “CLUSTER OF CLUSTERS.” *Id.* ¶ 19.

These are the exact types of allegations the Board has determined sufficiently state a claim that a mark is descriptive.

For example, in *American Massage Therapy*, 2017 WL 5624668 at *5, the Board denied a motion to dismiss the descriptiveness claim based on the following allegations:

4. The phrase “trigger point” is commonly understood by the relevant consuming public to refer generically and descriptively to a sensitive part of the body, a type of therapy, or a category of products and services that address “trigger points.”

...

24. Applicant's evidence to support its claim of acquired distinctiveness is insufficient to show that the TRIGGERPOINT mark has acquired distinctiveness and serves as a source identifier for Applicant.

...

70. The phrase “trigger point” describes a sensitive part of the body or a type of massage therapy.

The Board also relied on allegations that “trigger point” was used descriptively by third parties. *Id.* at *6.

Similarly, in *SEO Houston Pros, LLC v. Server Side Design, Inc.*, Canc. No. 92065273, 2017 WL 3726501 at *3 (T.T.A.B. May 25, 2017) (not precedential), a single allegation was sufficient to state a claim for cancellation for descriptiveness: “The registration of the mark SEO HOUSTON should be canceled because the mark is not inherently distinctive and has not acquired distinctiveness.” The same is true here, where Alexandria has alleged far more than that to establish that “cluster of clusters” is descriptive in connection with Applicant’s services and has provided evidence of the generic and descriptive use of the mark by third parties. Pet. ¶¶ 6, 8-15; *see also id.* at Ex. 1-9. Indeed, Alexandria has thus alleged far more than necessary to state a claim.

Again, Applicant raises a straw man when arguing that Alexandria “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....” Motion at 7. Alexandria is not required to provide evidence or arguments at this stage of the proceeding. Moreover, Applicant does not cite any authority holding that allegations akin to the facts pleaded in the Notice of Opposition are insufficient. And Applicant ignores the number of articles that Alexandria *did* file showing the mark used in a descriptive way. These well-pled allegations more than suffice to raise a factual issue as to whether the phrase “cluster of clusters” could ever designate a single source.

V. CONCLUSION

Applicant cannot and should not be allowed to use the trademark registration process to appropriate for itself words that are necessary and appropriate for use by others in a particular industry without signaling a specific source of goods or services. Applicant’s effort to monopolize the term “cluster of clusters,” knowing that those terms are used in the industry was ill-advised at best. Alexandria’s Notice of Opposition presents plausible claims that the term “cluster of clusters” is either generic or, at best, descriptive when used in connection with the applied-for services. The allegations were not conclusory, but rather were supported by substantial factual matter. Accordingly, Applicant’s Motion should be denied. To the extent the Board finds that Alexandria has failed to allege a plausible claim, Alexandria respectfully requests that it be permitted to amend its Notice of Opposition. *See* Fed. R. Civ. P. 15(a) (leave to amend should be freely given).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of **ALEXANDRIA REAL ESTATE EQUITIES, INC.’S MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS** is being served upon counsel for Defendant on this 9th Day of December to the following email addresses:

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