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ESTTA Tracking number: **ESTTA1016545**

Filing date: **11/18/2019**

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

Proceeding	91251539
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Date	11/18/2019
Attachments	Motion to Dismiss - INCLUSIVE INNOVATION - Cl 45 - 91251539.pdf(20087 bytes)

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

In the Matter of Serial Number 88/284,758
Trademark: INCLUSIVE INNOVATION

Alexandria Real Estate Equities, Inc., Opposer, v. Bugsby Property LLC, Applicant.	Opposition No.: 91251539 **APPLICANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

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") moves to dismiss Opposition No. 91251539 filed by Alexandria Real Estate Equities, Inc. ("Opposer") against Applicant's application Serial No. 88/284,758 for the mark INCLUSIVE INNOVATION in Class 45 for failure to state a claim for which relief may be granted.

I. INTRODUCTION

On January 31, 2019, Applicant filed an application to register the INCLUSIVE INNOVATION standard character mark on the Principal Register for "online social networking services" in International Class 45. The INCLUSIVE INNOVATION 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 any inclusive innovation . . . may be

improperly cast into doubt." See Opposer's Notice of Opposition ("Opp.") at 6. Opposer alleged that Applicant's INCLUSIVE INNOVATION mark "does not function as a trademark as defined by 15 U.S.C. § 1127 because it is simply a generic or, at best descriptive, phrase that refers to including persons or entities in the development of new methods, ideas or products, and thus cannot identify and distinguish any services of one entity from those offered by others." Opp. at 4. In the alternative, Opposer alleges that the registration of Applicant's INCLUSIVE INNOVATION 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 support the allegations that Applicant's INCLUSIVE INNOVATION 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 general use of the phrase "inclusive innovation." *See* Opp. at 2 - 4. Such facts show no connection, however, to Applicant's specific online social networking services, nor do they allege how the unique phrase INCLUSIVE INNOVATION is merely descriptive or generic for online social networking 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 INCLUSIVE INNOVATION Mark is Generic for Online Social Networking 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 opposition. Instead, Opposer has merely provided several references to third-party articles which mention or make use of the phrase "inclusive innovation." Opp. at 2-4. Notably, the articles provided by Opposer contain no references to the mark INCLUSIVE INNOVATION being used in connection with providing online social networking services, much less any evidence to support the contention that consumers understand INCLUSIVE INNOVATION 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 INCLUSIVE INNOVATION mark is widely used generically to identify the services specifically identified in Applicant's description of services, which are providing online social networking services. Opposer only alleges that "the phrase 'inclusive innovation' does not function as a trademark as defined by 15 U.S.C. § 1127 because it is "simply a generic or, at best descriptive, phrase that refers to including persons or entities in the development of new methods, ideas or products, and thus cannot identify and distinguish any services of one entity from those offered by others." Opp. at 5. Opposer has not alleged that Applicant's mark, INCLUSIVE INNOVATION, 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 INCLUSIVE INNOVATION 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 well-pleaded factual matter to support its claim that the mark INCLUSIVE INNOVATION is generic. Properly pleaded oppositions 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 "inclusive" as "something that includes a wide array of persons, items or services" as well as a definition of "innovation" as "the development of new ideas, methods or products." Opp. at 2. Opposer then states that "Applicant's Mark, 'INCLUSIVE INNOVATION,' thus has a plain meaning, namely, the development of new ideas, methods or products which are designed to include a wide array of persons, items or services." Opp. at 2. None of these so-called definitions, however, reference or make any connection to Applicant's

specifically identified online social networking services. Opposer also states that a "search of news items from recent years revealed several unrelated third parties using and continuing to use the phrase 'inclusive innovation' to refer to services that cover a broad array of persons, items or services." Opp. at 2. Opposer cites to third-party sources which refer to the phrase "inclusive innovation." Opp. at 2 – 4. These third-party sources, however, do not show use of the phrase INCLUSIVE INNOVATION to identify online social media services. Indeed, Opposer classifies these third-party sources as examples that show "the phrase 'inclusive innovation' is a descriptor used to refer to innovation that includes a group of persons, entities or things." Opp. at 5. Opposer's own definition provides no support for the allegation that Applicant's mark is generic as they lack any reference or connection to the online social networking services Applicant has identified in its description of services. As none of Opposer's evidence demonstrates or even implies that Applicant's mark, INCLUSIVE INNOVATION, is either widely used generically to identify the genus of the services identified in Applicant's application or that consumers primarily understand INCLUSIVE INNOVATION to be the generic name or identifier of or adjective for the genus of Applicant's services, Opposer has failed to allege well-pleaded factual matter to support its claim that the mark INCLUSIVE INNOVATION is generic.

C. Opposer Fails to Plead That Applicant's INCLUSIVE INNOVATION Mark is Merely Descriptive for Online Social Networking Services.

Opposer also fails to plead its alternative claim for merely descriptiveness. 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 plead 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 state a claim that Applicant's INCLUSIVE INNOVATION mark is merely descriptive as Opposer's opposition fails to allege that Applicant's INCLUSIVE INNOVATION mark merely describes the specific services identified in Applicant's application, namely, online social networking services.

Opposer alleges that the registration of Applicant's INCLUSIVE INNOVATION mark should be refused because the INCLUSIVE INNOVATION 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 support its claim that the mark INCLUSIVE INNOVATION merely describes a feature or component of Applicant's online social networking services except for this unsupported legal conclusion. Including a statement that the "phrase 'inclusive innovation' simply describes the development of new ideas, methods or products which are designed to include a wide array of persons, items or services" is not sufficient to allege that Applicant's Mark is merely descriptive to consumers of the online social networking services offered. Opp. at 5. Opposer does not provide any facts to plausibly support a claim that the mark INCLUSIVE INNOVATION is merely descriptive of online social networking services. As such, Opposer has 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 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 18th day of November to the below email addresses:

pto-oc@gibsondunn.com

By: /s/ chris civil
Chris Civil