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Filing date: **11/05/2009**

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

Proceeding	91192102
Party	Defendant Lagina, Martin G.
Correspondence Address	LAGINA, MARTIN G. 121 E FRONT ST STE 200 TRAVERSE CITY, MI 49684-2570 lois@rockmi.com
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Martin G. Lagina
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Signature	/Martin G. Lagina/
Date	11/05/2009
Attachments	Motion to Dismiss.pdf (5 pages)(589096 bytes)

IN THE MATTER OF APPLICATION SERIAL NO. 77617766
PUBLISHED IN THE OFFICIAL GAZETTE ON JUNE 2, 2009

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

PINE RIDGE WINERY, LLC.
OPPOSER,

OPPOSITION NO. 91192102

v.

MARTIN G. LAGINA,
APPLICANT

**MOTION TO DISMISS FOR LACK OF SERVICE AND SUPPORTING
MEMORANDUM OF LAW**

APPLICANT, Martin G. Lagina (“APPLICANT”) hereby respectfully moves the Board pursuant to 37 C.F.R. 2.127 and Fed. R.Civ. 12(b)(5), to dismiss the Notice of Opposition filed by Pine Ridge Winery, LLC (hereinafter, “Opposer”), a company organized under the laws of California, for lack of service.

In support of this Motion, APPLICANT states as follows:

1. The record in the application reveals that the mark ARCUS VINETUM was published for opposition on June 2, 2009, and that the opposition period expired on September 30, 2009 by extension.

2. Pursuant to 37 CFR 2.101(b) and 2.119, the Notice of Opposition must include a proof of service on the APPLICANT, or its attorney or domestic representative of record, at the correspondence address of record in the Office .

3. The Notice of Opposition was filed by Opposer via the Board's Electronic System for Trademark Trials and Appeals (ESTTA), on September 29, 2009, which required that the Opposer check the applicable box on the ESTTA form to indicate that it

had effected service on APPLICANT. The ESTTA would not have allowed Opposer to complete the electronic filing process that resulted in the institution of this proceeding absent the checking of the applicable box on the ESTTA form. *See Springfield, Inc. v. XD 86 USPQ2d 1063 (TTAB 2008).*

4. Opposer, however, failed to *actually* serve a copy of the Notice of Opposition *prior to filing* on APPLICANT. See Declaration of APPLICANT, attached hereto as Exhibit "A." Rather, service was sent by First Class Mail after filing the ESTTA form and was received via First Class Mail by APPLICANT on October 1, 2009. Additionally, APPLICANT received a copy of the Board's Order dated September 29, 2009 via mail on October 6, 2009.

5. It is clear that the Trademark Rules require that the Opposer serve a copy of the Notice of Opposition directly on APPLICANT or its counsel of record *prior* to the filing of its Notice of Opposition –not after. In *Springfield, Schott AG v. L'Wren Scott* 88 USPQ2d 1868 (TTAB 2008), and *In re Sasson Licensing Corp.*, 35 USPQ2d 1510, 1512 (Comm'r 1995), the Board dismissed the Notice of Opposition due to the Opposer's failure to serve the Notice of Opposition prior to filing.

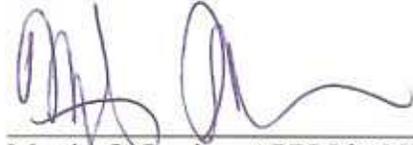
6. Accordingly, in view of *Springfield* and *Schott AG*, the Opposer failed to satisfy the service requirements detailed in the Trademark Rules, the Board should dismiss the instant proceeding.

WHEREFORE, APPLICANT respectfully requests that this opposition proceeding be dismissed and that application serial no. 77617766 should be forwarded for issuance of allowance.

DATED: NOVEMBER 5, 2009

This Motion to Dismiss is hereby executed, dated November 5, 2009.

MARTIN G. LAGINA

A handwritten signature in blue ink, consisting of stylized, cursive letters that appear to read 'M. G. Lagina'. The signature is written above a horizontal line.

Martin G. Lagina, APPLICANT

DECLARATION OF APPLICANT

1. I am Martin G. Lagina, APPLICANT, in connection with Application Serial No. 77617766. I submit this Declaration in support of the attached Motion to Dismiss.
2. On September 29, 2009, I received an electronic notification of the filing of a Notice of Opposition through the ESTTA online system. However, I did not receive a copy of the Notice of Opposition which Opposer was supposed to serve directly on me prior to the September 29, 2009 filing pursuant to Trademark Rule 2.101(b), in any of the ways listed in Trademark Rule 2.119(b).
3. I received a copy of the Notice of Opposition from Opposer via first class mail on October 1, 2009, after the Opposer had completed its September 29, 2009 filing.
4. On October 6, 2009, I received a copy of the September 29, 2009 Order instituting Opposition No. 91192102.

I certify under penalty of perjury under 28 U.S.C. §1746 that the foregoing is true and correct to the best of my knowledge and belief.

November 5, 2009.

MARTIN G. LAGINA



Martin G. Lagina, APPLICANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the attached Motion to Dismiss was served by depositing the same with the U.S. Postal Service, First Class Mail, addressed to the appointed attorney of record for the Opposer PINE RIDGE WINERY, LLC. as follows:

Heather A. Dunn, Esq.
DLA Piper LLP (US)
555 Mission Street, Suite 2400
San Francisco, CA 94105-2933

Attorney for PINE RIDGE WINERY, LLC.

Date of Service: November 5, 2009

MARTIN G. LAGINA



Martin G. Lagina, APPLICANT