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

Proceeding	91188814
Party	Plaintiff Rodney Masri
Correspondence Address	Joseph T Kucala, Jr Norvell IP LLC 1776 Ash Street Northfield, IL 60093 UNITED STATES officeactions@norvellip.com, jkucala@norvellip.com
Submission	Other Motions/Papers
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Date	05/13/2009
Attachments	090513 Opposition to Motion to Dismiss.pdf (4 pages)(16115 bytes)

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

In re Application Serial No. 78/957,993
Filed: August 22, 2006
Mark: ENERGY
Published in the *Official Gazette* (Trademarks) on: October 14, 2008

Rodney Masri,)	
)	
Opposer,)	
)	
v.)	Proceeding No.: 91188814
)	
Martinellie, Inc.,)	
Applicant.)	

MR. MASRI’S OPPOSITION TO APPLICANT’S MOTION TO DISMISS

RODNEY MASRI (“Mr. Masri”), by his attorneys, files this Opposition to the Motion to Dsdismiss filed by Applicant, Martinellie, Inc. (“Applicant”).

On February 11, 2009, Mr. Masri filed a Notice of Opposition against the U.S. Application for the mark ENERGY owned by Applicant. On April 26, 2009, Applicant filed a Motion to Dismiss concurrently with its Answer. The Motion to Dismiss consists of a single sentence, which states “The Applicant, MARTINELLIE, INC. (“Martinellie”), moves the Trademark Trial and Appeal Board as follows: 1. To dismiss the action because the complaint fails to state a claim against Applicant upon which relief can be granted.” The Motion to Dismiss lacks any facts or legal arguments supporting its position, and should be denied on this basis alone.

Under Section 503.02 of the TBMP, all of Mr. Masri's allegations must be accepted as true, and the Notice of Opposition must be construed in the light most favorable to Mr. Masri. TBMP Section 503.02. Moreover, a Motion under Rule 12(b)(6) only challenges the legal theory of the Notice of Opposition and does not consider the sufficiency of the evidence.

“In order to withstand such a motion, a pleading need only allege such facts as would, if proved, establish that the plaintiff is entitled to the relief sought, that is, that (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists for denying the registration sought.” TMBP Section 503.02. The allegations are to be construed liberally. *See Fair Indigo LLC v. Style Consience*, 85 U.S.P.Q.2d 1536, 1538 (T.T.A.B. 2007) (denying motion to dismiss for opposition). The Notice of Opposition filed by Mr. Masri satisfies both prongs because he has alleged standing (See Para. 19 of the Notice of Opposition) and sought to deny registration based upon the lack of a bona fide intent to use the mark (See Paras. 16-18 of the Notice of Opposition). In responding to the Motion to Dismiss, Mr. Masri need not submit proofs in support of his pleading. *See* TBMP Section 503.02; *Fair Indigo*, 85 U.S.P.Q.2d at 1539. Construing the Notice of Opposition in the light most favorable to Mr. Masri, the allegations in the Notice of Opposition are properly plead and there is no basis for dismissal.

As a result, Mr. Masri respectfully requests that Applicant's Motion to Dismiss be denied, and the proceedings resumed.

Respectfully submitted,

RODNEY MASRI

Dated: May 13, 2009

By: /Joseph T. Kucala, Jr./
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MR. MASRI'S
OPPOSITION TO APPLICANT'S MOTION TO DISMISS has been served upon
Martinellie, Inc. via United States first class mail, postage prepaid, addressed to:

Martin Mendoza
Martinellie, Inc.
202 Paint Way
Patterson, CA 95363

This 13th day of May 2009.

/Joseph T. Kucala, Jr./
Joseph T. Kucala, Jr.