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

WALTERS GARDENS, INC.,
Opposer,

vs.

OPPOSITION NO. 91153755

PRIDE OF PLACE PLANTS, INC.,
Applicant.

DEPOSITION OF:

August 30, 2004
1992 96th Avenue
Zeeland, Michigan

JOHN DALE WALTERS

Appearances - BARRY C. KANE, P-45851
Attorney for Opposer

LAUREN E. SCHNEIDER, ESQ.
Attorney for Applicant

Recorded By - NETWORK REPORTING CORPORATION
Sandra Corsiglia, CER-3454

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I N D E X

PAGE

Direct Examination by Mr. Kane 3

E X H I B I T I N D E X

PAGE

Deposition Exhibit 1 marked 12
(Wayside Gardens-The Complete Garden Catalog
for Spring Planting 2001)

Deposition Exhibit 2 marked 15
(1-5-01 "Polish Clematis Tentative Clematis
order for December 2001 from Szczepan Marczyński)

Deposition Exhibit 3 marked 18
(5-10-02 E-mail from Mark Vander Wal to John D.
Walters re: "Fw: Clemati 'Piilu' and my visit to
US")

Deposition Exhibit 4 marked 22
(3-16-02 E-mail from Pride of Place Plants
rsorenson@pacificcoast.net to John D. Walters
re: "Pride of Place Plants Ad-copy)

1 (Deposition scheduled to start at 9:00 a.m.;

2 actual start time was 11:50 a.m.)

3 MR. KANE: Good morning, John.

4 MR. WALTERS: Good morning.

5

6 J O H N D A L E W A L T E R S, having been called as

7 a witness on behalf of the Opposer, and having

8 been first duly sworn, testified as follows:

9

10 DIRECT EXAMINATION BY MR. KANE:

11 Q John, could you state your full name for the record,

12 please?

13 A John Dale Walters, D A L E, and then Walters,

14 W A L T E R S.

15 Q And are you a resident of Holland, Michigan?

16 A Actually Zeeland, Michigan, is my mailing address.

17 Q John, what is your current occupation?

18 A I consider myself to be a nursery person or a nurseryman,

19 growing perennial plants actually.

20 Q So perennial plants would be a specialty?

21 A Absolutely.

22 Q Are you currently employed?

23 A Yes, I am, here at Walters Gardens. And I've been here all

24 my life. I don't think I've ever had any other job besides

25 this, so I grew -- I started when I was real young and I'm

1 still here.

2 Q Family tradition?

3 A Yes; family business.

4 Q So a long time. Can you translate it into actual years for
5 me, please?

6 A Well, actually it would be -- it'll be 30 years since I
7 graduated from college. I graduated from college in May of
8 '74, and so this will be -- since it's 2004, it'll be 30
9 years.

10 Q Where did you go to school?

11 A Calvin College, Grand Rapids. And I graduated with a
12 business major. And my horticulture experience I got on
13 the job.

14 Q Who started the business?

15 A If you go back far enough, it might be -- my grandmother on
16 my father's side which -- initially started in it, and then
17 my father came in as a hired hand, married my mother and
18 took over the business at some point and then began growing
19 perennials quite extensively.

20 Q What is your current position with Walters Gardens?

21 A I'm the chief executive officer and chairman of the board.

22 Q John, I don't think you've ever told me this before. I
23 just sort of assumed you were high up on the list.

24 A Not too big into titles here, I guess.

25 Q No, you're not. Okay. As the -- as the chief executive

1 officer and chairman of the board, are you often involved
2 in new business deals, contracts?

3 A Yes, I am. Yes; uh-huh. Different -- business deals as
4 well as searching the world for new plants as well.

5 Q Uh-huh (affirmative).

6 A I share that responsibility with my sister Mary and others
7 as well, but that's one of my roles that I play and it's a
8 pretty major role that I play.

9 Q Okay. I notice that Walters Gardens does carry a wide
10 variety of plants, --

11 A Yes.

12 Q -- one genus of which is Clematis?

13 A Yes.

14 Q Okay. How long has Walters Gardens been carrying Clematis,
15 approximately?

16 A That's a good question. I'm sure it's been longer than
17 I've been here, so it's been 30-plus years. I'd say
18 probably -- could be 40 years, and that's a pretty close
19 guesstimate on my part.

20 Q Okay. As part of the business, do you act -- you said you
21 actually search for plants -- new or novel plants to add to
22 your nursery line?

23 A Yes.

24 Q Have you participated in searching out new plants in the
25 Clematis line?

1 A Absolutely. In fact, that's probably something that I've
2 done with my associate, Mark Vander Wal, in working with
3 some of the people. I just want to backtrack a little bit.
4 I think our -- our interest in the Clematis business -- we
5 used to buy from Arthur H. Steffen out of Fairport, New
6 York. And then we moved on and we changed suppliers. And
7 Steffen since went out of business. We bought from Spring
8 Valley Greenhouses for a few years and then most recently a
9 few years back we switched our purchasing to the Clematis
10 Container Nursery, Szczepan Marczynski, out of Poland,
11 close by Warsaw, from what I understand. I've got it on my
12 docket to visit him sometime, but I just haven't made it
13 there yet.

14 Q Arthur H. Steffen, is it S T E F F E N?

15 A Yes. I think they're no longer in business. I'm quite
16 confident of that.

17 Q But the name sounds familiar to me. Were they a well
18 known --

19 A Yes.

20 Q -- Clematis grower?

21 A Yes. We've never really grown Clematis ourselves. We've
22 always out-sourced them, bought them from suppliers. In
23 fact, we've even had a Dutch source we bought from this
24 past year as well.

25 Q And did you say that you've also purchased material from

1 Spring Valley Greenhouse?

2 A Yes, we did. In fact, we still do. We still have a line
3 in our catalog that gets drop-shipped directly from Spring
4 Valley Greenhouses out of -- I'm not sure of the city in
5 New York -- I can't remember -- but close by Fairport, if I
6 remember right.

7 Q So if an order comes in, then, to Walters Gardens, for a
8 particular variety of Clematis that Spring Valley
9 Greenhouses carries, you just zip the order to them and
10 they ship it directly?

11 A Yes. Well, let me explain a little bit further. We did a
12 little shift in our thinking a few years back, and we --
13 Spring Valley and Steffen always grew it in a -- like a
14 2-1/2 inch pot or plug. And we went with this Clematis
15 Container Nursery out of Poland. We went to more of a bare
16 root stock. And so we left in our catalog yet the
17 opportunity for a customer to buy some of these plugs yet
18 with a limited -- a variety offering. And these get
19 drop-shipped directly from Spring Valley Nurseries.

20 MR. KANE: Lauren, I should have said a predicate here
21 to the testimony -- is that the information that Mr.
22 Walters is going to provide is going to be detailed --
23 somewhat detailed of the business and so it's going to fall
24 under the protective order that we have. So we're going to
25 ask that this information from the very beginning of this

1 tape not be shared with Mr. Sorenson, your client.

2 MS. SCHNEIDER: (Nodding head in affirmative)

3 MR. KANE: Thanks. Would you mind, Sandra, placing at
4 the top of the transcript "confidential subject to
5 protective order"? If you could mark each page, I'd
6 appreciate it.

7 COURT REPORTER: Sure.

8 MR. KANE: I should have addressed that first. Now
9 you're going to get this reminder halfway through the tape.

10 Q Okay. So you're still apparently buying product from
11 Spring Valley Greenhouses or having actually product
12 shipped to your customers?

13 A Yes.

14 Q You mentioned -- is it Szczepan Marczyński?

15 A Yes.

16 Q And M A R Z Y N S K I (sic)?

17 A Something close to that, yes.

18 Q Okay. And you indicated he's a Polish grower?

19 A That is correct; yes.

20 Q And when did you -- when were you first contacted by
21 Szczepan Marczyński?

22 A Well, in just general terms?

23 Q Yes.

24 A Oh, boy, it goes back a number of years. We tried some of
25 them a number of years back, and we weren't quite satisfied

1 with them. And then finally we made a move -- I think it
2 was about three years ago. I think it was the fall of --
3 fall of 2000/spring of 2001, or it was the fall of 200- --
4 I think it -- I think it was the fall of 2000/spring of
5 2001. I'm within a year, I'm sure -- that we started -- we
6 switched our entire order over to him -- or just about our
7 entire order of what got shipped here. And we started --
8 we started bringing plants in and shipping them directly to
9 our customers.

10 Q Okay.

11 A You'll find more information about them in our catalog,
12 just for information.

13 Q The growers listed in the catalog?

14 A Yeah.

15 Q Okay. Do you -- of course, this whole deposition is
16 surrounding the availability or ability of another to use
17 'Piilu' --

18 A Uh-huh (affirmative).

19 Q -- as a trademark. And that's why you're here. Do you
20 remember when you were -- first encountered 'Piilu'?

21 A Well, that's a good question. To the best of my
22 recollection, I remember that Szczepan offered it to us
23 back in December or early January of -- December 2000/early
24 January of 2001. And at that time I was kind of interested
25 in the variety, because I checked on Wayside Gardens

1 catalog. Now, Wayside is a mail order catalog. And I
2 can't remember exactly how many catalogs they send out.
3 But Wayside has always been known for being kind of
4 innovative in the nursery industry. I'm going to turn this
5 off a second. I apologize. And they have quite a customer
6 base -- a retail customer base. And it's always good that
7 if -- if Wayside lists something, chances are people
8 recognize it or have built a recognition within the -- not
9 only the perennial industry but also within the general
10 population.

11 MS. SCHNEIDER: Objection. That's lack of personal
12 knowledge.

13 MR. KANE: It's an opinion.

14 Q Is that your opinion?

15 A I think it's a very good opinion, but that's my opinion,
16 yes.

17 Q Okay.

18 A I think others would substantiate that as well.

19 Q So what did you find in the Wayside Gardens catalog?

20 A I found 'Piilu' being listed there, and I saw a picture of
21 it. And it looked pretty attractive to me.

22 MS. SCHNEIDER: Objection. That's hearsay.

23 Q You can continue.

24 A Well, I looked it up in the catalog. And I saw it there.

25 I saw it listed and I saw the picture of it. And it looked

1 pretty attractive to me. I also went on Roseville Farms'
2 website back at that day, and I saw it pictured there as
3 well. And it had some information about it. At that
4 time --

5 MS. SCHNEIDER: Objection. That's also hearsay.

6 MR.,KANE: There's no question being offered here.

7 Q That's okay.

8 A That I can't -- that I can't substantiate, although I could
9 refer back to the Wayside catalog and show that to you,
10 'cause we would have that information available. And I did
11 notice that they were offering it, and there was no
12 indication at that point of any protection or any
13 protective rights being claimed about the plant on either
14 website -- in either the website or in the Wayside catalog.

15 MR. KANE: I'm going to have this marked as John
16 Walters 1, if we can, if we're not going to confuse
17 matters. These are all going to be re-numbered. I've lost
18 my sequence of the exhibits in the last deposition, so I
19 don't know whether I was starting at 30 or 40. So rather
20 than go through all of that nightmare, we'll just start
21 with each witness. And Lauren can expect that there will
22 be a parenthetical behind each new exhibit number that will
23 say "formerly Walters' 1" or whatever. And I need to have
24 it marked first, and then I'm going to give it to Lauren to
25 take a look at. And that's a photocopy.

1 (Deposition Exhibit 1 marked)

2 Q You mentioned the Wayside -- while she's doing that, you
3 mentioned the Wayside Gardens catalog as something you've
4 referenced.

5 MS. SCHNEIDER: I'm going to object to hearsay for
6 this one.

7 Q Do you know when their catalogs typically come out?

8 A Back when that catalog was issued the catalogs were
9 typically dropped in the mail sometime mid to late
10 December. So that catalog should have been mailed -- if
11 that would have been the Spring 2001 catalog, that catalog
12 should have been mailed in December of 2000.

13 Q Okay. I presented to you here -- before you what's been
14 marked as Deposition Exhibit 1 from J. Walters. And this
15 is a photocopy. Do you recognize the exhibit?

16 A Yes, I do. In fact, I think originally I either gave you
17 this catalog 'cause I had a copy or Clarence gave it to
18 you, because I'd given my copy to him or something like
19 that.

20 Q Okay. And I see that you've immediately flipped to a page
21 which is marked "WG0024" of this exhibit. Why did you flip
22 to that page?

23 A Well, this is where the 'Piilu' is pictured as well as the
24 descriptive information.

25 MS. SCHNEIDER: Objection. Hearsay.

1 Q So this is the -- this is where you saw it in the catalog?

2 A Yes.

3 Q And then did this -- the fact that it was listed in the
4 Wayside Gardens catalog spark some interest for you?

5 A Yes, it did, because, once again -- once again, it would be
6 a relatively new cultivar, even though it's been around for
7 a few years and especially in Western Europe. But it would
8 be new -- and it also has some introduction already into
9 the American market by -- among a number of home nursery
10 people or home gardeners, you know, who would -- who would
11 probably be able to recognize that plant when they saw it
12 in a garden center someplace.

13 Q So let's get back to Mr. Marczyński, 'cause he's in Poland.
14 And Wayside Gardens in -- it looks like in the January of
15 2001 is already offering this plant for sale?

16 A Yes.

17 Q Did Mr. Marczyński offer Walters Gardens the same variety
18 of plant?

19 A To the best of my knowledge, yes, it was the same variety.
20 It's been -- from our understanding this plant -- this
21 cultivar has been available in Western Europe, say,
22 beginning about the mid 1990's, although I understand it
23 was probably hybridized in Estonia somewhere around 1984.

24 Q Okay. Now, how do you know that it's been available from
25 Europe? Do you receive solicitations?

1 A Yes, I do. In fact, I got a catalog recently from one of
2 my colleagues out of Boskoop, the Netherlands, Nico
3 Rijnbeek & Son, who listed -- and you don't have that in
4 your information, I'm afraid. I just got that within the
5 last month. And he is -- he's got a -- he's got a catalog,
6 which is an export catalog, and he's offering that in his
7 catalog as well, the Clematis 'Piilu' variety.

8 MS. SCHNEIDER: Objection. It's hearsay.

9 Q Okay. You mentioned -- this Boskoop, where is Boskoop?

10 A Boskoop is a city in the Netherlands. It's well known for
11 being a center for horticultural production as well as
12 others.

13 Q And what was the name of the -- of the provider?

14 A Nico Rijnbeek & Son. Rijnbeek would be R I J N B E E K.

15 Q Okay. Are you familiar with a nursery by the name of J.
16 vanJoest, Joest (pronouncing) or Joest?

17 A I've heard of the name. I have not had any dealings with
18 them.

19 Q What was the name of Mr. Marczynski's business, again?

20 A The Clematis Container Nursery. And I think he's
21 somewheres outside of Warsaw. I can't say how many
22 kilometers. I'm not sure.

23 Q Did he ever provide you with a formal quote?

24 A Yes, he did.

25 MR. KANE: I'm going to have marked for identification

1 purposes Deposition Exhibit Number 2, Walters Gardens --
2 John Walters. Excuse me.

3 (Deposition Exhibit 2 marked)

4 A I think this is our internal document that we sent to him.
5 You can see --

6 Q We're going to get to that in a minute, John. John, I'm
7 going to present before you here what's been marked as
8 Deposition Exhibit Number 2. And you began to comment as
9 to the origin of this text. Can you -- would you continue,
10 just so we're clear here on the record?

11 A I think what happened was -- was that he offered us these
12 varieties. And these were the ones that we picked out for
13 that particular year. It's says "tentative" --

14 MS. SCHNEIDER: Objection. This hasn't been
15 authenticated and it is hearsay.

16 A May I continue or --

17 Q Yeah, I guess -- let me ask this question: Have you seen
18 this document before?

19 A Have I?

20 Q Yes.

21 A Yes, I have.

22 Q And in what capacity did you see -- where did this document
23 come from?

24 A Well, this was generated internally here by my associate,
25 Mark Vander Wal, whose function is to -- is to Polish --

1 "is to Polish" -- is to purchase -- is to purchase these
2 plants as well as coordinate the shipping and delivery of
3 them.

4 Q Do you work closely with Mr. Vander Wal?

5 A Very closely, yes.

6 Q Daily basis?

7 A He's a direct report, yes.

8 Q And he's in the same office as you?

9 A That is correct.

10 Q Okay. Within a shouting distance?

11 A Yes.

12 Q Paper airplane distance?

13 A Yes.

14 Q Very close?

15 A Right.

16 Q Okay. This document is dated what date?

17 A January 5, 2001.

18 Q Okay. It looks like it also has some fax information at
19 the top?

20 A Yes.

21 Q And the dates on there are also --

22 A Yes.

23 Q -- about the same time?

24 A One looks like it's January 1. It came from Poland itself.

25 And this looks like -- I know -- I can't explain exactly,

1 but I think that those guys faxed something back and forth.

2 MS. SCHNEIDER: I'd just like to continue the hearsay
3 objection.

4 MR. KANE: Yeah. That's okay.

5 Q And on this --

6 A It looks like we put some numbers down. You can see here,
7 too, kind of a European style. He kind of revised some of
8 the numbers. So there's a little bit of --

9 Q But there appear to be three columns? And the first column
10 is -- on the left-hand side is "variety"?

11 A Yes.

12 Q Then there are some dates?

13 A Right. Those are delivery dates.

14 Q Delivery dates. Okay. And it says one is December 200- --

15 MS. SCHNEIDER: Objection. It's leading.

16 Q -- and the other one is --

17 MR. KANE: I'm just highlighting these columns here,
18 'cause the document's going to speak for itself.

19 Q Was the variety 'Piilu' part of these discussions with Mr.
20 Marczynski?

21 A Yes, it was; uh-huh.

22 MS. SCHNEIDER: Objection. That's hearsay as well.

23 Q And is that variety listed on this document?

24 A Yes, it is.

25 Q Okay. And you were -- how many -- how many plants were you

1 thinking about purchasing from Mr. Marczynski?

2 A Not a real big number. I think -- I think here we had
3 talked about maybe shooting for about 1500 of these
4 tentatively. But I think part of that was -- and this is
5 speculative, of course. I think part of that was a supply
6 problem, too, that we could only obtain a certain smaller
7 number at this stage of the game.

8 Q Okay.

9 A I think I have some correspondence that I gave to you, too,
10 that was from -- concerning this cultivar.

11 Q This is --

12 A Yes. In which -- no, this is --

13 Q Let me review this first before we do this.

14 A Okay.

15 (Counsel reviews document)

16 MR. KANE: Okay. Let's mark this as Deposition
17 Exhibit Number 3.

18 (Deposition Exhibit 3 marked)

19 MS. SCHNEIDER: I object to that as hearsay.

20 Q John, I'm going to present to you what's been marked as
21 Deposition Exhibit Number 3. Do you recognize this
22 document?

23 A Yes, I do.

24 Q What is it?

25 A Well, basically -- basically what happened is -- is that

1 after we had began our plans to purchase plants in we ran
2 across the website of Rick Sorenson Pride of Place Plants
3 indicating proprietary rights on his website. I had not
4 seen this in the Wayside Gardens catalog or even on --
5 initially on the Roseville website. And after that we got
6 back to Szczepan and said -- I had Mark do this. And Mark
7 indicated to him -- and it doesn't necessarily say that
8 here, but he says, "We'd better hold off on 'Piilu' because
9 we're not sure exactly where we stand legally and maybe
10 this is an issue for the US Patent and Trademark Office."

11 Q Okay. This is a communication from who?

12 A From -- this is from Szczepan Marczyński.

13 Q And it's addressed to?

14 A Mark Vander Wal.

15 Q And who else?

16 A Oh, as -- as well as myself and my sister Mary.

17 Q Okay.

18 A Well, Mark is actually forwarding that response on to me,
19 is what's happening.

20 Q He's forwarded it to you?

21 A Yes; that is correct. This is from Szczepan Marczyński to
22 Mark Vander Wal, my associate.

23 Q Okay. I'll have to get --

24 A Mark might have the original yet.

25 Q I'll have to -- I'm going to have to get Mr. Vander Wal.

1 I'll have to plan that for another day.

2 A Sorry about that, but that's the way it is.

3 Q I was under the impression that this was copied to you, but
4 it happens to be from Mark Vander Wal.

5 A Mark forwarded it on to me, yes.

6 Q All right. We'll leave that where it is. Nonetheless,
7 there was a -- there had -- you had become aware that there
8 was a controversy surrounding the name 'Piilu'?

9 A Yes. I was not aware of it up until we -- we stumbled
10 across it on Rick's website -- Rick Sorenson's website.

11 Q Okay. And this is -- we've already had this already. But
12 you went to New Eden -- New Eden Pride of Place Plants
13 website?

14 A Yes; yes, we did. Yes.

15 Q Okay. And did that website indicate that Mr. Sorenson was
16 claiming proprietary rights in the term 'Piilu'?

17 A Well, that's a good question. We were confused by it
18 somewhat. And I began some correspondence with Mr.
19 Sorenson. Because what confused me a little bit was we
20 had -- we assumed that 'Piilu' was a cultivar name. And we
21 assumed that typically because of a couple reasons, first
22 of all --

23 Q If you'd give those to us, yeah.

24 A -- first of all, because of how we had seen it presented in
25 literature, both in the Wayside Gardens and plus some

1 literature that came out of Western Europe, because they've
2 been offering it there since approximately 1996. Also the
3 fact is that we knew that in the year 2000 it was
4 registered with the International Recognized Registrar, the
5 Royal Horticultural Society and it had -- it became a
6 registered cultivar on their listing back in 2000.

7 MS. SCHNEIDER: Objection. This is -- this is
8 hearsay.

9 A And all the presentation that we saw indicated that -- in
10 my estimation at least, would be that it was presented to
11 us as a cultivar name of this particular Clematis cultivar.

12 Q Okay. And so you contacted Mr. Sorenson?

13 A Yes.

14 Q And what was the nature of your first -- did you initiate
15 the contact?

16 A I did, yes, by e-mail; uh-huh.

17 Q And what was the point that you raised?

18 A I might have had a phone conversation with him.

19 MS. SCHNEIDER: Objection. That's hearsay as well.

20 A Okay. Well, we had a little bit correspondence back and
21 forth. When I initially questioned him, I says, "I'm a
22 little bit confused here. Are we talking about the same
23 plant as what I've seen presented in literature? You know,
24 I see 'Piilu' being trademark name when I assumed that
25 'Piilu' was a cultivar name and I also see now 'Kivso'

1 being indicated with p.p.a.f. as a cultivar name." And I
2 said, "I'm confused by what's proper here or what's going
3 on." And at that point he indicated to me what he was
4 trying to do --

5 Q Okay.

6 A -- or he indicated to me the proper way of presenting it.

7 Q His way?

8 A His way of presenting it.

9 Q His way of presenting it.

10 A Thank you.

11 Q Did he respond to you?

12 A Yes, he did. We disagreed, but he responded.

13 MR. KANE: I'm going to have marked for identification
14 purposes -- what are we at? -- John Walters 4? This is an
15 e-mail from Rick Sorenson to John Walters.

16 (Deposition Exhibit 4 marked)

17 MS. SCHNEIDER: I object on hearsay grounds as well.

18 MR. KANE: That's all right.

19 Q Mr. Walters, I've presented to you what's been marked as
20 Deposition Exhibit Number 4 John Walters. Can you -- you
21 have seen this document before?

22 A Yes, I have.

23 Q Okay. And just -- what does this document represent?

24 A Well, it represents myself questioning Rick in terms of the
25 proper usage of the name that we're in discussion about,

1 'Piilu' -- 'Piilu.'

2 Q Okay. So it's in the form of an e-mail --

3 A Yes.

4 Q -- printout?

5 A Uh-huh (affirmative).

6 Q Okay. And apparently there was a -- it's addressed -- it's
7 from Pride of Place Plants, and in parentheses it says
8 "rsorenson@pacificcoast.net; is that correct?

9 A Yes.

10 Q And it's dated September --

11 A March 16, 2002.

12 Q March. Exactly.

13 A That's his response to my comment, which is below it. So
14 I've got also one here dated March 16, 2002.

15 Q Okay. And he -- I'm going to quote here from this. And
16 you can read it with me and see if I'm doing this right.
17 Actually, why don't I have you read it? It's the third
18 sentence of the -- of the e-mail. And the subject of this
19 is which plant, first off?

20 A Well, I don't know.

21 MS. SCHNEIDER: Object again. Hearsay.

22 MR. KANE: That's okay. You can -- we'll just renew
23 your objections for this discussion.

24 MS. SCHNEIDER: Okay.

25 A I'm not sure what plant he's referring to here. I was

1 referring to the plant Clematis -- the cultivar name,
2 Clematis 'Piilu' -- 'Piilu' (pronouncing). And I think
3 he's referring to it when he says -- he's referring to a
4 plant by the name of 'Kivso'. And I'm not sure if that's
5 the same plant or not the same plant, although he does
6 indicate behind it that's "'Kivso' p.p.a.f." and a 'Piilu'
7 or 'Piilu' (pronouncing) trademark behind it.

8 Q Okay. And he says he's -- he's -- is he introducing this
9 to you or recognizing -- what's he -- what's the -- -- why
10 is he writing back?

11 A I think he's responding to my question and also he is --
12 once again, this may be a little bit speculative, but I
13 think he's also assuming that I have some interest in this
14 plant and that I might want to work with him in terms of
15 becoming licensed -- not necessarily a propagator but a
16 licensed seller. That's a possibility.

17 Q And that assumption -- if you look at the third sentence, I
18 mean, does that -- can you read that out loud for us,
19 please?

20 A "The accolades and awards presented to this cultivar
21 continue to mount and I think Clematis 'Kivso'
22 p.p.a.f. and 'Piilu'" -- trademark -- "TM will become
23 the standard for others to follow."

24 Q And he's referring to it as a cultivar; correct? I mean,
25 he does use the term "cultivar" there?

1 A He does use the term "cultivar," yes.

2 Q And that's the standard spelling. It's not misspelled?

3 A That's correct.

4 Q Okay.

5 MR. KANE: I don't have any further questions as --
6 this one we will submit, and it'll stand for it -- on it's
7 own, subject to Ms. Schneider's objections.

8 Q The dealings with -- your dealings with -- in the 'Piilu'
9 matter -- or 'Piilu' (pronouncing) matter are not unusual
10 for you, are they, John? You deal with -- do you deal with
11 growers from all over the world?

12 A That is correct, yes. We're in a very global society, and
13 nowadays we out-sourcing plants from all over the world,
14 not only finding plants but also purchasing plants from
15 basically every temperate part of the world we can think
16 of.

17 Q Uh-huh (affirmative). And how often do you see -- strike
18 that. Of the plants that you have -- have responsibility
19 for and working with, would you characterize the percentage
20 of them that are -- that are claiming trademark status?

21 A Well, I think there's more and more taking place all the
22 time. I think that -- I think that -- you know, what we're
23 trying to ferret out here or trying to make sure that we
24 understand is that -- what's proper and what's normal. You
25 know, I think it's -- you know, from a plant protection

1 viewpoint, from a US plant patent, I think the one has one
2 year from the date of disclosure. Now define "disclosure"
3 for me. You know, then that's maybe just a little bit
4 ambiguous. But there's one year from the -- from when a
5 plant is first offered there's one year that one has the
6 opportunity to apply for a US plant patent. Now, in the
7 case of a trademark, I think that's a little different.
8 You know, trademarks are being used in the plant industry,
9 and it usually refers to something that's not currently
10 being used as a cultivar name. I think that's quite -- I
11 think that's quite straightforward when it comes to the
12 rules and regulations from the US Patent and Trademark
13 Office, too.

14 Q Do you resell plants that are trademarked --

15 A Yes, we do.

16 Q -- by the -- by the -- and the trademark rights are being
17 claimed by who? By people that supply the plants to you?

18 A Yes; that's correct.

19 Q Okay. And when those plants are identified in your
20 catalog, are they -- are they identified by the trademark
21 name?

22 A That's correct; yes.

23 MS. SCHNEIDER: Objection. That's hearsay.

24 Q At least they are in your catalog?

25 A Yes. There's a copy right there. I can point you to one,

1 if you want me to.

2 Q Yeah. This was a -- this was introduced earlier as Falstad
3 Exhibit Number 2. And it's -- we're on the record here of
4 what the document consists of.

5 A There's a Caryopteris we're doing from Spring Meadows --
6 not Spring Valley, Spring Meadows. And you can see it's
7 listed here as "Caryopteris Sunshine Blue, TM" without any
8 quote marks. They're just plain. And in parentheses it
9 says "'Jason,'" which is p.p.a.f. That refers to actually
10 the cultivar name.

11 MS. SCHNEIDER: Objection. That's hearsay.

12 Q And 'Jason' is in single quotes?

13 A Yes.

14 Q Okay. But when -- if someone wanted to order this plant
15 from you, how would they refer to this plant?

16 A As Sunshine Blue.

17 Q So when you see Sunshine Blue, even though it's a
18 trademark, it really is identifying a very specific plant;
19 is that correct?

20 A Yes, that's correct.

21 Q It is the name that's being used for that plant?

22 A That's correct.

23 Q Just like you're John Walters?

24 A Yes.

25 Q John Dale Walters?

1 A Yes.

2 Q John, does Walters Gardens sell the 'Piilu' variety of
3 Clematis?

4 A No, we do not. It was my intention to offer it
5 beginning -- I think -- I'd have to double-check. It could
6 have been spring of 2002. And after we found out that Rick
7 had claims to certain proprietary rights, we decided not to
8 do it until we could ferret out the information.

9 Q Okay. And Walters Gardens is the opposer in this case?

10 A That's correct.

11 Q And why was -- why was there a decision made for Walters
12 Gardens to oppose the application?

13 A Well, we probably never are going to recover the amount of
14 money we've spent in opposing this, but the key behind it
15 was with -- was from our point of view there were two
16 things. First of all -- first of all, we were convinced
17 that 'Piilu' was a cultivar name and not a trademark name.
18 That was one of the reasons. And, secondly, we're looking
19 at it from a broader scope within the industry and even in
20 a global setting, as we wanted -- we also wanted to make
21 sure that -- that we -- that our industry was on a path
22 that would continue to make things as clear and as
23 simple -- or not simple as possible, but as understanding
24 as possible within the horticulture industry. I think it's
25 very unfortunate to have a plant offered as a cultivar name

1 in one part of the world or even in the United States and
2 then later have it show up as a trademark name. We think
3 that's somewhat questionable practice. But, once again,
4 the ultimate determinee is -- would be the US Patent and
5 Trademark Office.

6 Q But you did mention that the horticulture industry is no
7 longer just limited to the United States?

8 A Absolutely not.

9 Q I mean, it's, you mentioned, specifically international in
10 scope?

11 A Yes. We're convinced of that. There's absolutely no
12 question.

13 Q And it's evident you order plants from outside this
14 country?

15 A Right. We get plants from -- we get plants out of New
16 Zealand, out of the Netherlands, out of India, out of
17 Thailand. We're adding to the country list almost every --
18 every few years.

19 Q Do you also export plants outside this country?

20 A We do, but it's a very limited amount. We focus on our --
21 on our operations within the US and Canada.

22 Q John, with respect to Walters Gardens, who is your customer
23 in a general sense? How would you -- what would you --
24 what's the demographics, if you can characterize it as
25 such?

1 A Okay. Our customer base is going to be primarily the
2 independent garden center that we sell to, plus mail order
3 catalogs, such as Wayside Gardens and others.

4 Q So it's the retail -- the retail side?

5 A Well, we're selling to -- more or less to wholesalers who
6 would get our product and then sell to the retail people or
7 would sell to the mail order people, who then send our
8 product directly to their retail customers.

9 Q Okay. And based on the correspondence you're getting --
10 that you had with Rick Sorenson, too, I mean, I'd like to
11 ask the corollary question. Were you -- it appears quite
12 clear from the correspondence that you were to be the
13 customer for Pride of Place Plants?

14 MS. SCHNEIDER: Objection. Hearsay.

15 MR. KANE: It's his opinion.

16 Q Were you -- Rick Sorenson was soliciting you to buy plants
17 from him?

18 A I would probably -- that's a good question. We never got
19 to that point. We probably could be able to buy plants
20 from whoever as long as we were a licensed seller in the
21 US. I mean, once we got our license, he probably would
22 allow -- once again, I'm not sure. He would probably allow
23 us to buy it from whoever we wanted to in order to sell the
24 plants, 'cause he himself is not a grower per se. He has
25 licensed growers. So we'd have to buy from someone else.

1 But we would -- and then -- he offered that to me like -- I
2 think once upon a time he talked about 75 cents royalties
3 based on plants sold, that we'd be able to sell plants to
4 our customers as long as we paid a royalty on it.

5 Q So Rick Sorenson and Pride of Place Plants is not a -- is
6 not producing product?

7 A I better -- I better be careful. I'm not sure.

8 MS. SCHNEIDER: Objection. Lack of personal
9 knowledge.

10 Q You don't know?

11 A I'm not sure.

12 Q That's a good point. If he's not doing it -- we'll have to
13 find that out. Who here would know if Rick Sorenson was
14 providing plant material?

15 A I'm not sure if I can answer that question.

16 Q John, are you a member of any societies or organizations?

17 A Well -- personally --

18 Q Yes.

19 A -- or as corporate -- as corporately?

20 Q Personally, first.

21 A I guess -- personally I'm a member -- I'm a personal member
22 of the American Hosta Society like Clarence is. And that's
23 really the only professional society I'm aware -- I'm a
24 member of. I do attend -- I do attend -- will be attending
25 the International Plant Propagators Society meeting in

1 September. And we are -- as a company we are members of --

2 Q Is that -- is that contained in your catalog?

3 A Yes, it is, someplace.

4 Q Do you know a gentleman by the name of Maurice Horn?

5 A No, I do not. I'm not familiar with him.

6 Q Are you familiar with a nursery, Joy Creek Nursery?

7 A Yes, I am. In fact, I was there last week.

8 Q Okay. Did you meet -- do you remember meeting a Maurice?

9 A I met his partner, Mike.

10 Q Mike.

11 A Maurice was not available.

12 Q Okay. So you were up in the Portland area?

13 A Yes. Scappoose.

14 Q Scappoose.

15 A 17 miles northwest of Portland.

16 Q Okay. How was the nursery?

17 A It was a nice nursery. It's a retail nursery, but it was
18 definitely an upscale nursery in my estimation.

19 Q Okay. Did you see Clematis 'Piilu' being offered for sale
20 at their nursery?

21 A To be honest with you -- to be honest with you, I wasn't
22 there to look for Clematis. I was there looking at a
23 Miscanthus called 'Gold Bar.'

24 Q And you didn't talk to him about 'Piilu' while you were
25 there?

1 A No.

2 Q Oh, what a great opportunity. You know, Maurice is helping
3 us on this case; right?

4 A Yes, I'm aware of that.

5 Q John --

6 MR. KANE: You can tell I didn't wood-shed him before
7 the deposition. We didn't talk about anything. Okay.

8 Q Was Joy Creek intended to be one of your customers; you
9 wanted to sell product to him from Walters Gardens?

10 A I don't know if they're one of our customers or not.

11 Q Okay.

12 A I'm not sure. My association with him is through a
13 different arena.

14 Q Okay. Well, let's see, John. I don't think I have any
15 further questions. Is there anything you'd like to offer?

16 A Other than the fact is that -- what I've been -- what I've
17 been trying to establish here today is that it was our
18 knowledge that Clematis 'Piilu', which was originally
19 hybridized in Estonia in 1984, offered in Western Europe
20 beginning in the mid 1990's and offered by nurseries both
21 in the Netherlands and in United Kingdom, what you've
22 supplied documentations for -- and also offered in the US,
23 was always offered under normal settings indicating more of
24 a cultivar name. We question the practice of whether or
25 not one can actually take a cultivar name and change it to

1 a trademark name and give it a new cultivar name. I think
2 if you look under the Federal Trade Commission Rules, under
3 the plant industry, I think you'll see that that's frowned
4 upon. There should be good reason for it. There should be
5 reason because of some type of confusion.

6 Q Sure.

7 A And we think something like this only adds to the
8 confusion. And we think that something is -- doing this is
9 trying to take what's available as a so-called free plant
10 and trying to give proprietary rights to someone, and we
11 question whether that's deserving considering the amount of
12 time that that plant has been offered in the industry.

13 Q Sure.

14 MR. KANE: Any cross-?

15 MS. SCHNEIDER: No cross.

16 MR. KANE: We're concluded.

17 (Deposition concluded at approximately 12:35 p.m.)

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DEPONENT'S CERTIFICATE

I, John Dale Walters, do hereby certify that I have read the foregoing transcript of my testimony, given at the time and place set forth on the face sheet of said transcript, and that the same is true and correct.

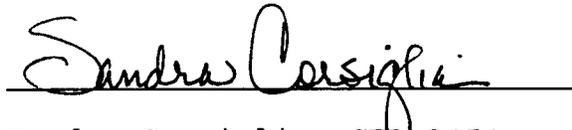
John Dale Walters
Date: September 14, 2004

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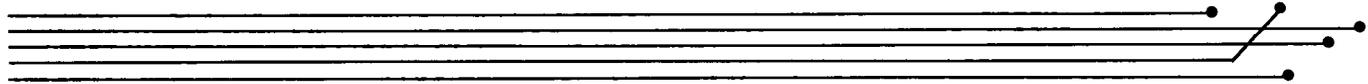
RECORDER'S CERTIFICATE AND NOTARIZATION

I, Sandra Corsiglia, Court Recorder, do hereby certify that on the 30th day of August, 2004, at 1992 96th Avenue, Zeeland, Michigan there did personally appear before me, a Notary Public, John Dale Walters; that I did swear said person to tell the truth, and did then electronically record his testimony, the same being later reduced to typewriting, and that the foregoing is a true and accurate transcription of said electronic recording taken at such time and place.

I further certify that I am not related to, or employed by, any party to this cause or their respective counsel.



Sandra Corsiglia, CER-3454
Notary Public
My commission expires 06-04-2006



Wayside Gardens

The Complete  Garden Catalog

DEPOSITION
EXHIBIT
1
J. Walters/sc 8/30/04
PENGAD 800-631-6889

Our fabulous new Rose,
'Barbra Streisand'
See page 2.

For
Spring
Planting
2001

01/01

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CLEMATIS PLANTING

WALTERS GARDENS

01/05/01

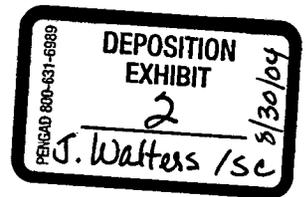
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816 772 5803

January 5, 2001

Polish Clematis

Tentative Clematis order for December 2001 (estimated - & Dec. 2002)



Variety	December 2001	tentative December 2002
Belle of Woking	2,000	2,000
Bees Jubilee	0	2,000
Blue Angel	8,500	8,500
Cardinal Wyszynski	1,500	1,500
Comtesse de Bouchard	4,000	11,000
Dorota	1,000	1,500
Dr. Kuppel	9,000	9,000
Duchess of Edinburgh	2,000	2,000
Ernest Markham	12,000	12,000
General Sikorsky	3,000	4,000
Hagley Hybrids	9,500	7,000
Henry	0	1,000
Jackmani	8,000	15,000
John Paul II	2,000	2,000
Lady Betty Balfour	1,500	1,500
Madame le Coultre	6,500	6,500
Mrs. N. Thompson	1,000	1,000
Multibluc	2,000	2,000
Nelly Moser	4,500	7,000
Niobe	3,000	4,000
Piila	1,000	1,500
Pink Champagne	1,000	1,500
Pink Fantasy	0	1,000
Ramona	2,500	2,500
Red Cardinal	3,000	3,000
Snow Queen	1,000	1,000
Star of India	15,500	15,500
terniflora	13,000	8,000
The President	1,500	1,500
Ville de Lyon	1,000	1,500
Vyvan Pannel	10,000	7,000
Warsaw Nike	1,000	1,000
integrifolia 'Rosca'	1,500	1,500
macropetala 'Markham's Pink'	1,000	1,000
tangutica 'Helios'	1,000	1,000
viticela purpurea plena 'Elegans'	153,000	168,000
Total	4000	
Asuo	3000	
H.F. Young	5,000	
Mrs. Cholmondeley	4,000	
Sunset	1,500	
C. montana var. rubens		

It is good variety and could be used

John D. Walters

From: Mark Vander Wal [mvw@waltersgardens.com]
Sent: Friday, May 10, 2002 6:35 AM
To: John D. Walters; Mary A. Walters
Subject: Fw: Clemati 'Piilu' and my visit to US.

Do we want to pursue the 'Piilu' in light of this? (I can ask Szczepan if he can still supply.) I also should get back to him about his proposed visit of July 11.

Thank you.

Mark

----- Original Message -----

From: Szczepan Marczyński <clematis@clematis.com.pl>
To: Mark Vander Wal <mvw@waltersgardens.com>
Sent: Wednesday, May 08, 2002 3:49 AM
Subject: Clemati 'Piilu' and my visit to US.

> Dear Mark,

>
> I investigated where Clematis 'Piilu' is protected and I have final
> answer from official authorities, that this variety is not protected
> in any country on the world. It is not protected also in US. It was
> bred in Estonia in 1985 and it hasn't have protection ability,
> because it is too long on the market. As far as I know, some firms in
> US try to make feeling that some varieties are protected, so they
> inform everybody about protection of variety (even such which can't be
> protected) in the moment of application for protection. It is refused
> later by US authorities but part of industry know about protection
> (which is not true). I had similar situation a few years ago with
> Clematis 'Arabella'.

>
>
> We are very busy this spring because weather is excellent and we have
> extremely good sale. We are in full preparation for the new season
> with potting, sticking cuttings ... I hope to have all plans as you
> ordered. We build up some stock of Clematis "Silver Moon" and
> 'Fireworks' so I hope to have liners for you in the next year as you
> wished. All time we work intensively to improve our web site and we
> make many substantial improvements in last weeks.

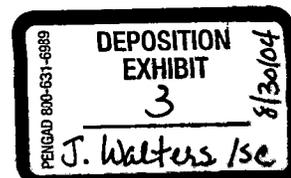
>
> In the end of June I organize 8 days International Clematis Society
> Conference in Poland. It is registered about 50 people from 12
> countries, also from US and Japan. We will visit natural growing
> Clematis alpina in Tatra Mountains, some gardens, Krakow and Warsaw,
> where will be 1.5 day of lectures and slide shows. I am nervous how to
> all prepare properly.

>
> I am going to travel to US, together with my wife Barbara, on the
> beginning of July. I would be pleased to visit Walters Gardens,
> Thursday July 11 morning (about 10 am). I would like to learn more
> about your needs, about your Clematis plans for the future and
> discuss all needed subjects.

>
> Please discuss the matter with John and Mary and inform me, is our
> visit possible?

> I am looking forward for your prompt replay.

>
> Kind regards



John D. Walters

From: Pride of Place Plants [rsorenson@pacificcoast.net]
Sent: Saturday, March 16, 2002 12:27 PM
To: John D. Walters
Subject: Re: Pride of Place Plants Ad-copy Garden Center Merchandising and Management

Hello John;

I am very pleased you have taken an interest in Clematis 'Kivso' p.p.a.f. "Piilu"t.m.. It is, in my biased opinion, the very best clematis for Home Garden container use. Very hardy, compact, with a mature height of 4-5 ft., with an abundance of flowers over a very long period of time. The accolades and awards presented to this cultivar, continue to mount and I think Clematis 'Kivso' p.p.a.f. Piilu t.m., will become the standard for others to follow. I know that currently the genetics are being used by members of The Japan Clematis Society and I look forward to viewing their results. I am hopeful that you will feel comfortable offering Clematis 'Kivso' p.p.a.f. Piilu t.m., in your next catalog. All the best
Rick Sorenson

----- Original Message -----

From: "John Walters" <jdw@waltersgardens.com>
To: "rick sorenson" <rsorenson@pacificcoast.net>
Sent: Saturday, March 16, 2002 7:28 AM
Subject: Fw: Pride of Place Plants Ad-copy Garden Center Merchandising and Management

> Rick: Mary forwarded this to me. As I indicated, [REDACTED]
> [REDACTED]
> [REDACTED] was protected. However, my
> major concern is whether this plant is indeed patentable since it has
> been on
> the

market for a few years. And I also question the appropriateness of
trademarking 'Piilu' if indeed this was the original cultivar name.

>
> We do not question the practice of plant protection. Maybe I am
> asking
> for
> a further clarification of your intention in this particular
> situation. John Walters
>
>

> ----- Original Message -----

> **From:** "Mary Walters" <maw@waltersgardens.com>
> **To:** "John Walters" <jdw@waltersgardens.com>
> **Sent:** Monday, March 11, 2002 6:21 AM
> **Subject:** Fw: Pride of Place Plants Ad-copy Garden Center Merchandising
> and Management
>
>

> >
> > Mary Walters
> > Walters Gardens, Inc.
> > PO Box 137
> > Zeeland, MI 49464
> >
> > maw@waltersgardens.com
> > 1-800-925-8377 x 215
> > Cell: 616-218-8915
> >

> > ----- Original Message -----

> > **From:** "Pride of Place Plants" <rsorenson@pacificcoast.net>
> > **To:** <Maw@waltersgardens.com>
> > **Sent:** Sunday, March 10, 2002 4:32 PM
> > **Subject:** Pride of Place Plants Ad-copy Garden Center Merchandising
> > and Management
> >

