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

Proceeding	91153755
Party	Defendant PRIDE OF PLACE PLANTS, INC. PRIDE OF PLACE PLANTS, INC. 674 CROMARTY AVENUE CAX SIDNEY, BRITISH COLUMBIA V8L 5G6,
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

WALTERS GARDENS, INC. Opposer, vs. PRIDE OF PLACE PLANTS, INC. Applicant.	Opposition No. 91153755 **Mark: PIILU** **Serial No.: 76,201,447** **Filed: January 29, 2001**

APPLICANT'S OPPOSITION TO OPPOSER'S MOTION FOR DIRECTED VERDICT

Opposer Walter Garden, Inc. ("WGI") has filed a Combined Motion to Reopen Opposition and Motion for Directed Verdict. While Applicant Pride of Place Plants ("PoPP") agrees with WGI that the time is ripe for the United States Trademark Trial and Appeal Board ("TTAB") to continue adjudication of this matter, WGI's motion for a directed verdict should be denied because a directed verdict is not available in opposition proceedings before the TTAB, and because the recent decision of the Court of Appeals for the Federal Circuit, *In re KRB Seed Co.*, on which WGI relies, has no bearing on the facts of this case. WGI's request for a directed verdict is therefore improper, and the TTAB should deny the motion.

I. Procedural History

The trial briefs have long since been filed, and the oral hearing took place on February 2, 2006. Subsequently, the TTAB suspended this proceeding pending the ruling by the Court of Appeals for the Federal Circuit in *In re KRB Seed Co.* The Federal Circuit has since affirmed the Board's holding in *In re KRB Seed. Co.*, and the issues in this proceeding are now ripe for adjudication.

II. The issue to be Decided: Whether an Unrelated Party Can Eradicate Applicant's Trademark Rights by Attempting to Register Applicant's Mark as a Cultivar.

The question presented to the TTAB in the PIILU case is quite straight forward.

Applicant has presented evidence that it established trademark rights in PIILU prior to any activity, by any entity, to convert PIILU from a trademark into a cultivar name. Therefore, assuming Applicant has successfully proven that it established trademark rights in PIILU, the ultimate question the TTAB must address is:

> When the Applicant has established trademark rights in PIILU for "live plants," can a competitor -- or other unrelated party -- successfully eradicate Applicant's trademark rights simply by attempting to register Applicant's PIILU trademark as a cultivar name with an organization based outside of the United States?

III. A Directed Verdict is Procedurally Unavailable in Board Proceedings.

It is simply not proper for either party to file a motion for a directed verdict at this point in the proceeding. It is well established that "[m]otions that require examination of trial evidence prior to final decision, such as those under Fed. R. Civ. P. 41(b) for involuntary dismissal and under Fed. R. Civ. P. 50(a) for judgment as a matter of law (formerly known as a motion for a directed verdict), *are not available* in Board proceedings." *Coding Techs. GmbH v. Am. Audio Components, Inc.*, 76 U.S.P.Q.2d (BNA) 1638 (TTAB 2005) (emphasis added) (citing *Kasco Corp. v. S. Saw Serv., Inc.*, 27 U.S.P.Q.2d 1501 (TTAB 1993); *Rainbow Carpet, Inc. v. Rainbow Int'l Carpet Dyeing & Cleaning Co.*, 226 U.S.P.Q. 718 (TTAB 1985); and *Stockpot, Inc. v. Stock Pot Rest., Inc.*, 220 U.S.P.Q. 52 (TTAB 1983), *aff'd*, 737 F.2d 1576 (Fed. Cir. 1984)).

WGI is thus procedurally barred from filing a motion for a directed verdict, for no such option is available in these proceedings. PoPP thus respectfully requests that the TTAB deny WGI's motion.

IV. WGI's Reliance on the Recent Federal Circuit Decision is Misplaced Because the Facts of that Case are Inapposite to those in this Opposition Proceeding.

Even if WGI were procedurally permitted to move for a directed verdict, which it is not, WGI's motion should still be denied because WGI appears to be basing its motion on the recent decision issued by the Court of Appeals for the Federal Circuit in *In re KRB Seed Co.* 76

U.S.P.Q.2d (BNA) 1156 (TTAB 2005), *aff'd sub nom*, *In re Pennington Seed, Inc.*, 466 F.3d 1053 (Fed. Cir. 2006). However, the factual scenario and the legal holding in the KRB Seed case are both easily distinguished from the pending PIILU case.

In *KRB*, the applicant designated the term "Rebel" as the varietal (or cultivar) name for a grass seed that was the subject of a plant variety protection certificate ("PVP") for which it had applied. *Id.* at 1055. Some time after issuance of the certificate, the applicant began the registration process for the term "Rebel" as a trademark claiming that it had acquired distinctiveness under 15 U.S.C. § 1052(f) and could thus be the subject of trademark protection. *Id.* Thus, the only issue before the Board, and before the Federal Circuit on appeal, was whether the PTO's long standing policy of treating varietal names as generic was still valid. *Id.* The Court held that because it was *undisputed* that the term "Rebel" was the designated cultivar name for a variety of grass, the term was generic from its first use and thus not entitled to protection. *Id.* at 1056.

In the PIILU case, however, and unlike in *KRB*, PoPP uses PIILU as a trademark and has never designated PIILU as cultivar name. Furthermore, purchasers and prospective purchasers are presented with Little Duckling as the cultivar name, and PIILU as a trademark. In the PIILU case, PoPP is not trying to convert an established cultivar name into a trademark, as the applicant was attempting in *KRB*. Instead, WGI is attempting to convert PoPP's PIILU trademark into a cultivar name, and thus render it generic. The facts here are the exact opposite of the facts in *KRB*, and thus the Court's holding is inapposite to this case and should not be considered.

V. Conclusion

A directed verdict is procedurally improper in this case, and any other case pending before the TTAB. Because the recent Court of Appeals for the Federal Circuit decision in *In re KRB Seed Co.* deals with an attempt to convert an established cultivar name into a trademark, and not with an attempt to convert an established trademark into a cultivar name, the case has no bearing on the pending PIILU matter, and WGI cannot properly use it to support its attempts to render PoPP's mark generic. PoPP requests the TTAB deny WGI's motion for a directed verdict

and reopen the opposition for adjudication on the merits.

DATED: March 5, 2007

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TRADEMARK
Docket No. 110.2*1/P622

CERTIFICATE OF TRANSMISSION AND SERVICE

I certify that on March 5, 2007, the foregoing **APPLICANT'S OPPOSITION TO OPPOSER'S MOTION FOR DIRECTED VERDICT** is being electronically filed with:

Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

It is further certified that on March 5, 2007, the foregoing **APPLICANT'S OPPOSITION TO OPPOSER'S MOTION FOR DIRECTED VERDICT** is being served by mailing a copy thereof by first-class mail addressed to:

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