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

Proceeding	92045971
Party	Plaintiff Westgro Sales, Inc.
Correspondence Address	John A. Hughes Townsned and Townsend and Crew LLP Two Embarcadero Center, Eighth Floor San Francisco, CA 94111 UNITED STATES mmgorelnik@townsend.com, jahughes@townsend.com
Submission	Motion for Summary Judgment
Filer's Name	Marc M. Gorelnik
Filer's e-mail	mmgorelnik@townsend.com
Signature	/Marc M. Gorelnik/
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Registration No. 3,037,538
Issued: January 3, 2006
For: **CAMPARI**

WESTGRO SALES, INC.,	)	
	)	
Petitioner,	)	Cancellation No. 92045971
	)	
vs.	)	**MOTION FOR SUMMARY JUDGMENT**
	)	
MASTRONARDI PRODUCE, LTD.	)	
	)	
Registrant.	)	
	)	

I. Introduction

In 1995 an accomplished plant breeder designated Campari the plant variety name for a cocktail-sized tomato. The Campari tomato variety is widely sold in the United States, and has been since 1997. All of the United States supply of this tomato variety is grown from seed labeled with the Campari variety name. Petitioner Westgro Sales, Inc. ("Westgro") distributes much of the North American supply of seed. This variety name is generic, has always been generic, and cannot, as a matter of law, ever function as a trademark for tomatoes or tomato products. There can be no genuine dispute that the putative Campari "mark" is a generic term.

Campari is a variety name for tomatoes irrespective of past or current efforts to create trademark significance, whether by Registrant, Petitioner or others. Efforts to create secondary meaning are legally irrelevant where the term is generic *ab initio*. Aside from genericness, there are other grounds for cancellation in the Amended Petition, specifically fraud on the Trademark Office. But Petitioner specifically limits this motion to the first enumerated ground for

cancellation: that Campari is a plant varietal name for the goods offered by Registrant (Amended Petition, ¶ 1), and therefore an unregisterable generic term for tomatoes and tomato products.

Westgro moves for summary judgment on genericness because neither the Board nor the parties need look beyond this single, readily adjudicated, dispositive issue. The interests of justice and judicial economy strongly favor summary resolution before more costly and unnecessary effort goes into discovery, pretrial motion practice, testimony, briefing and oral argument.

II. Description of the Record

The pleadings consist of the Amended Petition to Cancel and Registrant's Answers and Affirmative Defenses to the Amended Petition. No party has previously made evidence of record.

III. Statement of the Issue

The only issue presented is whether the term Campari is a plant varietal name, and therefore an unregisterable generic term for fresh tomatoes and products made from tomatoes.

IV. Undisputed Facts

More than fourteen years ago, the Campari tomato variety was given its varietal name by its breeder. The breeder dutifully had the Campari variety name entered on its home country's register of plant varieties and sought plant variety protection for Campari. The seed for this variety carries the Campari variety name and growers know the variety as Campari. The produce industry and academics use Campari as a plant variety name. And Registrant itself refers to Campari as a variety of tomato. Mastronardi's latter-day assertion of trademark rights in Campari arises in direct contradiction to the undisputed facts.

A. Campari Is the Variety Name Designated by the Breeder

Enza Zaden B.V. is a Dutch plant breeder.[1] Declaration of Dave Gingrich in Support of Westgro's Motion for Summary Judgment (Gingrich Decl.), ¶ 2. On November 6, 1995, Enza Zaden Beheer B.V. applied to the Community Plant Variety Office ("CPVO") for protection of a tomato variety it denominated Campari. The application published on June 24, 1996. *See* CPVO Official Gazette of June 24, 1996, Tab 1 to Declaration of the President of the Community Plant Variety Office ("CPVO Decl.") The applicant subsequently withdrew the application for plant variety protection. *See* CPVO Official Gazette of December 15, 1998, Tab 2 to CPVO Decl.

On January 2, 1995, even before Enza Zaden sought plant variety protection for the Campari tomato, it applied to place Campari on the Netherlands Register of Plant Varieties. That registration issued on July 28, 1996. *See* certified copy of plant variety registration No. 27079, Netherlands Register of Plant Varieties attached as Ex. A to Declaration of Marc M. Gorelnik in Support of Petitioner's Motion for Summary Judgment ("Gorelnik Decl."). Unremarkably, the European Commission's "Common Catalogue of Varieties of Vegetable Species" lists Campari as a variety of tomato (*Lycopersicon esculentum mill.*) *See* Catalogue excerpt (page 355) attached as Ex. B to Gorelnik Decl. (marked as WEST00547 in document production).

B. The Term "Campari" is Used as a Variety Name by Mastronardi, Academia, and Throughout the Produce Industry

[1] Enza Zaden has never sought trademark protection, anywhere in the world, for the Campari varietal name that it chose. However, the Campari variety sold in Europe carries the "Tasty Tom" trademark. Gingrich Decl., ¶ 3. In fact, Enza Zaden proudly lists Campari as one of its best varietal accomplishments. See excerpts from book "The adventure called Enza Zaden," *Id.*, ¶¶ 4 and 5 and Exs. A and B thereto.

Aside from its official status as a plant variety name, the term Campari is widely understood to refer to a tomato variety. Indeed, even Registrant refers to Campari as a variety when peddling its tomatoes.[2]

- "Campari TRUMPS other cocktail tomato varieties" is the title of an article on Registrant's website at *http://www.sunsetproduce.com/camparitomato/news/index.html*. Gingrich Decl., ¶ 14 and Ex. I thereto.
- "New Campari tomatoes deliver authentic tomato taste" is the title of an article on Registrant's website at *http://www.sunsetproduce.com/camparitomato/news/index.html*. *Id.*, ¶ 14 and Ex. I thereto.
- Mastronardi refers to Campari as a "European variety tomato" in its advertising to the produce trade. *Id.*, ¶¶ 18 and 19 and Figures 1 and 2 thereto.

Registrant also conceded that Campari is a varietal name in various agreements it entered into with Enza Zaden, the breeder of the variety.

- In November, 2001, Westgro and MGS Horticultural, Inc. entered into a one year agreement to provide Campari seed to Mastronardi for the 2002 crop year. The seed was provided in order to "market this variety of tomatoes in both Eastern Canada and the Eastern United States." The parties also agreed that "[t]echnical

[2] Westgro provides exemplary articles and references to the Campari plant variety. The file history of Mastronardi's pending trademark applications for Campari contain further references. See Exs. D and L to Gorelnik Decl. An exhaustive presentation of such publications would be unnecessarily redundant because there is no need to "balance" evidence of generic varietal use against evidence of putative trademark use. The latter is irrelevant where the term is generic as a matter of law.

assistance for the variety, to the extent it is available from Enza Seeds, will be provided to Mastronardi Produce." Mastronardi signed on to this agreement and this language. *See* Gingrich Decl., ¶ 15 and Ex. J.

- On April 1, 2005, Mastronardi entered into an "Exclusive Distribution Agreement." The parties to the 2005 Agreement, aside from Mastronardi, included Westgro, MGS Horticultural, BCHH, and breeder Enza Zaden. The 2005 Agreement referred to a "Campari-type tomato." *See* Gingrich Decl., ¶ 20 and Ex. K.
- Schedule B to the 2005 Agreement sets forth "the defining characteristics of a 'Campari-type' tomato. *Id.*, ¶ 21. The following are the defining characteristics of a "Campari-type" tomato, including its shape, weight, color, retail presentation, and disqualifying characteristics.

Of course, academics treat Campari as a varietal name in their scholarly research:

- The December 2005 edition of the International Journal of Food Science Nutrition published an article title "Antioxidant activities of New Zealand-grown tomatoes". The author references Campari as a tomato cultivar. Gorelnik Decl., ¶ 6 and Ex. E thereto.
- The Economic Research Service of the United States Department of Agriculture published an article titled "Greenhouse Tomatoes Change the Dynamic of the North American Fresh Tomato Industry." The publication states: "Campari tomatoes, a type of cocktail tomato, which is midway in size between a traditional TOV and cherry TOV, are a growing component of greenhouse supply. The seed

company that owns the variety only licenses it to three firms." Gorelnik Decl., ¶ 7 and Ex. F thereto.

- The University of Florida's Cooperative Extension published an article titled "Evaluation of Greenhouse Cluster Tomato Cultivars in Florida." The authors evaluate a number of cultivars, including Campari. Gorelnik Decl., ¶ 8 and Ex. G thereto. The examining attorney cited this publication in the final refusal dated August 31, 2008, but Mastronardi did not acknowledge – let alone address – the publication in the Requests for Consideration filed on March 2, 2009.

Newspapers and other publications of wide distribution consider Campari a plant varietal name:

- The April 10, 2006 issue of the Chicago Sun-Times contains an article titled "You say tomato, I say Campari: Sweet new variety featured in 'Sopranos' a hit with customers." Gorelnik Decl., ¶ 9 and Ex. H thereto. [See letter of Protest Exhibit] The author states that "Campari … is noticeable for … its fashionable name, which marketers hope strikes a chord with consumers the way specific varieties of, say apples, do."
- The July 13, 2004 edition of the "National Post," a Canadian newspaper, contains an article titled "That's Campari." The article refers to the "campari" tomato, describing its defining characteristics. The author also states that "Mastronardi experimented with about 60 different varieties of seed … until they came upon the European campari seed." Gorelnik Decl., ¶ 10 and Ex. I thereto.

Distributors and retailers believe that Campari is a variety of tomato:

- Costco Wholesale sells tomatoes of various varieties, including Campari. Not only does Costco Wholesale seem to know that Campari is a varietal name, *see* Ex. J to Gorelnik Decl., but the Campari tomatoes shown on their website carry the BC Hothouse brand. Gingrich Decl., ¶ 11. BC Hothouse is a competitor of Mastronardi. *Id.* Growers Windset Farms, Eurofresh and Village Farms now supply the Campari tomato variety to Costco. *Id.* See packaging for Campari variety, Exs. F and G to Gingrich Decl.

Westgro-distributed Campari tomato seeds have continuously been sold in the United States since 2002, but Canadian-grown Campari fruit from these seeds have been sold in the United States since 1996. Gingrigh Decl., ¶¶ 8 and 9. Westgro has multiple customers, each of which grows and distributes the Campari variety. Current customers include Windset Farms, Village Farms, and Eurofresh Farms. *Id.*, ¶¶ 9-12 and Exs. F and G. Each uses the Campari term to identify the type of fresh tomato. *Id.* Registrant Mastronardi is not one of Westgro's direct customers, but it started growing the Campari variety in 2001. This was after BC Hothouse had begun offering the Campari variety for sale in the United States. Gingrich Decl., ¶¶ 9 and 10.

C. Canadian Regulation of Growers of the Campari Variety

The British Columbia Vegetable Marketing Commission (the "Commission") establishes grower quotas according to vegetable variety and market segment. The Commission annually reviews market and grower conditions and, with the participation of grower representatives, makes findings and sets quotas among growers. Gingrich Decl., ¶ 13 and Ex. H. Pertinent to this motion for summary judgment is the Commission's recognition and treatment of Campari as a tomato variety.

> Although this product was originally introduced into the North American market by the BC industry, Campari is now only one variety of the "cocktail type" TOV's and the Commission has no control over the

> allocation of the Campari seed owned by a Dutch company. This variety was once exclusively grown in BC for the North American market, but now the Commission has little influence over this highly lucrative product.

See Decision on 2004 Greenhouse Quota Transfers and 2005 Greenhouse Quota Allocations in District I & II, p. 6, Ex. H to Gingrich Decl. While the Commission's order addresses Campari production in Canada, most of that production is exported to the United States. Packaged Campari tomatoes bear the Campari variety name, regardless of which of the competing growers is the source. *Id.*, ¶ 13.

D. Registrant Mastronardi Owns Two Campari Trademark Applications That Have Been Finally Refused on Grounds That Campari is a Variety Name

Mastronardi owns two pending applications to register Campari: Serial No. 78/898,558 for "salsa, hot sauce, picante sauce" (parent application) and Serial No.78/980,518 for "fresh tomatoes, raw tomatoes, unprocessed tomatoes" (child application). On January 2, 2008, prior to the division, the examining attorney refused the parent application "because the proposed mark 'CAMPARI' is a varietal name for the identified goods and as such, does not function as a mark." *See* January 2, 2008 office action attached as Ex. C to Gorelnik Decl. Mastronardi responded on July 2, 2008 that the "name of the goods as used in the industry for the type of tomato sold under the CAMPARI brand is 'tomato-on-the-vine.'" *See* July 2, 2008 Response to Office Action[3] attached as Ex. K to Gorelnik Decl. The examining attorney made final on August 28, 2008, the refusals to register both applications because "CAMPARI is a varietal or cultivar name for

[3] The Response to Office Action contains a number of demonstrably false representations to the Trademark Office, particularly those that attribute a *competitor's use* of Campari – cited by the examining attorney as evidence of varietal use – to the benefit of Mastronari. Gingrich Decl., ¶ 22. However, the grounds of this Motion for Summary Judgment are limited to the objective fact that the varietal name Campari is generic and unregisterable. Mastronardi's ongoing dissembling to the Trademark Office bears on its general credibility. But Mastronardi's fraud is not urged as a basis for summary judgment, so Westgro has no burden to prove Mastronardi's knowing false statements.

tomatoes." *See* August 28, 2008 Office Actions in the parent and child applications attached as Exs. D and L to Gorelnik Decl. and references cited therein.[4] On March 2, 2009, Mastronardi filed a Notice of Appeal and Request for Consideration in both applications. Mastronardi did not address any of the references cited by the Examining Attorney. Instead, Mastronardi baselessly asserted that "there is no actual evidence the mark CAMPARI is a varietal term." *See* March 2, 2009 Requests for Reconsideration in the parent and child applications attached as Exs. M and N to Gorelnik Decl.

V. Procedural History

On October 15, 2003, Mastronardi filed the application that matured into the subject registration. Following prosecution, the registration issued for CAMPARI for fresh tomatoes on January 3, 2006. Westgro petitioned to cancel the registration on May 5, 2006. Rather than answering, Mastronardi moved to dismiss the petition on August 7, 2006. The Board suspended the proceeding on August 21, 2006. The parties briefed the motion, but subsequently sought to suspend the matter as they explored settlement. A negotiated resolution proved elusive. Westgro filed its Amended Petition to Cancel on October 4, 2007. Mastronardi again moved to dismiss, which the Board granted in part and denied in part on August 29, 2008. Mastronardi answered the First Amended Petition on October 28, 2008.

Following the Board's order of August 29, 2008, the Amended Petition for Cancellation alleges four causes of action. These are, alternatively: (1) that Campari is a varietal name; (2) that Mastronardi is not the owner of the mark; (3) that Mastronardi fraudulently procured the registration because Mastronardi knew that it was not the owner of a the "trademark" when it

[4] Westgro incorporates the Examining Attorney's references and invites Mastronardi to do something that it has so far declined: address the references factually and with particularity.

filed the application; and (4) that Mastronardi fraudulently procured the registration because Mastronardi continued to prosecute the application after it again acknowledged that it did not own the trademark.

Westgro served its first set of discovery requests on Mastronardi on September 25, 2008. At the same time, Westgro provided Mastronardi with a copy of the Board's standard protective order, expressing hope that the discovery process would not be impeded. *See* September 25, 2008 letter of Marc M. Gorelnik, Ex. O to Gorelnik Decl. Mastronardi did not acknowledge the protective order, let alone provide any comments or proposed revisions. On October 23, Westgro again contacted Mastronardi noting that Trademark Rule 2.116(g) imposes the standardized TTAB protective order unless the parties agree otherwise. Westgro took the position that, in the absence of any comments from Mastronardi, the standardized protective order was in place for Mastronardi's discovery responses. *See* October 23, 2008 letter of Marc M. Gorelnik, Ex. P to Gorelnik Decl.

A few days later, on October 30, 2008, Mastronardi served its written discovery responses. Mastronardi largely avoided providing any substantive information, asserting that no protective order was in place. *See, e.g.*, Mastronardi's Responses to Westgro's First Set of Interrogatories, Ex. Q to Gorelnik Decl. Westgro initiated a meet and confer with Mastronardi by letter dated February 18, 2009. *See* Ex. R to Gorelnik Decl. Westgro told Mastronardi that the objections to discovery responses were inappropriate and urged that document production commence without further delay. On February 27, 2009, with Westgro's responses to Mastronardi's discovery requests now due, Mastronardi finally withdrew its specious "confidentiality" objection. Mastronardi produced 191 pages, all indiscriminately marked as "confidential."

Mastronardi served its own discovery requests on December 22, 2008: 37 interrogatories (not counting subparts); 84 document requests; and 86 requests for admission. Following an extension of time to respond afforded by Mastronardi, Westgro timely responded to these requests on February 26, 2009. Westgro produced 1712 pages of relevant documents to Mastronardi on March 3, 2009.

VI. Standard

Summary judgment is an appropriate method of disposing of a case in which there are no genuine issues of material fact in dispute, thus leaving the case to be resolved as a matter of law. *See* Fed.R.Civ.P. 56(c). A dispute as to a material fact is genuine only if a reasonable fact finder viewing the entire record could resolve the dispute in favor of the nonmoving party. *See Old Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992). In deciding a motion for summary judgment, the Board must view the evidence in the light most favorable to the nonmovant, and must draw all reasonable inferences from underlying facts in favor of the nonmovant. *See id.*

A party moving for summary judgment has the burden of demonstrating the absence of any genuine issue of material fact, and that it is entitled to entry of judgment as a matter of law. *See Celotex Corp v. Catrett*, 477 U.S. 317 1986; *Sweats Fashions Inc. v. Pannill Knitting Co. Inc.*, 833 F.2d 1560, 4 USPQ2d 1793 (Fed. Cir. 1987). When the moving party's motion is supported by evidence sufficient to indicate that there is no genuine issue of material fact, and that the moving party is entitled to judgment, the burden shifts to the nonmoving party to demonstrate the existence of specific genuinely disputed facts that must be resolved at trial. The nonmoving party may not rest on the mere allegations of its pleadings and arguments in response to the motion, but must designate specific portions of the record or produce additional evidence showing the existence of a genuine issue of material fact for trial. In general, to establish the

existence of disputed facts requiring trial, the nonmoving party "must point to an evidentiary conflict created on the record at least by a counterstatement of facts set forth in detail in an affidavit by a knowledgeable affiant." *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1786 (Fed. Cir. 1990), *citing Barmag Barmer Maschinentfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 221 USPQ 561, 564 (Fed. Cir. 1984).

VII. Argument

As a matter of law, plant variety names are not registerable, a point that Mastronardi will not dare dispute. Campari is a plant variety name, a fact that is beyond *genuine* dispute. This fact is so uncontroversial that Mastronardi should concede the motion. But it will not. Nevertheless, the law is straightforward and the indisputable facts readily applied.

A. Varietal Plant Names are Not Registerable

Plant varietal names are generic and unregisterable as a matter of law. *In re Pennington Seed Inc.*, 466 F.3d 1053 (Fed. Cir. 2006). This holding is only the latest in a long line of consistent authority dating to at least *Dixie Rose Nursery v. Coe*, 131 F.2d 446 (D.C. Cir. 1942) ("known throughout the trade, and listed in appellant's catalog by this name. Purchasers call for it, and for no other variety, by this name."). The Trademark Office, through both the Trademark Trial and Appeal Board and the Trademark Manual of Examining Procedure[5], has rigorously applied this rule. *See Cohn Bodger & Sons Co.*, 122 U.S.P.Q. 345 (T.T.A.B. 1959) (refusing registration of the name "Blue Lustre" as a trademark for hybrid petunia seeds); *In re Farmer Seed & Nursery Co.*, 137 U.S.P.Q. 231 (T.T.A.B. 1963) (refusing registration of the name "Chief

[5] "[I]f the examining attorney determines that wording sought to be registered as a mark for live plants, agricultural seeds, fresh fruits or fresh vegetables comprises a varietal or cultivar name, then the examining attorney must refuse registration, or require a disclaimer, on the ground that the matter is the varietal name of the goods and does not function as a trademark." TMEP §1202.12

Bemidji" as a trademark for a strawberry plant); *In re Delta and Pine Land Co.*, 26 USPQ2d 1157, 1159 n. 4 (TTAB 1993). A vendor or purchaser "has to have some common descriptive name he can use to indicate that he wants one variety of apple tree, rose, or whatever, as opposed to another, and it is the varietal name of the strain which naturally and commonly serves this purpose." *In re Hilltop Orchards & Nurseries, Inc.*, 206 U.S.P.Q. 1034, 1036 (T.T.A.B. 1979) (affirming refusal to register the name "Commander York" as a trademark for apple trees).

B. Campari is a Tomato Plant Variety

Campari's conclusive status as a tomato plant variety follows from statute, widely available publications in the United States, Mastronardi's own usage, and the breeder's own designation.

1. A Plant Variety Exhibits Identifiable Characteristics

The United States Plant Variety Protection Act ("PVPA") defines a plant variety in specific terms and *without regard* to whether plant variety protection has been sought or granted in the United States:

> The term "variety" means a plant grouping within a single botanical taxon of the lowest known rank, that, without regard to whether the conditions for plant variety protection are fully met, can be defined by the expression of the characteristics resulting from a given genotype or combination of genotypes, distinguished from any other plant grouping by the expression of at least one characteristic and considered as a unit with regard to the suitability of the plant grouping for being propagated unchanged. A variety may be represented by seed, transplants, plants, tubers, tissue culture plantlets, and other matter.

7 U.S.C. Section 2401(a)(9).

Abundant, indisputable evidence demonstrates that the Campari tomato variety is distinguished by a specific shape, weight, color, and retail presentation. *See, e.g.,* Schedule B to 2005 Agreement, Ex. K to Gingrich Decl. These characteristics differentiate the Campari variety

from other tomato varieties and meet the legal standard for "expression of at least one characteristic." Moreover, there is no dispute that Campari tomatoes exhibit uniform characteristics and thus are "considered as a unit with regard to the suitability" of unchanged propagation.

2. Once a Variety, Always a Variety

The International Convention for the Protection of New Varieties of Plants ("UPOV"), of which both the United States and The Netherlands are signatories, provides that a name for a new plant variety must be designated and that that denomination will be its generic name. UPOV, Article 20(1), attached for the Board's convenience as Ex. S to the Gorelnik Decl. ("The variety shall be designated by a denomination which will be its generic designation. ... [N]o rights in the designation registered as the denomination of the variety shall hamper the free use of the denomination in connection with the variety.")[6] *See, also, In re Pennington Seed Inc.*, 466 F.3d 1053, 1058 (Fed. Cir. 2006).

Enza Zaden is the breeder of the Campari tomato plant variety. Enza Zaden sought plant variety protection for the Campari tomato plant variety in the European Community, specifically denominating Campari as the varietal name. See page 26 of the June 26, 1996 Official Gazette of the Community Plant Variety Office, Tab 1 to CPVO Decl. While Enza Zaden subsequently withdrew that 1995 application for protection, it had already designated Campari as the varietal name. The voluntary withdrawal of the application is legally irrelevant to this motion because the

[6] The PVPA provides that seeking varietal protection, "in any country, shall be considered to render the variety a matter of common knowledge" should protection be granted or the variety entered in the official register, as may apply. 7 U.S.C. Section 2401(b)(4). If protection is not granted, the variety may still become a matter of common knowledge, although the statute does not command it. Moreover, the PVPA affords protection to a new variety provided the breeder complies with the strict statutory requirements. *See, e.g.*, 7 U.S.C. Section 2402(a)(1)(A) (application must be made within one year of introduction to the United States).

PVPA's definition of variety makes clear that it does not matter "whether the conditions for plant variety protection are fully met." 7 U.S.C. Section 2401(a)(9).

The plant breeder, aside from seeking plant variety protection, also registered the Campari variety name on the Netherlands Register of Plant Varieties. *See* Ex. A to the Gorelnik Decl. The PVPA, the UPOV, and controlling case law make crystal clear that this registration of the Campari varietal name is dispositive of the non-registerability of Campari as a trademark. The facts and the law are unambiguous, as is Westgro's entitlement to summary judgment.

C. Campari Appears as a Variety Name on Packaging as Required by the Federal Seed Act

The Federal Seed Act requires that varietal seeds transported in interstate commerce bear their variety name. 7 U.S.C. § 1571(a)(1). The seeds sold by Westgro are packaged by breeder Enza Zaden and bear the Campari varietal name and no other. See exemplar of packaging, Ex. D to Gingrich Decl. Mastronardi *claims* that Campari is a trademark and not a variety name, which raises several questions pertinent to the Federal Seed Act:

- If Campari isn't a variety name, then why does the tomato seed packaged by breeder Enza Zaden and sold by Westgro and grown by Windset Farms, Village Farms, Eurofresh Farms, and Mastronardi bear the variety name Campari as required by law?
- If Campari isn't the variety name for the tomatoes sold as Campari, then what is the variety name and why isn't it on the seed labeling and other documentation as required by the Federal Seed Act?

Enza Zaden's use of Campari on seed packaging, in compliance with the Federal Seed Act, strongly reinforces the already obvious fact that Campari is a varietal name.

D. *De Facto* Distinctiveness is Not Relevant and Therefore Not Material to Summary Judgment

No amount of alleged "trademark use" by Mastronardi or anyone else can change the legally dispositive fact that Campari is a varietal name for tomatoes and thus forever generic for tomatoes and tomato products. There is no legal relevance to Registrant's alleged efforts to create trademark significance out of a varietal name. Regardless of any claim or putative evidence that Mastronardi has created *de facto* secondary meaning, one cannot transform an inherently generic term into a trademark. *In re Northland Aluminum Prods., Inc.*, 777 F.2d 1556, 227 USPQ 961, 964 (Fed. Cir. 1985) (BUNDT common descriptive name for type of cake and evidence of *de facto* secondary meaning cannot change that result). *In re Log Cabin Homes Ltd.*, 52 U.S.P.Q.2d 1206, 1999 WL 974144 (T.T.A.B. 1999) ("[W]e simply do not accept applicant's argument that it can obtain exclusive service mark rights in a word or term for the architectural design of a particular type of building when that word or term is a generic name for the particular type of building."); *Roux Laboratories, Inc. v. Clairol Inc.*, 427 F.2d 823, 166 USPQ 34, 39 (CCPA 1970). *Continental Airlines Inc. v. United Air Lines Inc.*, 53 USPQ2d 1385 (TTAB 2000) ("Even if one has achieved *de facto* acquired distinctiveness in a generic term through promotion and advertising, the generic term is still not entitled to protection because to allow protection would deprive competing manufacturers of the product of the right to call an article by its name."); and *In re BOC Group, Inc.*, 223 USPQ 462 (TTAB 1984) (No amount of secondary meaning evidence can "rescue" a generic term.)

The Board should reject any effort to avoid summary judgment by Mastronardi's assertion of a factual dispute concerning the meaning of the term Campari. The merits of this motion may not be rebutted by proffering evidence, however dubious, that Mastronardi has tried really, really hard to create a brand out of the Campari varietal name.

> While it is always distressing to contemplate a situation in which money has been invested in a promotion in the mistaken belief that trademark rights of value are being created, merchants act at their peril in attempting, by advertising, to convert common descriptive names, which belong to the public, to their own exclusive use. Even though they succeed in the creation of de facto secondary meaning, due to lack of competition or other happenstance, the law respecting registration will not give it any effect.

Weiss Noodle Co. v. Golden Cracknel & Specialty Co., 290 F.2d 845, 847 (C.C.P.A. 1961). Particularly galling is that Mastronardi is a late-comer to the Campari marketplace, yet asserts proprietary rights against senior users of the generic term.

E. Nothing Obtained in Discovery Can Transform a Generic Term Into a Trademark

Nothing in the possession, custody or control of Westgro or any third-party can change the genericness finding that is compelled here. As in the case of *de facto* secondary meaning, any putative use of Campari as a trademark – whether by Mastronardi, Westgro or anyone else – is legally irrelevant where the term was generic *ab initio*. It is absolutely true, as Mastronardi will certainly note, that Westgro formerly asserted in error that Campari is a trademark. Westgro's past use cannot and does not change the inherently generic character of the Campari variety name.

Every document relied on by Westgro in this motion has previously been provided to Mastronardi. Indeed, all of the documents are either publicly available or long in Mastronardi's possession or both. No legitimate purpose would be served by continuing this action through the end of discovery, inevitable motion practice, testimony and briefing. Mastronardi will likely assert that Westgro refused to respond to certain of Mastronardi's discovery requests on grounds of irrelevance. That assertion is itself irrelevant because the petition to cancel must be granted on the basis that Campari is a generic term, a fact that is conclusively and irrefutably established without regard to any of Westgro's sales information or customer lists.

VIII. Conclusion

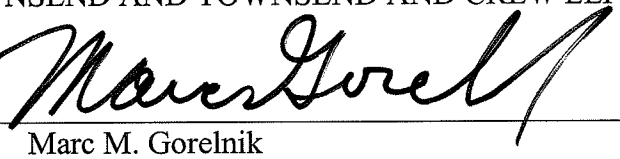
The issue to be decided on summary judgment is whether Campari is a varietal name. If the Board makes this finding, then the registration must be cancelled and Westgro is entitled to summary judgment. There is abundant and indisputable evidence that Campari is a varietal name. The breeder denominated Campari as the variety name in 1995. The seed has been sold by Westgro under the Campari variety name since 1996. Tomatoes of the Campari variety are offered by multiple sources. Horticultural literature recognizes Campari as a plant variety. Perhaps most damning of all are Mastronardi's own marketing efforts, which for years have touted Campari as a superior tomato *variety*.

No legitimate purpose is served by putting off summary judgment where further discovery cannot possibly assist the Board's decision. More discovery will not change the fact that Campari is a tomato plant variety, although it may reveal that Westgro and others did not always appreciate this fact. But Westgro's past misunderstanding of the law does not aid Mastronardi. Campari has always been generic for a tomato plant variety. Petitioner respectfully urges that the Board grant this Motion for Summary Judgment and order the cancellation of U.S. Registration No. 3,037,538 for Campari.

Respectfully submitted,

TOWNSEND AND TOWNSEND AND CREW LLP

Dated: March 16, 2009

By 

Marc M. Gorelnik
Attorneys for Petitioner
WESTGRO SALES, INC.

TOWNSEND AND TOWNSEND AND CREW LLP
Two Embarcadero Center, 8th Floor
San Francisco, CA 94111
(415) 576-0200 telephone
(415) 576-0300 fax

CERTIFICATE OF SERVICE AND MAILING

I hereby certify that on March 16, 2009, this MOTION FOR SUMMARY JUDGMENT was served by first class mail, postage prepaid, on Registrant, as follows:

John C. Filosa, Esq.
Baker & McKenzie LLP
One Prudential Plaza
130 East Randolph Drive
Chicago, Illinois 60601

Dated: March 16, 2009

Billie Raney

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