

David VanSpeybroeck, OSB #954440
E-mail: david.vanspeybroeck@bullivant.com
Chad Stavley, OSB #034656
E-mail: chad.stavley@bullivant.com
BULLIVANT HOUSER BAILEY PC
300 Pioneer Tower
888 SW Fifth Avenue
Portland, Oregon 97204-2089
Telephone: 503.228.6351
Facsimile: 503.295.0915

Michael P. Boudett, BBO# 558757 (Mass.)
E-mail: mboudett@foleyhoag.com
Catherine H. Wicker, BBO# 664326 (Mass.)
E-mail: cwicker@foleyhoag.com
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, Massachusetts 02210
Telephone: 617.832.1000
Facsimile: 617.832.7000

Attorneys for Canadian Sphagnum Peat Moss
Association, Premier Horticulture, Inc., and Sun
Gro Horticulture Distribution

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

CANADIAN SPHAGNUM PEAT MOSS
ASSOCIATION, PREMIER
HORTICULTURE, INC.; and SUN GRO
HORTICULTURE DISTRIBUTION,

Plaintiffs,

v.

ORGANIX, INC.,

Defendant.

CV '07 - 1568 - AS
Civil No.:

COMPLAINT AND JURY DEMAND

COMPLAINT

1.

This is an action brought by Plaintiff, the Canadian Sphagnum Peat Moss Association (“CSPMA” or the “Association”), which is seeking to protect itself and its members from Defendant’s attempts to use a false, misleading and confusing trademark. Plaintiffs Premier Horticulture, Inc., and Sun Gro Horticulture Distribution are members of the CSPMA. Defendant Organix, Inc. has designed, marketed, and begun distributing a peat moss alternative under the name, “RePeat™.” Despite its name, RePeat actually contains no peat or peat moss, but, rather, is derived from dairy manure. Plaintiff seeks injunctive relief and damages.

THE PARTIES

2.

Plaintiff Canadian Sphagnum Peat Moss Association is an association of peat moss producers and distributors from both the United States and Canada. CSPMA is a Canadian corporation with its principal place of business at 2208-13 Mission Avenue, St. Albert, Alberta, Canada T8N 1H6.

3.

Plaintiff Premier Horticulture Inc. (“Premier Horticulture”) is a company in the United States that sells peat and peat products from Canada. Premier Horticulture is a corporation organized and existing under the laws of Delaware, with its principal place of business at 127 South Fifth Street, Suite 300, Quakertown, PA 18951.

4.

Plaintiff Sun Gro Horticulture Distribution Inc. (“Sun Gro”) distributes peat and peat products in the United States. Sun Gro is a corporation organized and existing under the laws of Delaware, with its principal place of business at 15831 NE 8th Street, Suite 100, Bellevue, WA 98008.

5.

Upon information and belief, Defendant Organix, Inc. (“Organix”) is a corporation organized and existing under the laws of Oregon, with its principal place of business at 2517 S. Wilbur Street, Walla Walla, Washington 99362.

JURISDICTION AND VENUE

6.

This court has federal question jurisdiction under 28 U.S.C. § 1331.

7.

This court also has original jurisdiction over all claims pursuant to 28 U.S.C. § 1332 because there is complete diversity of citizenship and the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.

8.

Venue is proper in this jurisdiction pursuant to 28 U.S.C. § 1391 (b), as this is a district in which Defendant resides, is located, and/or transacts business.

FACTS

Unique Qualities of Peat Moss

9.

Peat moss is widely recognized as having unique properties to support the ideal growing conditions for plants and grass. Horticulturists and home gardeners select peat moss based upon its capacity to yield excellent water and air exchange, provide enhanced root growth, provide excellent buffering capability, save water by retaining moisture and releasing it slowly, save fertilizer by reducing “nutrient leaching,” and protect soil from hardening through adding organic material.

10.

CSPMA members exclusively sell peat moss with these unique properties. CSPMA

ensures that its members offer only true peat moss and that the peat comes from a bog where strict environmental guidelines are in place.

11.

Organix has touted the properties of true peat moss. On its website, Organix refers to peat moss as North America's "most utilized soil amendment," and explains that "its ability to hold moisture and provide the horticulture industry with a safe, reliable growth medium is well-known." See <http://www.organix.us/product/repeat/>.

Organix's "RePeat" Trademark

12.

On March 29, 2006, Organix applied to register a trademark application for its product, "RePeat." Organix described its product as a "soil amendment utilized in horticulture as a peat moss replacement, derived from the solid residuals resulting from the anaerobic digestion of dairy manure." Organix has no federal trademark registration as of this date.

13.

In January 2007, Organix announced the creation of its RePeat product in a press release. Organix described RePeat as a "peat moss replacement made from dairy solids."

14.

Organix currently promotes sales of its RePeat product on the world wide web, among other media. When searching under the "Products" tab on Organix's website, one first sees the "RePeat™" name in large letters, followed by the subscript, "the renewable peat moss substitute." See <http://www.organix.us/product/>. The webpage then lists three lines of information about the product, but fails to mention that RePeat contains no peat, but consists of dairy manure.

15.

On September 14, 2007, Organix issued a statement and provided pictures on its website showing the “first load” of RePeat being delivered.

Communications Between The Parties

16.

Upon learning of RePeat through the Company press release, CSPMA contacted Organix by letter dated January 18, 2007, i.e. well before any RePeat product was sold. CSPMA’s objected to Organix plans to market and sell a soil amendment product under the name RePeat as a substitute for peat moss. A copy of this letter is attached hereto as Exhibit A.

17.

Numerous communications with counsel followed. Unable to reach a resolution with Organix, CSPMA now seeks the assistance of the Court to resolve its claims.

COUNT I

VIOLATION OF THE LANHAM ACT, 15 U.S.C. § 1125(a)

18.

Plaintiffs reallege and incorporate all prior paragraphs of this Complaint.

19.

Organix has falsely described its RePeat product and misrepresented goods in interstate commerce, thereby violating Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). Organix’s RePeat mark is false on its face, and/or misleading, as it is not actually made of peat.

20.

Through its website and in press releases, Organix has held its product out as containing peat or peat moss. These advertisements have the tendency to deceive the general

public, and thereby influence the public's purchasing decisions

21.

This misrepresentation is likely to cause confusion and mistake by the general public as to: 1) the affiliation, connection and association of Organix with producers and distributors of peat moss; 2) the origin, sponsorship and approval of Organix's RePeat product by producers and distributors of peat moss, and 3) the nature, characteristics, qualities and geographic origins of the RePeat product, which is composed of manure, not peat.

22.

CSPMA members exclusively sell actual peat moss, which is determined to meet unique soil properties for plant and grass growth. Because the public is likely to be confused by Organix's "RePeat" trademark, and thereby change its purchasing decisions, Premier Horticulture, Sun Gro, CSPMA and its members will be harmed by this misrepresentation. This misrepresentation will cause commercial injury to Premier Horticulture, Sun Gro, CSPMA and its members by decreasing actual sales and hurt the plaintiffs' abilities to compete with the defendant.

23.

Organix's use of a false and misleading trademark will also injure Premier Horticulture, Sun Gro, CSPMA and its members by damaging the image of true peat moss. Peat moss is a natural, organic substance, whereas RePeat is dairy manure that undergoes extensive processing through an anaerobic digester. True peat moss has proven itself as unique in its ability to facilitate plant and grass growth, whereas RePeat is largely untested. The confusing and misleading use of the word "Peat" in Organix's RePeat is likely to degrade the image of true peat moss, thereby causing commercial injury with irreparable damages to plaintiffs.

COUNT II

UNFAIR COMPETITION

24.

Plaintiffs reallege and incorporate all prior paragraphs of this Complaint.

25.

Organix's use of the word "peat" on its RePeat packaging and advertising is likely to deceive buyers into believing they are purchasing a peat product produced by a peat manufacturer instead of a manure product, without peat, produced by Organix.

26.

Organix's misleading trademark, packaging and advertising have caused and will continue to cause economic damages to Plaintiffs.

RELIEF REQUESTED

WHEREFORE, for the reasons set forth above, and for such other reasons that may be presented hereafter, Premier Horticulture, Sun Gro, and CSPMA respectfully request that this Court:

1. Preliminarily and permanently order Organix to cease and desist at once from any further use of the word "peat" or any other similarly representative and misleading name in connection with its RePeat product;
2. Enter judgment in Premier Horticulture's, Sun Gro's, and CSPMA's favor in an amount proven at trial;
3. Award Premier Horticulture, Sun Gro, and CSPMA their reasonable attorneys' fees, costs, and pre-judgment interest;
4. Award Premier Horticulture, Sun Gro, and CSPMA multiple damages, up to treble the amount; and
5. Award Premier Horticulture, Sun Gro, and CSPMA such other and further

relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury on all issues so triable.

DATED this 18th day of October, 2007.

FOLEY HOAG LLP

BY M. Boudett
Michael P. Boudett, BBO# 558757 (Mass.)
E-mail: mboudett@foleyhoag.com
Catherine H. Wicker, BBO# 664326 (Mass.)
E-mail: cwicker@foleyhoag.com
Telephone: 617.832.1000

Attorneys for Canadian Sphagnum Peat Moss
Association, Premier Horticulture, Inc., and Sun
Gro Horticulture Distribution

DATED this 17th day of October, 2007.

BULLIVANT HOUSER BAILEY PC

BY D. VanSpeybroeck
David VanSpeybroeck, OSB #954440
E-mail: david.vanspeybroeck@bullivant.com
Chad Stavley, OSB #034656
E-mail: chad.stavley@bullivant.com
Telephone: 503.228.6351

Attorneys for Canadian Sphagnum Peat Moss
Association, Premier Horticulture, Inc., and Sun Gro
Horticulture Distribution

10410712.1



January 18, 2007

Organix Inc,
2517 S. Wilbur
Walla Walla, WA 99362

Attention: Mr. R. Davis

Dear Mr. Davis:

I read with some concern your press release of January 2, 2007, in which you announced that your company was launching a new product called RePeat. The article describes the product as a digested manure and indicates that it contains no peat.

The Canadian Sphagnum Peat Moss Association challenges any use of the word "peat" in a non-peat product in the United States.

I am informing you of this so that you can change your brand name to something that does not refer to peat, before we take further action.

Here are the results of our challenges.

- ▶ Two companies have signed settlement agreements.
- ▶ Three companies have been challenged at the US patent office and their applications refused on the basis of our protest.
- ▶ The patent office is being monitored for future attempts to register names with peat in the brand name.

I urge you to act now. The sooner you do, the less it will cost you to change at some time in the future.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Gerry Hood', written over a horizontal line.

Gerry Hood
President, CSPMA
GOH/dr