

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

DR. HAUSCHKA SKIN CARE, INC.,)	
)	
Plaintiff,)	
)	Civil Action No. _____
v.)	
)	
DEMETER ASSOCIATION, INC.,)	
)	
Defendant.)	
)	

**COMPLAINT FOR CANCELLATION OF CERTIFICATION
MARK REGISTRATIONS AND DECLARATORY JUDGMENT**

Plaintiff, Dr. Hauschka Skin Care, Inc. (“Hauschka”), files its Complaint for Cancellation of Certification Mark Registrations, and for Declaratory Relief against Defendant, Demeter Association, Inc. (“Demeter”), and states:

NATURE OF THE ACTION

1. This action seeks cancellation of federally registered certification trademarks pursuant to 15 U.S.C. sections 1064 and 1119, and a declaration of Plaintiff’s rights with respect to the Fair Use Doctrine, codified at 15 U.S.C. section 1115 of the Lanham Act, among other rights.

2. Demeter is the record owner of the three federally registered certification marks containing the term “biodynamic” issued by the United States Patent and Trademark Office (“USPTO”), namely, U.S. Registration Nos. 3,102,570 (the “570 Registration”), 2,286,984 (the “984 Registration”), and 3,448,478 (the “478 Registration”), copies of which are attached hereto at Exhibits “1”, “2”, and “3”, respectively. These three marks shall collectively be referred to as the “Demeter Marks”. Hauschka contends that the Demeter Marks containing the

term “biodynamic” should be cancelled, or at a minimum modified, to disclaim the term “biodynamic”.

3. The term “biodynamic” is, or has become, a generic term universally used to describe a self-sustaining farming method and agricultural system, which cannot serve as a trademark to the exclusion of others. Additionally, declaratory relief should be granted establishing that any use that Hauschka is making of the term “biodynamic” is in good faith, and in a non-trademark manner to truthfully describe the farming methodology used to cultivate and harvest ingredients comprising DR. HAUSCHKA-branded products manufactured and sold by Hauschka.

THE PARTIES

4. Plaintiff, Hauschka, is a corporation organized and existing under the laws of Massachusetts. Hauschka and its affiliated companies manufacture and sell high quality skin care and cosmetic products containing biodynamically grown ingredients. DR. HAUSCHKA-branded products are sold internationally and domestically in all fifty states, including within this Judicial District.

5. Defendant, Demeter, is a corporation organized and existing under the laws of Massachusetts, with its principal place of business in Philomath, Oregon. Demeter is a non-profit company in the business of promoting and certifying farming methods and agriculture systems, including biodynamic farming and products.

6. Demeter is the American chapter of Demeter International, which purports to be the world’s only certifier of biodynamic farms and products. Demeter offers its certification services in all fifty states and conducts business within this Judicial District.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this matter pursuant to 15 U.S.C. Sections 1119 and 1121, and 28 U.S.C. Section 1331 and 2201.

8. This Court has personal jurisdiction over the parties as they transact and solicit business within this District.

9. Venue in this District is proper under 28 U.S.C. section 1391 as substantial events giving rise to this action occurred in this District.

FACTS COMMON TO ALL COUNTS

The Term “Biodynamic” And Its History

10. The term “biodynamic” has been used as a common descriptive name for a method and theory of agricultural farming for almost a century. Biodynamic farming represents long-standing principles of non-chemical, organized sustainable agricultural methods and predates the recent rise in popularity of, and the economic capitalization upon, the “organic” agricultural movement.

11. Demeter itself recognizes the historic origins of the term “biodynamic” to describe farms and agricultural methodology. According to Demeter’s own website, www.demeter-usa.org, in the early 20th century, Dr. Rudolph Steiner, a scientist and philosopher, taught an “agricultural course” to European farmers in which he outlined an approach to sustainable holistic agriculture. See pages copied from www.demeter-usa.org attached at Exhibit “4”. This farming methodology came to be called “biodynamics.”

12. As the term “biodynamic” suggests, the method is designed to work directly with changing biological processes and cycles. For example, to maintain and foster soil fertility, biodynamic farmers rely on organic manure and compost, crop rotation, proper working of the

soil, and protective measures such as mixed cropping. Such methods have been designed to create self-sustaining farms that produce better feed for livestock and better food for humans.

13. Dr. Steiner built upon previously utilized practices and theories in fostering what has come to be known as the biodynamic movement. Dr. Stein taught these theories during lectures given in 1924, and the term “biodynamics” has subsequently been ascribed to the teachings of Dr. Steiner. Proponents of the biodynamic farming methodology have banded together and created organizations around the world with the intent to spread the practice of biodynamic farming and the principles underpinning biodynamic farming.

14. Demeter (and its overseeing body, Demeter International) are among the most well known biodynamic farming advocacy groups. However, unlike other biodynamic farming organizations, Demeter is attempting to exercise exclusive rights and control over the term “biodynamic” through its registered certification marks, under which it seeks to become the de facto regulator for all uses of the term “biodynamic,” and benefit monetarily as a result.

15. In addition to Demeter, other biodynamic farming and advocacy groups exist in the United States and internationally. For instance, Biodynamic Farming and Garden Association was formed for these purposes in 1938, as well as other associations and groups promoting biodynamic farming methods in countries that include Australia, Canada, Chile, Croatia, the Czech Republic, Greece, the Georgian Republic, Latvia, Peru, Romania, Russia, South Africa, among others.

16. These associations, farmers, and consumers use the term “biodynamic” generically to describe an historic farming method and agricultural system. Biodynamic products and the principles and methods of biodynamic farming existed universally prior to, and independent of, Demeter and its claims to be the sole arbiter over how the term “biodynamic”

may be used. Both prior to and after Demeter's establishment, researchers, scholars, and others have come to use the term generically in articles and research literature to describe the practice, its components and characteristics.

Hauschka and the Dr. Hauschka-Branded Line of Skin Care Products

17. Hauschka is a renowned skin care company that markets and sells high end skin care and cosmetic products comprised of biodynamically grown ingredients throughout the United States and internationally. Hauschka's products are typically sold in boutique stores, upscale salons and pharmacies.

18. Hauschka is named after Dr. Rudolph Hauschka ("Dr. Hauschka"), an Austrian born chemist who studied the teachings of Dr. Steiner. Over eighty years ago, Dr. Hauschka decided to apply these principles to develop medicines, health and hygiene products in Germany. These products were so successful that Dr. Hauschka was able to open the WALA Heilmittel ("WALA") laboratory in Germany.

19. Dr. Hauschka eventually met a pioneering esthetician, Elisabeth Sigmund ("Sigmund"), who traveled to Germany to work with Dr. Hauschka at the WALA Heilmittel laboratory and developed a holistic and anthroposophical approach to skin care. As a result of that collaboration, in 1967, the DR. HAUSCHKA-brand of skin care products was launched, which carries forward today.

20. Hauschka's products are still developed at the WALA laboratory and continue to be respected throughout the world as some of the most pure, wholesome and effective skin care and cosmetic products available.

21. Hauschka, through its founders, has been at the forefront of the anthroposophic and biodynamic movement for over seventy-five years and has employed biodynamic farming

methods and products since long before the public interest in environmentally friendly products and chemical/pesticide free farming methods became the popular “green” movement that exists today. Hauschka’s use and incorporation of biodynamic principles and products in the high quality goods it sells also long predates the recent efforts by Demeter to police and restrict the fair use of the term “biodynamic” through its federally registered certification marks.

22. For over forty years, Hauschka has used the term “biodynamic” to describe the farming methods and agricultural systems involved in cultivating some of the ingredients used in its products. Hauschka has used the term on its marketing materials, including among other things, its product labels, package inserts, point of sale materials, and more recently its website, www.drhasuchka.com.

Hauschka and Demeter’s Relationship

23. Demeter knows about, and for a period of time has known of Hauschka’s use of the term “biodynamic” to describe raw materials used in Hauschka’s products. WALA is the supplier for, and manufacturer of, DR. HAUSCHKA brand skin care products. WALA has a long standing relationship with Demeter in Germany, and WALA’s herb garden and farm are both Demeter certified as biodynamic in Germany. Biodynamically grown products from WALA are utilized in DR. HAUSCHKA products.

24. Demeter had never sought to prevent Hauschka’s use of the term “biodynamic” in connection with its products until a business opportunity arose in connection with the expanding market for products manufactured from biodynamically grown components. In May, 2011, Hauschka’s agents contacted Demeter to discuss the possibility of a number of companies collaborating in the creation of a “shop-in-shop” concept featuring products made from

biodynamically-grown raw materials in Whole Foods Markets (“Whole Foods”) throughout the country.

25. The biodynamic shop-in-shop project with Whole Foods remains in discussion; however, following Hauschka’s disclosure of the concept to Demeter, for the first time, Demeter indicated to Hauschka that Hauschka (and presumably other participants) must pay Demeter fees for Demeter’s certification of the products to be sold, which would include amounts for inspection of facilities, production, and continuing royalties for the sale of goods utilizing the term “biodynamic”. Hauschka’s manufacturer, WALA, already pays a premium for Demeter’s certification of raw materials

26. However, since discussion of the Whole Foods project, Demeter has indicated to Hauschka that Hauschka cannot use the term “biodynamic” to describe some of the raw materials in Hauschka’s products unless Demeter is paid additional fees, despite the fact that: Hauschka has incorporated the term “biodynamic” in its product packing materials with Demeter’s direct knowledge for years; Demeter never once objected to Hauschka’s use of the term “biodynamic” until the Whole Foods shop-in-shop concept was unveiled to Demeter; and WALA pays for Demeter’s certification of biodynamic components.

27. Demeter’s objection to the fair use of the term “biodynamic” on Hauschka’s products is tied to the Whole Foods concept and the perceived expanding market for biodynamically produced products in an attempt to extract monies out of Hauschka, Whole Foods and the other companies seeking to participate in the shop-in-shop concept at Whole Foods.

Demeter's Marks

28. Demeter currently owns the rights to the certification mark "BIODYNAMIC" (the '984 Registration) relating to certification of organic agricultural products or applications which have been grown and processed in accordance with guidelines established by Demeter. The certification applies to wideranging products in naturally occurring conditions such as soil fertility, crop resistance to various naturally occurring threats, raising livestock, storage and processing agricultural goods and the prohibition of various external or chemical treatments. The registration date for this certification mark is October 19, 1999.

29. Demeter also owns the rights to the certification mark BIODYNAMIC (the '570 Registration) and the certification mark DEMETER CERTIFIED BIODYNAMIC (the '478 Registration), both relating to certification of farms and products containing agriculturally produced materials as having met Demeter's standards and guidelines. The products encompassed by the certification marks include virtually any goods containing products raised agriculturally, or produced from agricultural products, including for example, processed or unprocessed food, beverages, dietary supplements, fiber products, body care products, soil additives, manure, cosmetics, fabrics, clothing, blankets and bedding, shoes, toys, produce of every variety, animal products, pastas, grains, seeds, and alcoholic beverages and spirits, among others. The registration dates for these certification marks are June 13, 2006 and July 17, 2008 respectively.

30. Based on the information available from the USPTO, Demeter has yet to file a Declaration of Incontestability for any of these Demeter marks.

Demeter's Recent Enforcement and Restrictive Conduct

31. For decades sellers and producers have used the term “biodynamic,” in a non-trademark manner, to describe their farms, products or components of their products. Such activities have gone on undisturbed by Demeter, despite its knowledge that sellers making such generic and descriptive use of “biodynamic” did so without meeting Demeter’s self-imposed, unregulated certification standards.

32. Upon information and belief, Demeter has recently stepped up its enforcement activities --including opposition to the Whole Foods project-- in an attempt to profit and capitalize on the emerging market for “green”, “organic” and “biodynamic” products.

33. Throughout its history, Hauschka has elected not to seek Demeter’s certification for its DR. HAUSCHKA-branded products and until recently, was never asked to, nor heard any complaint from Demeter.

34. Even if Hauschka wished to pay additional “tribute” to Demeter and seek its certification, it could not do so because the products manufactured and sold by Hauschka do not lend themselves to biodynamic certification. It would be impossible in some instances to obtain certification from Demeter due to worldwide unavailability of certain raw materials necessary to manufacture certain DR. HAUSCHKA-branded products. Further, attempting to utilize 100% biodynamic components --or whatever ratio Demeter would unilaterally enforce under its self-imposed standard -- would compromise the quality and/or effectiveness of these products.

35. Upon information and belief, Demeter has derived its certification standards for skin care and cosmetic products largely from its certification standards for food products. However, Demeter fails to appreciate or account for the differences in the intended uses of the products.

36. As a result, cosmetic and skin care products certified as biodynamic by Demeter are limited to products containing very limited ingredients, such as herbal body oils, flower essences, steam distilled essential oils, and hydrosis. Absent from this list are skin care creams and lotions as such products are more complex and require ingredients that cannot feasibly be biodynamically grown or cannot be biodynamically grown in the quantities necessary to meet the marketplace demands.

37. Demeter's self-imposed, unregulated certification standards for "biodynamic" skin care and cosmetic products are unrealistic and futile, and if recognized, would serve as a barrier for products to properly describe their biodynamic components, and thus are detrimental to the consumers.

38. Irrespective of the standards Demeter seeks to impose on the market for biodynamic products, Hauschka, and similarly situated sellers have the right to fairly describe the raw materials making up a portion of their end products as "biodynamic", when in fact the term is accurately used.

39. The fact that Demeter has obtained federally registered certification marks containing the term "biodynamic" does not entitle Demeter to monopolize a term of common usage within farming and agriculture to describe a process and the end result of that process.

40. Demeter's attempt to restrict the fair use of the term "biodynamic" by Hauschka and others within the marketplace has given rise to the present controversy, necessitating the cancellation of the Demeter's federally registered Marks, and a declaration of Hauschka's rights with respect to the fair use of the term "biodynamic".

41. All conditions precedent to this lawsuit have occurred, been performed, or have been waived by Demeter.

42. As a result of the conduct set forth above, Hauschka has been forced to retain the undersigned attorneys to prosecute the instant action and is obligated to pay reasonable attorney's fees. Those fees should be paid by Demeter, pursuant to controlling law.

COUNT I

Cancellation of U.S. Registration No. 3,102,570
(15 U.S.C. §§ 1064 and 1119)

43. Hauschka incorporates Paragraphs 1 through 42, as set forth herein.

44. Demeter claims ownership of the '570 Registration for the term "BIODYNAMIC". (See Exhibit "1" attached hereto). The '570 Registration should be cancelled pursuant to 15 U.S.C. sections 1064 and 1119, because the term "biodynamic" is generic, and of common ordinary usage, in connection with goods, services, products, and derivatives thereof.

45. As set forth above, the term "biodynamic" is commonly understood as a farming method, agricultural system, and is otherwise descriptive of the products resulting from the "biodynamic" process.

46. Pursuant to the Lanham Act, the Court has jurisdiction to order the USPTO to make appropriate entries on the Federal Register with respect to the subject mark, and its inability to serve as a proper indicator of origin, due to its genericness, common and ordinary meaning.

COUNT II

Cancellation of U.S. Registration No. 2,286,984
(15 U.S.C. §§ 1064 and 1119)

47. Hauschka incorporates Paragraphs 1 through 42, as set forth herein.

48. Demeter claims ownership of the '984 Registration for the term "BIODYNAMIC". (See Exhibit "2" attached hereto). The '984 Registration should be cancelled pursuant to 15 U.S.C. sections 1064 and 1119, because the term "biodynamic" is generic, and of common ordinary usage, in connection with goods, services, products, and derivatives thereof.

49. As set forth above, the term "biodynamic" is commonly understood as a farming method, agricultural system, and is otherwise descriptive of the products resulting from the "biodynamic" process.

50. Pursuant to the Lanham Act, the Court has jurisdiction to order the USPTO to make appropriate entries on the Federal Register with respect to the subject mark, and its inability to serve as a proper indicator of origin, due to its genericness, common and ordinary meaning.

COUNT III

Cancellation of U.S. Registration No. 3,448,478 **(15 U.S.C. §§ 1064 and 1119)**

51. Hauschka incorporates by reference Paragraphs 1 through 42, as set forth herein.

52. Demeter claims ownership of the '478 Registration for the term "BIODYNAMIC" mark. (See Exhibit "3" attached hereto). The '478 Registration should be cancelled pursuant to 15 U.S.C. Sections 1064 and 1119, because the term "biodynamic" is generic, and of common ordinary usage, in connection with goods, services, products, and derivatives thereof.

53. Demeter's certification mark found at the '478 Registration is a composite mark comprised of a floral logo, bordered on the top with the curved stylized writing of the word "Demeter", and on the bottom with the terms "certified biodynamic" written horizontally,

stacked over top of each other. To the extent that this certification mark is entitled to any protection, the word “biodynamic” should be disclaimed, and/or the mark cancelled to the extent necessary so that the generic term “biodynamic” is not included within the protection or rights conferred by the certification mark registration.

54. As set forth above, the term “biodynamic” is commonly understood as a farming method, agricultural system, and otherwise descriptive of the products resulting from the “biodynamic” process.

55. Pursuant to the Lanham Act, the Court has jurisdiction to order the USPTO to make appropriate entries on the Federal Register with respect to the subject mark, and its inability to serve as a proper indicator of origin, due to its genericness, common and ordinary meaning.

COUNT IV

Declaratory Relief **(28 U.S.C. § 2201)**

56. Hauschka incorporates Paragraphs 1 through 42, as set forth herein.

57. An actual and present controversy exists between Hauschka and Demeter with respect to Hauschka’s ability to use the term “biodynamic” to describe products, and component ingredients utilized in the manufacture and creation of products sold by Hauschka.

58. Hauschka believes that the term “biodynamic” is generic and is of ordinary meaning and usage, and that under any circumstances, Hauschka has a right to use the term “biodynamic” to fairly and properly describe its products, the component ingredient of its products, and/or the processes under which Dr. Hauschka products are brought to market and sold.

59. Demeter has recently notified Hauschka that it objects to Hauschka's long standing use of the term "biodynamic" to describe DR. HAUSCHKA products, their component parts, or the process used under which DR. HAUSCHKA's products are brought to market and sold. Demeter raised its objection claiming trademark rights and entitlements pursuant to the Demeter certification marks. Accordingly, Hauschka reasonably believes that Demeter will commence litigation against Hauschka if Hauschka does not cease use of the term "biodynamic".

60. Even if the Court were to determine that Demeter somehow is entitled to protection in connection with the term "biodynamic", Hauschka's use of that term nonetheless constitutes "fair use", pursuant to 15 U.S.C. section 1115. Dr. Hauschka uses the term "biodynamic" in good faith, in a non-trademark manner that does not operate as a source or indicator of origin for Dr. Hauschka products; rather, use of the term fairly describes farming methods and procedures utilized in the creation of Hauschka's products.

61. In the event that this Court determines that Demeter does have protectable rights in the term "biodynamic" under the Demeter Marks, those rights must be declared to cease at the point others in the market, such as Hauschka, can fairly and in good faith describe their wares as being biodynamic or incorporating biodynamic materials. Moreover, the prior knowledge and dealings between the parties further supports the declaration that Demeter has waived any right to object to Hauschka's fair or descriptive use of the term "biodynamic", that Demeter is estopped from asserting any such objection, and is similarly barred from doing so under the doctrines of laches and acquiescence. Hauschka and Demeter's interests are adverse, and a judicial determination is necessary and appropriate.

62. Hauschka requests that this Court resolve the competing contentions of the parties and declare that: (i) the term "biodynamic" is a generic term widely used throughout the world

over to describe a category or method of farming that has been in existence for over eighty years; (ii) Demeter does not have exclusive rights to the term “biodynamic” in reference to a farming method or agricultural system, and cannot control the use of that term or force others to refrain from using it; (iii) Demeter’s federal certification marks issued under the ’478 Registration, the ’984 Registration, and the ’570 Registration should be cancelled, and cannot be used by Demeter to prohibit the use of the term “biodynamic” on its products or services; (iv) Hauschka’s use of the term “biodynamic” has at all times been proper and does not violate any rights that Demeter may have; and (v) Demeter, has waived, is estopped, and otherwise barred from claiming Hauschka infringed the rights, if any, that Demeter owns in the term “biodynamic”.

PRAYER FOR RELIEF

WHEREFORE, Hauschka respectfully requests that this Court grant the following relief:

a. Enter Final Judgment cancelling Demeter’s certification marks, the ’478 Registration, the ’984 Registration, and the ’570 Registration, and directing the Director of the United States Patent and Trademark Office to remove such registrations from the Principal Register.

b. Declare that (i) the term “biodynamic” is a generic term widely used throughout the world over to describe a category or method of farming that has been in existence for over eighty years; (ii) Demeter does not have exclusive rights to the term “biodynamic” in reference to a farming method or agriculture system, and cannot control the use of that term or force others to stop using it; (iii) Demeter’s federal certification marks for the ’478 Registration, the ’984 Registration, and the ’570 Registration should be cancelled, and cannot be used by Demeter to prohibit the use of the term “biodynamic” on their products or services; (iv) Hauschka’s use of the term “biodynamic” has at all times been a proper, fair use that does not violate any rights that

Demeter may have; and (v) Demeter has waived, and is otherwise estopped, and barred from claiming Hauschka infringed the rights, if any, that Demeter owns in the term “biodynamic”;

- c. Award Hauschka’s costs incurred in this action; and
- d. Grant such additional relief as the court deems just and proper.

Dated: January 31, 2012

Respectfully submitted,

DR. HAUSCHKA SKIN CARE, INC.

By its attorneys,

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