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

Proceeding	91252622
Party	Plaintiff Spring Meadow Nursery, Inc.
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Signature	/Brian D. Wassom/
Date	06/14/2021
Attachments	Declaration of Dale Deppe - Signed.pdf(269082 bytes) Declaration of Jeremy Deppe - signed.pdf(740112 bytes)

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

In the matter of U.S. Application Serial No. 88567322
Publication in the Official Gazette: Nov. 19, 2019
For the mark **JEWEL BOX**

Spring Meadow Nursery, Inc.,
Opposer,

v.

Plant Development Services, Inc.,
Applicant.

Opposition No.: 91252622

DECLARATION OF DALE DEPPE

I, Dale Deppe, hereby declare, upon penalty of perjury under the laws of the United States of America, that the following is true and correct to the best of my knowledge and belief:

1. I am over the age of 18 and able to testify on the matters contained herein.
2. I obtained an associate degree in horticulture from Michigan State University in 1971.
3. I am currently employed as President of Spring Meadow Nursery, Inc. (“Spring Meadow”); a position I have held since 1982.
4. I submit this Declaration in support of the above-captioned Opposition proceeding filed by Spring Meadow against Plant Development Services, Inc. (“PDSI”) opposing registration of the mark JEWEL BOX.
5. I have been professionally involved in the horticultural industry for over 50 years, and have developed an expertise in the field developed through decades of hard work and innovation. Below are some of the more recent award and honors I have received in the field:

- a. In 2015, I was elected Chairman of the Board of American Hort (formerly ANLA).
- b. In 2016 I was awarded the prestigious Scott Medal by the Scott Arboretum of Swarthmore College for "outstanding national contribution to the science and the art of gardening."
- c. In 2018 I was presented with the Jackson Dawson Memorial Award for exceptional skill in the science or practice of hybridization or propagation of hardy, woody plants.
- d. In 2019, I was presented the WNLA Western Legend Award, recognizing a lifetime of sustained and significant professional achievement and public service to the green industry.

6. Spring Meadow was founded in 1981 by Dale and Liz Deppe. What started as a small, primarily contract-growing operation has grown to become one of the largest and best-known woody plant liner providers in North America. Our current selection tops 400 varieties.

7. I have read the Declaration of Jeremy Deppe, and the exhibits thereto, being submitted by Spring Meadows as trial testimony in this matter. I agree with everything said therein, and confirm the authenticity of the exhibits. In order to avoid unnecessary duplication and extra paperwork for this Board, I am avoiding repeating everything stated in Jeremy's declaration, but I am submitting this declaration to add my endorsement to the information he provided.

8. In my view as someone with 50 years of experience in the plant nursery industry, PDSI's use of JEWEL BOX in connection with distylium plants creates a high likelihood of confusion with Spring Meadows' GEM BOX and JUKE BOX marks.

9. The marks themselves sound highly similar to each other. “GEM,” “JUKE,” and “JEWEL” are all one-syllable words pronounced with the same opening “j” sound. And each mark shares the identical second word, “BOX.”

10. Each party’s marks create a similar connotation and commercial impression. The plants sold under each of these marks are advertised as replacements or substitutes for boxwood plants.

11. The parties’ goods travel in similar trade channels. It appears that PDSI advertises and sells its plants in a similar manner to how Spring Meadow does. It would not surprise me to find GEM BOX, JUKE BOX, and JEWEL BOX plants being sold by the same nursery, especially since the nurseries PDSI uses are in many of the same states as the nurseries Spring Meadow uses.

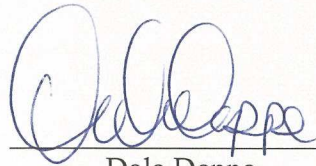
12. The plants sold under the GEM BOX and JUKE BOX marks are generally sold to end users at price points between \$20-\$40 at mass merchants and between \$20-\$50 at independent garden centers. In my experience, this suggests that purchasers are not likely to invest a significant amount of time and care into discerning or verifying the details or sources of the plant’s origins or the differences between similar brand names—at least, not nearly to the same degree as they would if the purchase was significantly more expensive. Further, it is my experience that end users (especially homeowners) do not put a lot of preplanning into the exact brand of plant they want to use in their landscaping beds. Instead, they are more likely to shop for plants when they have a landscaping need, and to choose from the plants available to them in the store at that moment. Some of these are planned purchases, and some are made on impulse.

13. I have a high degree of familiarity with my industry, the marketplace in which our plants are sold, and the competitors in our industry. A fair number of plants have the word “box” somewhere in their common names, mostly because they were species whose wood was useful in

making boxes. To the best of my knowledge, there is no other company using a similar two-word mark ending in BOX to describe live plants similar to ours.

FURTHER DECLARANT SAYETH NOT.

Date: June 11, 2021



Dale Deppe

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

In the matter of U.S. Application Serial No. 88567322
Publication in the Official Gazette: Nov. 19, 2019
For the mark **JEWEL BOX**

Spring Meadow Nursery, Inc.,
Opposer,

v.

Plant Development Services, Inc.,
Applicant.

Opposition No.: 91252622

DECLARATION OF JEREMY DEPPE

I, Jeremy Deppe, hereby declare, upon penalty of perjury under the laws of the United States of America, that the following is true and correct to the best of my knowledge and belief:

1. I am over the age of 18 and able to testify on the matters contained herein.
2. I obtained a bachelor degree in accounting from Calvin University in 1997.
3. I am currently employed as General Manager of Spring Meadow Nursery, Inc. (“Spring Meadow”), a position I have held since 2004. Since January 2019, I have also been the President of Great Garden Plants, Inc., a nursery in Grand Haven, Michigan growing hundreds of sun perennials, shade perennials, shrubs, groundcovers, roses, hedge plants and more.
4. I submit this Declaration in support of the above-captioned Opposition proceeding filed by Spring Meadow against Plant Development Services, Inc. (“PDSI”) opposing registration of the mark JEWEL BOX.

The Origins and Commercial Strength of Spring Meadow

5. Spring Meadow was founded in 1981 by Dale and Liz Deppe. What started as a small, primarily contract-growing operation has grown to become one of the largest and best-

known woody plant liner providers in North America. In 2004, Spring Meadow joined with the Proven Winners® brand of annuals to become Proven Winners® ColorChoice® Shrubs and is exclusively licensed to select, develop, distribute, and market shrubs for the brand.

6. Our current selection tops 400 varieties.

7. Spring Meadow also takes seriously the protection of the brand names it chooses for its plant varieties. As of this writing, Spring Meadow owns 312 live trademark applications and registrations in the US.

The GEM BOX® Mark

8. Since at least September 2014, Spring Meadow has consistently used the GEM BOX® mark in commerce in connection with an inkberry holly plant, as shown below:



9. As shown on our website,¹ we (accurately) describe this plant to customers as follows:

the GEM BOX® holly is inkberry holly is a dense, ball-shaped plant with small dark green leaves. Its foliage develops attractive red tips during the spring flush, and it maintains good branching right to the ground so it never looks bare-legged

¹ <https://springmeadownursery.com/plantfinder/gem-box-47250>

like other cultivars can. It is as versatile and good-looking as boxwood with no disease issues!

It is also accurately listed as “Native to North America, Boxwood alternative, Disease resistant.”

10. Additional specifications for this plant are as follows:

- USDA Zone 5 - 9 (-20°F/-28.9°C)
- Exposure Full sun, Part sun
- Height 2 - 3'
- Width 2 - 3'
- Finish Time 1 season
- Type Evergreen
- Bloom Time Spring
- Flower Color White
- Foliage Color Green
- Liner Sizes 2 1/4", 4", Quick Turn

11. On June 27, 2014, Spring Meadow filed App. No. 86322549 with the USPTO to register the mark GEM BOX for use with “live plants” in International Class 31. On February 10, 2015, the USPTO granted this application and issued Spring Meadow Reg. No. 4686050. That registration has since been renewed and is now incontestable. **Exhibit 1.**

The JUKE BOX® Mark

12. Since at least June 2017, Spring Meadow has consistently used the JUKE BOX® mark in commerce in connection with a dwarf broadleaf evergreen plant, as shown below:



13. As shown on our website,² we (accurately) describe this plant to customers as follows:

Juke Box[®] ×*Pyracomeles* is a remarkable new dwarf broadleaf evergreen could be mistaken for a boxwood or small holly at first glance; however, it comes without the threat of boxwood blight or spider mites. It has a natural, globe-like habit but can be sheared and shaped as desired. Fine branching creates a full habit. ×*Pyracomeles* is an intergeneric hybrid between *Pyracantha* and *Osteomeles*, but it has no thorns and does not flower. Faster to produce than boxwood as well.

It is also accurately listed as “Boxwood alternative, Evergreen, Disease resistant.”

14. Additional specifications for this plant are as follows:

- USDA Zone 7 - 9 (0°F/-17°C)
- Exposure Full sun, Part sun
- Height 1 - 3'
- Width 1 - 3'

² <https://springmeadownursery.com/plantfinder/juke-box-61900>

- Finish Time 1 season
- Type Evergreen
- Foliage Color Green
- Liner Sizes 2 1/4", 4", Quick Turn

15. On August 28, 2017, Spring Meadow filed App. No. 87585765 with the USPTO to register the mark JUKE BOX for use with “live plants” in International Class 31. On August 28, 2017, the USPTO granted this application and issued Spring Meadow Reg. No. 5544173. That registration remains in place. **Exhibit 2.**

16. I may refer to JUKE BOX and GEM BOX together herein as “Opposer’s Marks” or “Spring Meadow’s Marks.”

The Commercial Strength of Spring Meadow’s Marks

17. Spring Meadow has actively policed its rights in Opposer’s Marks by, among other things, asserting its rights against potentially infringing marks (specifically, two-word/syllable marks for live plants that end in “BOX”) and persuading the owners of those marks to cease and desist their infringement. A non-exhaustive collection of examples follows, along with authentic copies of related documents attached as exhibits:

Mark	Goods / Instructions	Action Taken
BOUQUET BOX 87372479 3-15-2017	wreaths, plants and trees	Letter to Attorney Katherine McDaniel, counsel to Cynthia Sixx to remove “live . . . plants and trees”; response received – will remove live plants and trees. Sixx agreed. Applicant has since deleted Classes 31 & 35 entirely. (Exhibit 3)
GRAZE BOX 86628755 5-13-2015	natural plants and flowers (among a variety of other things)	Demanded removal of “natural plants”; letter sent; Nature Delivered filed a Section 7 Amendment to delete “natural plants” from IC 31 that has since been accepted.

Mark	Goods / Instructions	Action Taken
44(e)		(Exhibit 4)
BLOOMSYBOX 87512686 06-03-2015	pending for natural flowering plants (use back to 2015)	Reached out for removal of “natural flowering plants” and “live flowers” After removal goods will read: “cut flowers; wreaths of natural flowers; bulbs and corms; live flower arrangements” Letter sent April 6 Bloomsy Box agreed to amend Application was eventually abandoned. (Exhibit 5)
BLOOMSYBOX.com (Design) 87512718 6-03-2015	pending for natural flowering plants (use back to 2015)	Reached out for removal of “natural flowering plants” and “live flowers” After removal goods will read: “cut flowers; wreaths of natural flowers; bulbs and corms; live flower arrangements” Letter sent April 6 Bloomsy Box has agreed to amend. Amendment has been made. <i>(Id.)</i>
JEWEL BOX 87594096 9-1-2017	pending ITU from Proven Winners	Reached out. PW abandoned the mark. (Exhibit 6)
SOFTBOX 87135619 8-11-2016	Published in January. Reg. pending Statement of Use	Letter to Vecchio Trees sent 12-19 Follow-up Feb. 14 Vecchio to amend with Statement of Use for only “living trees” Amendment has been made (Exhibit 7)
JOYBOX 87421840 2-5-2017	Dried flower arrangements; Live flower arrangements	To be published Feb. 27, 2018. 90-extension of opposition deadline until June 27 WNJ letter clarified “cut flowers”

Mark	Goods / Instructions	Action Taken
		Phone call with applicant – applicant to amend goods ID to “cut flower arrangements” from “live flower arrangements”. Amendment filed June 19, 2018 and accepted. (Exhibit 8)
FLOWERBX 87909700 5-7-2018	Flowers, live plants, dried flowers, live flower floral arrangements, Gift baskets containing live flowers	Applicant amended this application and the logo to remove “live plants” from Class 31 and “plants” from Class 35. (Exhibit 9)

18. A summary of Spring Meadow’s marketing and promotional expenses for each of Opposer’s Marks is attached as **Exhibit 10 (Sealed)**, which is designated Attorney’s Eyes Only and submitted under seal.

19. Spring Meadows advertises its plants in brochures, on its website and through the websites of affiliated companies, and sells them to various independent nurseries and retailers who grow and sell the plants to end users who are mostly landscapers, homeowners, and other individual consumers. These nurseries and retailers are located across the country. **Exhibit 11 (Sealed AEO)** (shipping list for BOX Series plants, with recipient names, but not states, redacted). A copy of the confidential license agreement allowing these nurseries to grow and sell plants bearing Opposer’s Marks is attached as **Exhibit12 (Sealed, Confidential)**.

20. Boxwoods are slow growing evergreen shrubs and small trees that typically grow no more than 12m (and sometimes less than 2m) tall. They have long been one of the most popular decorative landscaping plants in many regions across the country, but their populations have been severely impacted by the fungal “boxwood blight” disease in recent years. Therefore, there is a

high commercial demand for alternatives that have a similar look and feel to boxwoods while being resistant to boxwood blight.

21. Spring Meadows' GEM BOX and JUKE BOX plants are marketed to meet that need. That explains why each mark includes the word "BOX"; it is meant to connote the plant's ability to supplant boxwoods, not to identify them *as* boxwoods (which would be inaccurate). Spring Meadow has intentionally branded GEM BOX and JUKE BOX, along with other plants such as STRONGBOX, SKY BOX, and PATTI-O-BOX, as a series of plants with "-BOX" suffixes. Spring Meadow advertises this "Box Series" line of plants, its touting their advantages and using appropriate indicia of the fact that these product names are trademarks of Spring Meadow. Examples are attached as **Exhibit 13**.

22. This consistent marketing and commercial exposure has led to positive reactions and coverage from trade publications and other press. **Exhibit 14**.

23. Our records of direct consumer feedback show that individual end-users around the country purchase and enjoy our plants. They often reach out to tell us so, or to ask us questions seeking our expertise to help them get the most out of their Box Series plants. **Exhibit 15**.

24. Attached as **Exhibit 16 (Sealed, AEO)** is a confidential, Attorneys' Eyes Only summary of our sales revenues from plants bearing Opposer's Marks.

The Likelihood of Confusion Posed by the JEWEL BOX Mark

25. PDSI uses the JEWEL BOX mark in commerce in connection with a distylium plant, as shown below:



26. On its website, PDSI describes this plant as follows:

Attractive, soft, blue-green fine textured foliage with a compact, rounded habit makes Jewel Box a great alternative to Boxwood or Holly. Use in mass plantings, borders or hedges.

27. PDSI also provides the following specifications for its JEWEL BOX-branded plant:

- Size: 2–3' H x 3–4' W
- Exposure: Full sun to part shade
- Hardiness: USDA Zones 7a – 9b
- Soil: Well-drained garden soil

28. On August 5, 2019, PDSI filed U.S. App. No. 88567322 for the mark JEWEL BOX in International Class 31 for use with “Live plants, namely, distylium.” PDSI claimed a date of first use anywhere, and in commerce, of January 9, 2019.

29. In my view as someone with decades of experience in the plant nursery industry, PDSI’s use of JEWEL BOX in connection with distylium plants creates a high likelihood of confusion with Spring Meadows’ GEM BOX and JUKE BOX marks.

30. The marks themselves sound highly similar to each other. “GEM,” “JUKE,” and “JEWEL” are all one-syllable words pronounced with the same opening “j” sound. And each mark shares the identical second word, “BOX.”

31. Each party’s marks create a similar connotation and commercial impression. The plants sold under each of these marks are advertised as replacements or substitutes for boxwood plants.

32. The parties’ goods travel in similar trade channels. It appears that PDSI advertises and sells its plants in a similar manner to how Spring Meadow does. It would not surprise me to find GEM BOX, JUKE BOX, and JEWEL BOX plants being sold by the same nursery, especially since the nurseries PDSI uses are in many of the same states as the nurseries Spring Meadow uses. *Compare* Exhibit 11 (Sealed) (shipping list for BOX Series plants, with recipient names, but not states, redacted) with **Exhibit 17** (PDSI’s “Grower Network” map).

33. The plants sold under the GEM BOX and JUKE BOX marks are generally sold to end users at price points between \$20-\$40 at mass merchants and between \$20-\$50 at independent garden centers. Our wholesale prices are less than that, and are for starter plants that our nursery customers would grow for a year and then sell to independent garden centers. **Exhibit 18**. In my experience, this suggests that purchasers are not likely to invest a significant amount of time and care into discerning or verifying the details or sources of the plant’s origins or the differences between similar brand names—at least, not nearly to the same degree as they would if the purchase was significantly more expensive. Further, it is my experience that end users (especially homeowners) do not put a lot of preplanning into the exact brand of plant they want to use in their landscaping beds. Instead, they are more likely to shop for plants when they have a landscaping

need, and to choose from the plants available to them in the store at that moment. Some of these are planned purchases, and some are made on impulse.

34. I have a high degree of familiarity with my industry, the marketplace in which our plants are sold, and the competitors in our industry. As the person with the most responsibility for managing Spring Meadows' trademark portfolio, I also spend a lot of time researching the marks used throughout the industry. A fair number of plants have the word "box" somewhere in their common names, mostly because they were species whose wood was useful in making boxes. To the best of my knowledge, there is no other company using a similar two-word mark ending in BOX to describe live plants similar to ours.

FURTHER DECLARANT SAYETH NOT.

Date: June 10, 2021



Jeremy Deppe