

THIS OPINION IS
NOT A PRECEDENT OF
THE TTAB

Mailed: September 17, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

International Flora Technologies, Ltd.
v.
Desert Whale Jojoba Company, Inc.

Cancellation No.
92045327

Geoffrey S. Kercksmar of Kercksmar & Feltus PLLC for International
Flora Technologies, Ltd.

Dale F. Regelman of Quarles & Brady, LLP for Desert Whale Jojoba
Company, Inc.

Before Holtzman, Drost and Kuhlke, Administrative Trademark
Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Petitioner, International Flora Technologies, Ltd., has
filed a petition to cancel a registration owned by Desert Whale
Jojoba Company, Inc. (respondent) for the standard character mark
OIL FREE JOJOBA on the Supplemental Register for "skin and body
soaps, essential oils for personal use, cosmetics, and hair
lotions, all containing one or more chemically modified jojoba
extracts" in Class 3.¹ The word "JOJOBA" is disclaimed.

¹ Registration No. 2945397; issued April 26, 2005.

As its ground for cancellation, petitioner alleges that it is the owner of Registration No. 1816554 for the mark FLORAEESTERS for "chemical compounds; namely, jojoba esters for use in the manufacture of cosmetics and lubricants"; that petitioner is in the business of supplying Jojoba oil and its extracts in cosmetic ingredients to cosmetic and lubricant companies; that since at least 1994, petitioner has continuously used the term "oil-free Jojoba" as a generic term to describe its goods that comprise chemically modified Jojoba extracts that are substantially oil-free and thus, properly and generically referred to by the cosmetic industry as "oil free Jojoba"; and that continued registration of the mark would impair petitioner's rights to use the term generically in connection with its own goods.²

Respondent filed an answer denying the salient allegations of the petition.

The record includes the pleadings and the file of the involved registration. In addition, petitioner submitted notices of reliance, as well as the testimony, with exhibits, of the following witnesses: Robert Kelley Dwyer, petitioner's vice president sales; Robert Kleiman and David Ashley, both chemists

² The petition also contains allegations of likelihood of confusion with petitioner's FLORAEESTERS mark, and earlier in this proceeding, respondent filed a motion for summary judgment on that ground. The Board, in an order issued February 9, 2007, found that such allegations serve only to amplify petitioner's genericness claim, and they do not set forth a separate ground for cancellation. The Board, in addition, granted respondent's motion for summary judgment to the extent the allegations did set forth a separate claim, finding no likelihood of confusion as a matter of law.

with petitioner; and the expert testimony of Richard Randall Wickett, Ph.D., president of R. Randall Wickett Consulting Services and Professor of Pharmaceutics and Cosmetic Science at the University of Cincinnati College of Pharmacy, in charge of the graduate program in skin pharmaceutics and cosmetic science.

Respondent did not attend the depositions of petitioner's witnesses, nor did respondent submit any evidence on its own behalf.

Both parties have filed briefs.

We turn first to the evidentiary matters raised by respondent in its brief.

Respondent's motion to strike certain statements in petitioner's description of the record is denied. However, we have accorded no evidentiary value or consideration to any unsupported factual statements made by petitioner in its pleading or in its brief.³ See TBMP §§ 704.06(a) and (b) (2d ed. rev. 2004).

Respondent's motion to strike exhibits C, D, E and F attached to petitioner's main brief is denied. These exhibits consist of portions of the complete transcripts of testimony which had already been properly made of record by petitioner.

³ Furthermore, we have not considered petitioner's alternative pleadings and arguments in its brief concerning the descriptiveness of respondent's mark and its lack of acquired distinctiveness. The subject of this proceeding is a registration on the Supplemental Register. Thus, descriptiveness and lack of acquired distinctiveness are not in issue in this case.

However, we point out that petitioner's resubmission of this material with its brief was duplicative and unnecessary.⁴

Respondent's motion to strike exhibits 2-7 attached to petitioner's notice of reliance is granted. These exhibits, which consist of printouts from respondent's website and the websites of various third-parties, are not proper subject matter for introduction by a notice of reliance. See *Raccioppi v. Apogee Inc.*, 47 USPQ2d 1368, 1370 (TTAB 1998). To the extent that, as petitioner claims, these materials were identified and introduced as exhibits during the testimony of Mr. Ashley, they have been considered. We note that respondent did not object to the introduction of this evidence during the testimony of Mr. Ashley (respondent did not appear at the deposition) and, thus, any objection to the sufficiency of the foundation for this evidence is considered waived. See, e.g., *Pass & Seymour, Inc. v. Syrelec*, 224 USPQ 845, 847 (TTAB 1984) (objection on grounds of improper identification or authentication of exhibits waived since defects could have been cured if made during the deposition). Again, however, petitioner's resubmission of evidence that was already of record was unnecessary and it needlessly cluttered the record. See *ITC Entertainment Group Ltd. v. Nintendo of America Inc.*, 45 USPQ2d 2021, 2022-23 (TTAB

⁴ Moreover, petitioner should have at least used the same numbering system in its brief to identify these exhibits as it used when introducing the exhibits at trial.

1998) (submission of duplicative papers is a waste of time and resources, and is a burden upon the Board).

Respondent's motion to strike petitioner's notice of reliance on the 19 documents produced by respondent in response to petitioner's document production requests is granted. As stated in TBMP § 704.11 (2d ed. rev. 2004), "a party that has obtained documents from another party under Fed. R. Civ. P. 34 may not make the produced documents of record by notice of reliance alone, except to the extent that they are admissible by notice of reliance under 37 CFR § 2.122(e) as official records; or as printed publications, such as books and periodicals, available to the general public in libraries or of general circulation among members of the public or that segment of the public which is relevant under an issue in the proceeding." Petitioner contends that "many of these documents are self-authenticating." However, it is not clear from the face of these documents, and petitioner has not met its burden of demonstrating, that the documents constitute printed publications within the meaning of Trademark Rule 2.122(e). See TBMP §704.08, *supra*. Moreover, we disagree with petitioner that respondent's objection to this evidence is untimely. This is not a deficiency that could have been cured if the objection had been raised earlier. Cf. *Colt Industries Operating Corp. v. Olivetti Controllo Numerico S.p.A.*, 221 USPQ 73, 74 n.2 (TTAB 1983) (objection that items submitted by notice of reliance were

neither official records nor printed publications raised in brief sustained).

FACTS

Petitioner is a supplier of botanical products to the cosmetics and personal care industry. The products provided by petitioner include extracts derived from the jojoba plant. Jojoba is a shrub that is native to the southwestern United States and northern Mexico.⁵ The seed or "bean" of the plant contains 50% oil. The oil, which is referred to alternatively as a wax or ester, is used primarily in cosmetics and personal care formulations. The oil is extracted from the seed and it may be either further refined, or it may be converted through chemical modification into various derivatives. One such chemical modification removes the oil from the extract.

Petitioner sells its refined and chemically modified jojoba extracts to manufacturers and formulators of cosmetics and personal care products such as Revlon, Lancome and Estee Lauder. These companies in turn use the jojoba as an ingredient in manufacturing finished personal care and cosmetics products including moisturizers, foundations, skin and hair care products, soaps and sunscreens.

⁵ "Jojoba" is defined in Webster's New World College Dictionary (Third Edition 1996) as "an evergreen desert shrub...of the box family, found in Mexico and the SE U.S. with a seed (jojoba bean) containing an odorless, colorless liquid wax (jojoba oil) used in cosmetics, lubricants, etc." Notice of Reliance, Exh. 8.

Petitioner's jojoba products are offered under a series of "FLORAESTERS" trademarks. Marks for the jojoba products that do not contain oil include FLORAESTERS with certain number designations such as 15, 20, 30 and 60. Marks such as FLORAESTERS "jojoba oil golden" are used for petitioner's jojoba products which do contain oil. (Dwyer Dep., p. 53.)

STANDING

Petitioner's witnesses, including Mr. Dwyer and Mr. Ashley, state that the parties are competitors as they both supply jojoba extracts to the cosmetics industry. (Dwyer Dep., pp. 26, 32; Ashley Dep., p. 37.) As a competitor of respondent in the industry, petitioner has standing, or a real interest, in challenging respondent's right to maintain its registration of the term OIL FREE JOJOBA on the ground that the term is generic for respondent's goods. See *Eastman Kodak Co. v. Bell & Howell Document Management Products Co.*, 23 USPQ2d 1878 (TTAB 1992), *aff'd* 994 F.2d 1569, 26 USPQ2d 1912 (Fed. Cir. 1993). Respondent has presented no argument or evidence to the contrary.

GENERICNESS

The test for determining whether a mark is generic involves a two-step inquiry. First, what is the genus (category or class) of goods or services at issue? Second, is the term sought to be registered understood by the relevant public primarily to refer to that genus (category or class) of goods or services? H.

Marvin Ginn Corporation v. International Association of Fire Chiefs, Inc., 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986)).

It is petitioner's burden to demonstrate that OIL FREE JOJOBA is generic by a preponderance of the evidence. See Magic Wand Inc. v. RDB Inc., 940 F.2d 638, 19 USPQ2d 1551, 1554 (Fed. Cir. 1991); and Zimmerman v. National Association of Realtors, 70 USPQ2d 1425 (TTAB 2004).

1. *The genus of respondent's goods and the relevant public for the goods*

Cancellation of a mark is permitted when a "registered mark becomes the generic name for the goods or services ... for which it is registered." Section 14(3) of the Trademark Act. "Thus, a proper genericness inquiry focuses on the description of the [goods or] services set forth in the certificate of registration." Magic Wand Inc., supra at 1552 citing Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Petitioner contends, pointing to the information on respondent's website, that the genus or class of goods at issue is "jojoba that has been modified to be free of oil." (Brief, p. 8.) Petitioner relies on In re Reed Elsevier Properties Inc., 482 F.3d 1376, 82 USPQ2d 1378, 1380 (Fed. Cir. 2007) to support its position that the Board may investigate beyond the four corners of the registration to determine the genus.

We disagree with petitioner's definition of the genus of goods at issue. We find instead that the genus is properly

described, as respondent contends, by the identification of goods, namely "skin and body soaps, essential oils for personal use, cosmetics, and hair lotions, all containing one or more chemically modified jojoba extracts." That is, the genus of the goods is finished cosmetics that contain jojoba, not the jojoba component itself. Petitioner may look to extrinsic evidence, such as the information on respondent's website, for context and to understand the meaning of terms in an identification of goods or services. See *Reed Elsevier Properties*, supra at 1380 citing *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420 (Fed. Cir. 2005) (examining the subject website in order to understand the meaning of terms for which coverage was sought and thereby define the genus of covered services). However, petitioner may not rely on the website information to limit the scope of the identification, or to show that the goods identified are different from those as actually used. This would be contrary to well established law, stated above, that "a proper genericness inquiry focuses on the description of [goods or] services set forth in the certificate of registration."

We must next determine the relevant public for respondent's goods. Petitioner argues that the relevant purchasers for "oil-free jojoba" products are cosmetic formulators and their designated buyers. Respondent agrees with petitioner, although respondent contends that petitioner has offered no evidence that

OIL FREE JOJOBA is understood by the relevant public to refer to respondent's goods.

Both parties have incorrectly defined the relevant public. It is clear that the cosmetics industry is the relevant class of purchasers for petitioner's goods. However, as we noted, the question of whether the mark is generic requires consideration of the mark in relation to the goods identified in the registration. Respondent's products, as identified, are ordinary consumer goods. Based on the registration, the mark is applied to the finished cosmetic and personal care products that contain a particular component, not to the component itself. Thus, the relevant purchasers for registrant's goods are ordinary members of the general public. See *Zimmerman v. National Association of Realtors*, supra at 1429 ("When dealing with ordinary consumer goods or services, the test for genericness is the term's meaning to consumers, not necessarily the professionals in the trade.")

2. *The meaning of OIL FREE JOJOBA to
the relevant public*

Evidence of the relevant public's understanding of a term may be obtained from "any competent source...including purchaser testimony, consumer surveys, dictionary definitions, trade journals, newspapers and other publications." In re Dial-A-Mattress Operating Corp., 240 F.3d 1341, 57 USPQ2d 1807, 1810 (Fed. Cir. 2001). See also In re Reed Elsevier Properties Inc., supra at 1381 (Fed. Cir. 2007) (third-party websites are

competent sources to show what the relevant public would understand a term to mean").

We turn first to the meaning of "oil-free" to consumers. Mr. Dwyer states that a cosmetics company, for example, Lancome, would want to make claims about its product that has a "consumer-perceived" benefit. (Dwyer Dep., p. 14.) As Mr. Dwyer explains, Lancome would give its formulator instructions on the claims the company wants to make about its finished product, and the formulator would then identify raw materials that could function in such a way to cause the effect on the skin that could be claimed. One of the claims given to the formulator, according to Mr. Dwyer, could be to develop an "oil-free" product. (Dwyer Dep., pp. 17-18, stating that "one of the ways you can become a better supplier is by knowing what the formulators are looking for.")

According to Dr. Wickett, an expert in cosmetics claims support, the designation "oil-free" is critical in the cosmetic industry; and a claim on the label that a cosmetic product or ingredient is "oil-free" would enhance the product's marketability and its desirability to the consuming public. (Wickett Dep., pp. 28, 36-37.) He states that consumers believe that oil applied to their skin could contribute to acne problems, and that oil-free products may be considered noncomedogenic, less greasy and better for the skin. (Wickett Dep., pp. 25-26.)

Dr. Wickett and Mr. Dwyer confirm, as described in the articles below, that "oil-free" is beneficial to the skin, or is at least perceived that way by consumers, and that the term "oil-free" would appear on a product label:

- Oil Free Cosmetics

The best types of cosmetics to use for oily or acne prone skin, are either oil-free cosmetics or non-comedogenic cosmetics.

Oil-free cosmetics mean products that contain little or no ingredients such as isopropyl myristate, isopropyl esters, oleic acid, stearic acid, petrolatum and lanolin...

The label on the cosmetic should state that it is oil-free.

www.skincareguide.com (Exh. 9)

- CAREFAIR.com

Oil Free Cosmetics

The rule stands: the best types of cosmetics to use for acne skin are oil free cosmetics. ... **Always check with the product label to see if it is oil free.** ...

www.carefair.com (Exh. 10)

The record shows that cosmetics and personal care products are promoted to consumers as oil-free, or as having certain oil-free ingredients. The following are examples:

- BOBBI BROWN

VITAMIN ENRICHED FACE BASE

For All Skin Types

Bobbi recommends using Vitamin Enriched Face Base as the first step to prepare skin for the smoothest makeup application. Rich in feel, but never greasy, this advanced **oil-free**, face formula, with Shea Butter, instantly hydrates, softens, and cushions skin. ...

www.bobbibrowncosmetics.com (Exh. 17)

- St. Ives Apricot Scrub **Oil Free**

Invigorating For All Skin Types

www.amazon.com (Exh. 19)

- Mill Creek - **OIL-FREE BOTANICAL MOIST**
Product Description
Oil-Free Moisturizer is a rich, light body lotion to help replenish and revive dry, flaky, and undernourished skin
www.amazon.com (Exh. 20)
- SPA SALON IDUN
Idun Signature Facial
Relax while enjoying a luxurious hydrosol therapy treatment customized for you and your precious skin. Thirsty skin is drenched in **oil-free botanical essences** of cucumber, cranberry, citrus and pomegranate, while the facial massage leaves the skin silky-smooth, glowing and feeling firmer and vibrant.
www.idunspasalon.com (Exh. 22)
- GLYCOLIC GEL YOUTH SERUM
This powerful 15% Glycolic Acid Gel increases the rate of dead skin exfoliation while fighting bacteria. Repeated use will decrease oiliness and aid in the reduction of blemishes. **Aloe Vera Gel and Hyaluronic Acid provide oil-free hydration**, increasing the skin's moisture content. ...
www.bestfaceandbody.com (Exh. 24)
- netnutri.com
Hydroderm Intense **Oil-Free Facial Moisturizer**
www.netnutri.com (Exh. 25)
- eVitamins
Aloe and Green Tea Oil Free Moisturizer by Alba Botanica
Product Description
Certified organic aloe vera, green tea antioxidants and **oil-free humectants** absorb instantly to replenish essential nutrients and protect skin against dehydration for a soft, healthy, luminous complexion.
www.evitamins.com (Exh. 26)

Respondent's own promotional materials tout its jojoba products as being "oil free" (emphasis added):

Oil free products

Functional benefits/**oil free**

Product Name: Description:

Jojoba Esters 15 Liquid jojoba wax esters
derived from the

interesterification of
jojoba oil. **For OIL
FREE formulations**

OFJ™ Spheres **Oil Free Jojoba® Spheres**
with the same desirable
properties as their Jojoba
Wax counterpart, but without
the oil name. These spheres
are ideal for **Oil Free
skin and facial cleansers.**⁶

www.desertwhale.com (Exh. 29)

In addition, the record includes evidence that extracts from other plants, such as "aloe vera" and "shea," which like jojoba, are used as ingredients in cosmetics, are characterized and promoted as "oil-free." The following are examples (emphasis added):⁷

- The spa happenings
Your monthly e-newsletter from The Spa - Los Gatos
Products Available by Chef Yossi at The Spa - Los
Gatos
Chef's Lotion A fast-absorbing, **oil free Shea butter
hand moisturizer** specifically designed to re-hydrate
over-washed hands ...
www.thespaoflosgatos.com (Exh. 16)

⁶ On an archival version of this same webpage (Exh. 28), this product was described as: "OFJ™ Spheres - Jojoba Esters spheres for Oil Free, gentle exfoliation."

⁷ Aloe vera and shea are plants that contain oil which is extracted and used in cosmetics. We take judicial notice of the following definitions. "Shea" is defined as, "(noun) 1. a tropical African sapotaceous tree, *Butyrospermum parkii*, with oily seeds. 2. shea butter: the white butter-like fat obtained from the seeds of this plant and used as food, to make soaps, etc." *Collins English Dictionary* (2000). "Aloe vera" is defined as, "(noun) 1. any of a species of aloe with thick fleshy leaves from which an oil is obtained: Aloe vera. 2. an extract from the leaves of aloe vera that is used in cosmetic preparations." *The Penguin English Dictionary* (2000). Both definitions were obtained from the website www.credoreference.com. The Board may take judicial notice of dictionaries, including online dictionaries which exist in printed format. See *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789, 1791 n.3 (TTAB 2002).

EVERYTHING BUT THE KITCHEN STINK

... There's also an **oil-free shea butter lotion** to moisturize over-cleansed skin...and wet-nappish wipes for those shellfish feasts that leave you with that no-so-fresh feeling.

www.dailycandy.com (Exh. 15)

- VEVELLE INTERNATIONAL

The MagicClear Acne System

STEP-3 **Oil-Free Aloe Vera Moisture Lotion**

Oil-Free moisturizer. Protects the skin, helps heal, with a special Aloe Vera that comes from a particular Aloe Plant known for its more potent properties...

www.acnedoctor.com (Exh. 21)

- VERABELLA (Exh. 23)

Products Cleansers

Product Name and Description

Chamomile Cleansing Lotion A gentle **oil-free Aloe Vera based cleanser** designed to cleanse skin thoroughly. ...

www.verabella.com (Exh. 23)

- BORN CLEAR LIGHT MOISTURIZER

Lemon Bioflavonoid, Watercress extract and Sage extract balance oil and help to revitalize and purify oily, problematic and combination skin. ... This **oil-free, Aloe Vera Gel-based moisturizer** contains antibacterial ingredients to heal and condition.

www.bestfaceandbody.com (Exh. 24)

The record shows, through the testimony of Mr. Dwyer and petitioner's other testimony and evidence that the properties of jojoba make it a desirable ingredient in cosmetics and personal care products. It is known as a safe, nonirritating ingredient that is absorbed into the skin very readily, with less viscosity compared to other oils, so that it has a less greasy feel; and that it stays fresh longer than most other plant oils and will not develop the negative rancid odors. It is perceived by consumers as a natural, beneficial ingredient for the skin in

that it is plant derived, and believed not likely to contain what may be perceived as harmful chemicals. (Wickett Dep., pp. 26-27; Dwyer Dep., pp. 27-28; Kleiman Dep., pp. 27-28; Ashley Dep., p. 39.)

In its oil-free form, according to petitioner's witnesses, jojoba represents both a natural product and one that will not clog pores or damage the skin; and it allows cosmetic companies to make label claims of "natural" and "oil-free" for the product. (E.g., Wickett Dep., p. 25; Ashley Dep., pp. 29, 39-40.)

In addition, Dr. Wickett testified that the term "oil free Jojoba" is used, at least in the industry, as a common name to refer to the products that are derived from Jojoba that are "oil-free" or "free from oil"⁸ (46). Indeed, the record includes evidence that the phrase OIL FREE JOJOBA, as a whole, has been used generically by petitioner and at least one other competitor, Purcell Jojoba International ("PNJ"), as well as in promotional materials directed to the public (emphasis added):⁹

- Industry Presentations

Floritech's botanical ingredients include: gentle exfoliatives, **oil-free jojoba esters**, macadamia oil and esters, stabilized high-oleic acid sunflower oil and derivatives, water-soluble emollients and soft spheres delivering actives. ...
www.ascs2007.org (Exh. 3)

⁸ Dr. Wickett states that the designation "oil-free jojoba" contains no oil, "or so little oil that it's considered to be oil-free." (Wickett Dep., p. 46.)

⁹ Contrary to respondent's apparent contention (Brief, pp. 8-9), it is immaterial to the genericness determination that some of petitioner's FLORAESTERS products may not be "oil free."

- FLORAESTERS botanical
FLORAESTERS are functional
Liquid Foundation
Oil-Free Skin Care
Facial Masks
FLORAESTERS are unique, botanically-derived blends of **oil-free jojoba emollients** providing luxurious skinfeel and value-adding functions
[Petitioner's brochure dated 1998] (Exh. 4)
- PNJ 100% Pure Natural Jojoba Esters
Pure Natural Jojoba Esters' Semi-Occlusive Moisture Control Barrier Reduces Signs of Aging and Photo-Aging.
Reduces Oxygen Free Radicals
Other Jojoba Functions Enhance Product Value
Fixes fragrances, carries pigments, sunblockers, and other actives.
Works well with other ingredients including silicones.
Hypoallergenic and non-comedogenic.
Consumers like and trust **"oil-free jojoba."**

[the website goes on to describe the company's various "PNJ Jojoba Esters" as being "oil-free"]
www.purcelljojoba.com (Exh. 2)

- WorldwideHealth.com
Massage Therapy Directory
MYOSPA Center for Therapeutic Massage
An intimate, tranquil spa with full selection of massage and body treatments using **oil-free jojoba extract**, and CranioSacral Therapy. ...
www.worldwidehealth.com (Exh. 6)

It is clear from the evidence, including the evidence of respondent's own use, that "oil-free" is used to identify a product or an ingredient of a product that is free from oil. The evidence also shows that "oil-free" combined with "jojoba" to form "oil-free jojoba," like "oil-free shea"¹⁰ or "oil-free aloe,"

¹⁰ Respondent argues, pointing to Mr. Kleiman's testimony, that products that include shea oil could never be properly characterized as "oil-free." Respondent quotes Mr. Kleiman as stating "The term 'oil-free

names a type of plant extract. It is also clear that the term "oil-free jojoba" identifies a central characteristic of respondent's cosmetics and personal care products, as it is a principal ingredient of those goods. Marks which identify a key characteristic of goods or services have been held unregistrable for the goods or services. See *In re Helena Rubenstein, Inc.*, 410 F.2d 438, 161 USPQ 606 (CCPA 1969) (PASTEURIZED for applicant's face creams, which have been "'substantially pasteurized'... does not possess the capacity to distinguish applicant's goods."); *J. Kohnstam, Ltd. v. Louis Mark & Co.*, 280 F.2d 437, 126 USPQ 362 (CCPA 1960) (MATCHBOX for toy vehicles generic because that category of toy cars was sold in matchbox-sized boxes); *In re Central Sprinkler Co.*, 49 USPQ2d 1194 (TTAB 1998) (ATTIC generic for sprinklers used in attics; "The broad general category of goods involved here is sprinklers for fire protection. However, a product may be in more than one category, and here applicant's goods also fall within the narrower category of sprinklers for fire protection of attics."). See also, *Reed Elsevier*, supra at 1380 (LAWYERS.COM generic for online information exchange in the fields of law, legal news, and legal services; "a central and inextricably intertwined element of [the claimed] genus is information about lawyers and information from lawyers."); and *In re A La Vielle Russie Inc.*, 60 USPQ2d 1895

shea' is [an] oxymoron." (Kleiman Dep., p. 49.) However, respondent has taken that statement out of context. It is plain from Mr. Kleiman

(TTAB 2001) (RUSSIANART generic for particular field or type of art and therefore also for dealership services directed to that field).

Similarly, in this case, OIL FREE JOJOBA is a generic term for the broad category of cosmetics and personal care products that fall within the narrower category or subcategory of cosmetics that contain oil-free jojoba. The fact that respondent's finished products may contain additional ingredients does not detract from the term's generic meaning. The public would expect, upon encountering OIL FREE JOJOBA on, for example, respondent's soaps, that the soaps will consist at least in significant part of "oil free jojoba." See, e.g., *In re Demos*, 172 USPQ 408, 409 (TTAB 1971) (CHAMPAGNE "merely names the principal ingredient of [applicant's] salad dressing and to that extent...forms part of the normal nomenclature therefor, i.e., champagne salad dressing" and as such "is deemed unregistrable").

Further, contrary to respondent's contention, whether respondent's OIL FREE JOJOBA extract is, in fact, "oil-free,"¹¹ or whether the finished cosmetics contain other oil-based ingredients, e.g., "apricot oil" or "shea oil," such that the cosmetics are not, in fact, entirely oil-free, is not the issue. The point is that these products are promoted by the industry and

later statement on that same page of testimony that shea can be modified to make it oil-free.

¹¹ Respondent states on page 14 of its brief that the "hydrogenated jojoba oil" sold by respondent under the mark "would NOT meet the

perceived by the consuming public as "oil-free," or as containing a particular "oil-free" ingredient, in this case, oil-free jojoba. "As far as the issue of a term's genericness is concerned, it is beside the point whether the term may or may not accurately describe a particular product. E.g., In re Helena Rubinstein, Inc., 410 F.2d 438, 161 USPQ 606 (CCPA 1969) (PASTEURIZED held generic for face creams irrespective of whether goods are, in fact, pasteurized or would normally be expected by an average purchaser to have been pasteurized because they are so designated)." In re Northland Aluminum Products, Inc., 221 USPQ 1110, 1114 (TTAB 1984), aff'd, 777 F.2d 1556, 227 USPQ 961 (Fed. Cir. 1985). See also., e.g., Roselux Chemical Co., Inc. v. Parsons Ammonia Co., Inc., 299 F.2d 855, 132 USPQ 627, 634 (CCPA 1962) (SUDSY generic for ammonia; immaterial that some of the so-called SUDSY ammonia products were not sudsy because they contained no detergent).

Moreover, in this case, the identification of goods is broad enough to include cosmetics that may not contain any additional oil-based ingredients. Certainly at least for those products, the term OIL FREE JOJOBA would define the subcategory of products, e.g., "oil free jojoba soap." We also point out that although the identification does not specify that the chemically modified jojoba extract is oil-free, the identification is broad

definition of 'oil-free jojoba' because that product includes 'oil' in its ingredient name."

enough to include jojoba that has been chemically modified to be "oil-free."

We find that petitioner has demonstrated, by a preponderance of the evidence, that OIL FREE JOJOBA is generic for respondent's goods.

Decision: The petition to cancel is granted, and Registration No. 2945397 will be cancelled in due course.