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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Humanetics Corporation

Serial Nos. 75/426,140 and 75/530,919

Michael S. Sherrill of Sherrill Law Offices for Humanetics Corporation.

Curtis French, Trademark Examining Attorney, Law Office 115 (Thomas Vlcek, Managing Attorney).

Before Seeherman, Bottorff and Drost, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

Humanetics Corporation (applicant) filed two trademark applications to register the marks 7-KETO (in typed form)<sup>1</sup> and 7-KETO (stylized)<sup>2</sup> as shown below for goods identified as follows:

<sup>1</sup> Serial No. 75/530,919, filed August 4, 1998. The application alleges a date of first use and a date of first use in commerce of June 17, 1998.

<sup>2</sup> Serial No. 75/426,140, filed January 30, 1998. The application was based on an allegation of a bona fide intention to use the mark in commerce. The application was subsequently amended to

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Derivatives of dehydroepiandrosterone (DHEA) used as an ingredient in the manufacture of dietary supplements in International Class 1 and

Derivatives of dehydro[e]piandrosterone (DHEA) used as an integral component of dietary supplements in International Class 5.<sup>3</sup>

# 7-KETO

The Examining Attorney<sup>4</sup> refused registration under Section 2(e)(1) on the ground that applicant's mark in the '140 application was merely descriptive of the goods and the Examining Attorney required applicant to disclaim the term "7-KETO" in the '919 application under the provisions of Section 6(a) of the Trademark Act. 15 U.S.C. §§ 1052(2)(e)(1) and 1056(a). When the Examining Attorney made the refusal and requirement for a disclaimer final, applicant filed notices of appeal. Both applicant and the Examining Attorney have submitted briefs, but no oral

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allege a date of first use and a date of first use in commerce of September 23, 1998.

<sup>3</sup> The goods in International Class 5 in Application No. 75/426,140 are identified slightly differently: "Derivatives of Dehydroepiandrosterone (DHEA) sold as an integral component of dietary supplements." There is no evidence or argument that the difference in the Class 5 identification of goods is significant and, for convenience, we will refer to the goods as identified in the other application (No. 75/530,919).

<sup>4</sup> The current Examining Attorney was not the original Examining Attorney in this case.

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argument was requested in either case. Because the records in these cases are very similar and the issue of whether the term 7-KETO is descriptive is identical, we have consolidated these cases on appeal. Unless otherwise stated, references to the record appear in both applications. We will cite to the record in the '919 application.

The Examining Attorney argues that "applicant's product is a derivative of dehydro[e]piandrosterone (DHEA), used as an ingredient in the manufacture of dietary supplements, known as 7-keto-dehydroepiandrosterone (7-keto DHEA)." Examining Attorney's Br. at 3. The Examining Attorney concludes by stating that "the term 7-KETO describes a particular type of ingredient found in applicant's goods, namely, a metabolite derivative of DHEA, and as the relevant public would understand this designation to refer to the same, the proposed mark is therefore unregistrable on the Principal Register without a disclaimer of the term 7-KETO" in the '919 application. Examining Attorney's Br. at 6. In the '140 application, the Examining Attorney found that the mark was highly descriptive and likewise unregistrable on the Principal Register. The Examining Attorney relied on the following evidence. U.S. Patent No. 5,707,983, owned by applicant

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and entitled "Treatment of Alzheimer's Disease and Modulation of Immune System with  $\Delta^5$ -Androstenes" contained the following heading: "(2)  $\Delta^5$ -Androstene- $3\beta$ -ol 7,17-dione (7-keto DHEA)." Col. 3, line 18. In addition, the Examining Attorney included a dictionary definition of "keto-" as "Ketone; ketone group: ketosis." *American Heritage Dictionary of the English Language, Third Edition* (1992). Finally, the Examining Attorney submitted numerous website pages that were alleged to show use of the term in a descriptive manner. A sample of those websites is set out below.

7-Keto DHEA is one of more than 150 metabolites of DHEA (dehydroepiandrosterone), a mother precursor hormone that is naturally produced by the adrenal gland and source of many other full-fledged hormones. [www.airscapes.com](http://www.airscapes.com).

7-KETO DHEA is a naturally occurring metabolite derived from DHEA (dehydroepiandrosterone)... 7-Keto DHEA has also been shown to increase thermogenesis, or your body's ability to burn calories. [www.athleticnutrition.com](http://www.athleticnutrition.com).

When a regular DHEA supplement reaches the body's cells, it's broken down two ways: it can be converted into sex hormones, or into 7-keto DHEA (7-keto-dehydroepiandrosterone). [www.seacoastvitamins.com](http://www.seacoastvitamins.com).

7 Keto DHEA enhances thermogenesis or lean body mass. *VitaNet Health Foods*; [www.vitanet.net](http://www.vitanet.net).

7-Keto is a naturally occurring metabolite of the human hormone known as DHEA. [www.vitamins.com](http://www.vitamins.com).

7-KETO DHEA is a naturally occurring metabolite derived from DHEA (Dehydroepiandrosterone). [www.iherb.com](http://www.iherb.com) (emphasis omitted).

Q. I wonder what you think of 7-KETO DHEA which is now being marketed as a safer alternative to DHEA...

A. 7-keto DHEA is a hormone similar to DHEA, and touted as having many of the benefits of DHEA... [www.raysahelian.com](http://www.raysahelian.com).

Supported by this evidence, the Examining Attorney submits that the wording in applicant's marks is merely descriptive for the identified goods.

In its brief, applicant "acknowledged that keto is recognized by selected professionals, such as organic chemists, as indicating a double bonded oxygen group ... Applicant has further acknowledged that 5-androstene-3-acetoxy-7,17-dione has a keto group pendent from the seventh carbon atom on the steroid base ring structure." Br. at 3. Applicant argues that average customers would not recognize 7-keto as describing or suggesting an attribute of an ingredient of applicant's products. Second, it submits that even if 7-keto does describe the presence of a double bonded oxygen it does not describe any substantial attribute of the ingredient. Finally, applicant observes that the website and other information of record showing descriptive use of applicant's term is actually use by applicant's licensees or references by others to applicant's products.

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We agree with the Examining Attorney that the term "7-keto" is merely descriptive, and we, therefore, affirm the Examining Attorney's refusal to register the '140 application under Section 2(e)(1) of the Trademark Act and the requirement for a disclaimer of the wording in the '919 application.

A mark is merely descriptive if it immediately describes the ingredients, qualities, or characteristics of the goods or services or if it conveys information regarding a function, purpose, or use of the goods or services. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217 (CCPA 1978). See also In re Nett Designs, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). We look at the mark in relation to the goods or services, and not in the abstract, when we consider whether the mark is descriptive. Abcor, 588 F.2d at 814, 200 USPQ at 218. Courts have long held that to be "merely descriptive," a term need only describe a single significant quality or property of the goods. In re Gyulay, 820 F.2d 1216, 1217, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987); Meehanite Metal Corp. v. International Nickel Co., 262 F.2d 806, 807, 120 USPQ 293, 294 (CCPA 1959).

We agree with the Examining Attorney that the term "7-keto" describes an ingredient or component of a dietary

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supplement containing a derivative of DHEA. Even applicant admits that "'7-Keto' may describe a characteristic of the relevant goods (i.e., the seventh carbon in the steroid base structure is a carbonyl)." Response dated July 10, 2000, p. 7. See also Response dated July 27, 1999, p. 3 (Applicant "acknowledges that '5-androstene-3-acetoxy-7,17-dione has a keto group pendent from the seventh carbon atom on the steroid base ring structure"). Applicant further acknowledges that "selected professionals in the chemical and pharmaceutical industries can be expected to recognize and understand that 7-keto indicates the presence of a double bonded oxygen." Id. Thus, 7-KETO describes a characteristic or feature of applicant's goods.

The Federal Circuit has held that even if a term is not recognized as a descriptive term by the vast majority of potential customers, it may still be descriptive.

Appellant asserts that the "vast majority" of its customers would not be knowledgeable of the meaning of "first tier" in the banking industry.

Appellant misunderstands the import of the above decision [Abcor]. In context, "average" or "ordinary" consumers simply refers to the class or classes of actual or prospective customers of the applicant's particular goods or services. In this sense, corporate users of banking services who, appellant admits, understand the industry meaning of a "first tier" bank are "average" or "ordinary" customers. That corporate customers may constitute a smaller number of accounts than individuals is irrelevant. Descriptiveness is not determined by its meaning only

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to the class of regular customers with the largest head count.

In re Omaha National Corp., 819 F.2d 1117, 2 USPQ2d 1859, 1861 (Fed. Cir. 1987).

Based on applicant's admissions and the Examining Attorney's dictionary definition of record, it is clear that at least some prospective purchasers of applicant's products would recognize the descriptive nature of 7-KETO in relation to applicant's goods. We do not have to decide whether this small group is sufficient to hold that applicant's term is descriptive because the record amply supports a finding that a much broader group of purchasers would recognize 7-KETO in the marks as being merely descriptive.

Even to those not familiar with the chemical qualities of DHEA, the literature of companies marketing products containing 7-KETO shows that 7-KETO describes a desirable characteristic, feature, or ingredient of the dietary supplements.

7 keto DHEA enhances thermogenesis or lean body mass. *VitaNet Health Foods; www.vitanet.net.*

7 Keto is a naturally occurring metabolite of the human hormone known as DHEA. *www.vitamins.com.*

7-KETO DHEA is a naturally occurring metabolite derived from DHEA (dehydroepiandrosterone). *www.athleticnutrition.com.*



7-keto DHEA is a hormone similar to DHEA, and touted as having many of the benefits of DHEA...  
[www.raysahelian.com](http://www.raysahelian.com)

Purchasers, after viewing this information, would understand that 7-Keto is a metabolite that is similar to DHEA. Furthermore, because of 7-Keto's touted ability to enhance lean body mass and the body's ability to burn calories without the side effects of DHEA, the inclusion of 7-Keto would certainly be a significant feature and characteristic of goods containing 7-Keto derivatives of DHEA. Applicant's patent likewise uses the term in a descriptive manner.

Applicant's other point is apparently that "even in the event that a consumer would recognize and understand that 7-keto indicates the presence of a double bonded oxygen in the chemical structure ... Knowledge as to the presence of a double bonded oxygen structure does not convey any meaningful information." Applicant's Br. at 3. In effect, applicant argues that its term does not describe a significant feature of the goods. While many prospective customers of applicant's products may not understand the chemical composition, they certainly will understand that 7-keto describes a desirable characteristic of applicant's products. In a similar manner, most consumers are not

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aware of the chemical makeup of acetaminophen or how a turbodiesel works, but when they are purchasing a pain reliever or a motor vehicle purchasers would understand that these terms are, at the very least, merely descriptive of characteristics and features of the products.

Applicant argues that the evidence that the Examining Attorney has made of record involves references to its products and/or use of the term 7-Keto by its licensees. Evidence of descriptive use of the term by applicant and its licensees is relevant evidence to support a descriptiveness finding. See Gyulay, 3 USPQ2d at 1010 ("Appellant argues that it is 'unfair to use appellant's wholesale catalog to determine whether or not the trademark APPLE PIE is descriptive.' We discern no error or inequity in the Board's use of appellant's catalog as evidence of what it contains"). Even when applicant's licensees use the trademark symbol with the term, it is accompanied by information that shows the term is descriptive. "The most beneficial DHEA derivative isolated by the researchers is 7-keto-dehydroepiandrosterone (7-keto DHEA). Like DHEA, 7-keto DHEA is associated with a variety of essential human functions. Unlike, DHEA, 7-keto DHEA does not convert to testosterone or estrogens." *Enzymatic Therapy Introduces 7-Keto™*. Thus, even though this article sometimes uses the

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trademark symbol when referring to applicant's products, potential purchasers who read the article would likely conclude that "7-keto" describes a type of DHEA derivative. Because applicant or its licensees use the term to describe the goods, it is likely that the public will likewise view the term as merely descriptive. Therefore, the Examining Attorney's evidence supports the conclusion that the term "7-keto" merely describes applicant's goods, and the Examining Attorney's refusal to register and requirement for a disclaimer are appropriate.

Decision: The Examining Attorney's refusal to register the mark in 7-KETO in Application No. 75/426,140 on the ground that it is merely descriptive of the identified goods is affirmed. Also, the Examining Attorney's refusal to register the mark 7-KETO and design without a disclaimer of the term 7-KETO in Application No. 75/530,919 is affirmed. Under 37 CFR § 2.142(g), the decision with respect to the '919 application will be set aside and the application returned to the Trademark Examining Attorney to place it in condition for publication for opposition if applicant, no more than thirty days from the mailing date of this decision, submits an appropriate disclaimer of the term "7-KETO."