IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Aeon Biopharma, Inc.

Mark: AEON & Design

Serial No. 88/626,890

Examining Attorney: Ellen F. Burns
Law Office 116

Commissioner for Trademarks
P.O. Box 1451
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RESPONSE TO OFFICE ACTION OF DECEMBER 31, 2019

The applicant, Aeon Biopharma, Inc. ("Applicant"), by its attorneys, responds to the Office Action of December 31, 2019 as follows:

I. INTRODUCTION

Applicant filed to register the mark AEON & Design for the following goods:

- **Class 5**: pharmaceutical preparations for the treatment of neurological conditions; pharmaceutical preparations for the treatment of gastrointestinal conditions; pharmaceutical preparations for the treatment of neurologic and psychiatric disorders; botulinum toxins for therapeutic use

In the Office Action, the Trademark Office refused registration of Applicant's mark pursuant to 15 U.S.C. § 1052(d) on the grounds of a purported likelihood of confusion with the following registrations ("Cited Registrations"):

- **AEON CLINICAL LABORATORIES** (Registration Number 4600927) owned by Peachstate Health Management, LLC d/b/a AEON Clinical Laboratories for medical testing for diagnostic or treatment purposes in Class 44; and
- **AEON CLINICAL LABORATORIES** (Registration Number 4482292) owned by Peachstate Health Management, LLC d/b/a AEON Clinical Laboratories for medical laboratory services in Class 42.

As a preliminary matter, the Trademark Office also noted the following prior-filed applications, which could be cited if the applications register ("Cited Applications"):

- **AEON** (Serial Number 87899336) application filed by Moniker Inc. for nutritional supplements in Class 5; and
- **EON** (Serial Number 88091001) application filed by Moniker Inc. for nutritional supplements in Class 5.

(collectively, with the Cited Registrations, the "Cited Marks").

Applicant respectfully submits that Applicant's mark is not likely to be confused with the Cited Marks because (A) Applicant's mark covers different goods than the Cited Marks' goods and services; (B) the goods covered by Applicant's mark are purchased by sophisticated and discerning consumers; and (c) Applicant's mark differs from the Cited Marks in commercial impression.

II.
THERE IS NO LIKELIHOOD OF CONFUSION BETWEEN APPLICANT'S MARK AND THE CITED MARKS

A. Applicant's Mark And The Cited Marks Cover Different Goods And Services

The Examining Attorney must provide evidence showing that the goods and services are related to support a finding of likelihood of confusion. TMEP § 1207.01(a)(vi). *See, e.g.*, *In re White Rock Distilleries Inc.*, 92 U.S.P.Q.2d 1282, 1285 (T.T.A.B. 2009) (finding that the Trademark Office failed to establish that wine and vodka infused with caffeine are related goods because there was no evidence that vodka and wine emanate from a single source under a single mark or that such goods are complementary products that would be bought and used together). Moreover, the United States Court of Appeals for the Eleventh Circuit found no likelihood of confusion between the mark FREEDOM used in connection with realty services and the mark FREEDOM used in connection with savings and loan services, though a consumer in need of realty services is also generally in need of loan services. *Freedom Savs. Loan Ass'n v. Way*, 757 F.2d 1176 (11th Cir. 1985). If these goods and services are sufficiently unrelated, it is clear that Applicant's goods are sufficiently unrelated to the goods and services offered under the Cited Marks to preclude a likelihood of confusion.

Further, Applicant notes that the Cited Applications were approved and allowed despite the prior existence of and with no refusal citing the Cited Registrations. If the Cited Application's nutritional supplements are sufficiently different from the Cited Registrations' medical testing and laboratory services, despite the fact that both are related to the medical field, then as set forth below, Applicant's specialized therapeutics are sufficiently different from all of the Cited Applications' and Cited Registrations' goods and services to avoid a likelihood of confusion.

1. Applicant's Mark And The Cited Applications Cover Different Goods

First, the Cited Applications AEON and EON cover "nutritional supplements." Nutritional supplements are typically sold directly to consumers without a prescription and are not FDA approved. *See Exhibit A* (explanation of dietary supplements from the National Institutes of Health). While nutritional supplement companies must follow particular manufacturing practices, their products do not undergo the rigorous clinical trials required for biologics or drug products designed to treat disease.

Meanwhile, Applicant's application covers "pharmaceutical preparations for the treatment of neurological conditions; pharmaceutical preparations for the treatment of gastrointestinal conditions; pharmaceutical preparations for the treatment of neurologic and psychiatric disorders; botulinum toxins for therapeutic use." Applicant's products will be FDA-regulated and approved products that comprise a proprietary botulinum toxin complex and address debilitating medical conditions. *See Exhibit B* (screenshot of Applicant's website). Applicant's initial focus will be on pharmaceutical treatments for neurological and gastrointestinal diseases and disorders. These highly complicated pharmaceuticals require extensive research and development resources to develop, manufacture and obtain regulatory approval prior to marketing the products. Applicant's products will be marketed primarily to physicians to assist them in treating their patients and will only be available through a doctor's prescription. Applicant's products will also be marketed under additional brand names, with AEON and Design presently planned to be used as a house mark.

There is no chance that a consumer will mistake the Cited Applications' products for Applicant's product in the marketplace, or that anyone will believe that they emanate from the same source. Given these vastly different goods, there is no chance that a consumer will mistake the Cited Applications' nutritional supplements for Applicant's sophisticated pharmaceuticals in the marketplace, or that anyone will believe that they emanate from the same source.

2. Applicant's Mark And The Cited Registrations Cover Different Goods And Services

With respect to the Cited Registrations, the Office Action purported to show "that the medical laboratory services and the development and provision of pharmaceuticals are related, e.g., the development of pharmaceuticals is the result of research, development, and testing that are laboratory based." While Applicant concedes that, the Cited Registrations cover "medical testing for diagnostic or treatment purposes" in Class 44 and "medical laboratory services" in Class 42, Applicant rejects the assumption that Applicant's Class 5 description of various pharmaceutical preparations is the same as the provision of services characterized by the Office Action as the development of pharmaceuticals. Applicant's application does not cover services.

Instead, Applicant's application covers goods, particularly pharmaceutical goods. As such, while the development of Applicant's product may involve testing the safety and efficacy of the pharmaceutical product prior to obtaining approval to market the product, the product provided under the AEON & Design mark will be goods, a pharmaceutical product for treating a neurological or gastrointestinal condition, not services. This offering is distinct from the Cited Registrations' diagnostic testing for disease or medical laboratory services, which are used to support physicians screening for disease. Applicant is not running diagnostic tests for diseases or conducting medical laboratory services for third parties. The Office Action makes assumptions beyond what is written in the descriptions of Applicant's mark and the Cited Registrations.

Further, Applicant's "pharmaceutical preparations for the treatment of neurological conditions; pharmaceutical preparations for the treatment of gastrointestinal conditions; pharmaceutical

preparations for the treatment of neurologic and psychiatric disorders; botulinum toxins for therapeutic use" are not reasonable substitutes for diagnostic testing for disease or medical laboratory services offered in connection with the Cited Registrations. Diagnostic testing occurs at a completely different stage than the point at which a patient is prescribed drugs to treat his or her disease.

Moreover, the Cited Registrations' diagnostic testing and medical laboratory services follow stringent processes and likely involve proprietary methodologies to provide expedited and accurate test results. *See Exhibit C* (screenshot of registrant's website). These processes and proprietary methodologies are vastly different from Applicant's pharmaceutical products used in advanced therapeutic procedures and treatments by physicians involved in the treatment of neurological or gastrointestinal disorders with botulinum toxin. These goods and services would not travel in the same channels of trade and would not be mistaken for each other.

Thus, Applicant's goods and the Cited Registrations' services are not related and confusion is not likely.

B. The Goods Covered By Applicant's Mark Are Purchased By Sophisticated And Discriminating Consumers

Consumers will not confuse Applicant's mark and the Cited Marks because the marks cover goods and services used and purchased by sophisticated consumers. Where professional buyers or commercial buyers familiar with the field are involved, it is reasonable to assume they will be well informed and exercise a higher standard of care. *See CMM Cable Rep. v. Ocean Coast Props., Inc.*, 888 F. Supp. 192, 200, 36 U.S.P.Q.2d 1458 (D. Me. 1995), *aff'd*, 97 F.3d 1504, 41 U.S.P.Q.2d 1065 (1st Cir. 1996) (stating that sophisticated professional buyers "are less likely to be confused as to the source or origin of a product than ordinary consumers of inexpensive goods or services"); *Weiss Assoc. Inc. v. HRL Assoc., Inc.*, 902 F.2d 1546, 14 U.S.P.Q.2d 1840 (Fed. Cir. 1990); *L.J. Mueller Furnace Co. v. United Conditioning Corp.*, 222 F.2d 755, 106 U.S.P.Q. 112 (C.C.P.A. 1955).

Even where two marks are identical, both may be published if the goods or services they cover are sold to sophisticated customers. *Dynamics Research Corp. v. Langenau Mfg. Co.*, 704 F.2d 1575, 1576, 217 U.S.P.Q. 649 (Fed. Cir. 1983) (no likelihood of confusion between applicant's mark "DRC" and opposer's identical registered mark "DRC" where products covered were sold to "discriminating customers"). *See also Electronic Design & Sales, Inc. v. Electronic Data Systems Corp*, 954 F.2d 713, 21 U.S.P.Q.2d 1388 (Fed. Cir. 1992). In *Electronic Design*, the Federal Circuit reversed the Trademark Trial and Appeal Board's finding of a likelihood of confusion between applicant's mark "E.D.S." used for batteries sold for medical equipment and the opposer's mark "EDS" used for data processing services for medical insurers. 954 F.2d at 719. The Federal Circuit found that "both opposer's services and applicant's goods are usually purchased after careful consideration by persons who are highly knowledgeable about the goods or services and their source." *Id.* at 718.

Applicant's goods are similar to the goods involved in *Electronic Design* in that they are specialized pharmaceutical preparations used in advanced treatments for neurological and gastrointestinal conditions, which are prescribed and administered by accomplished and discriminating physicians who are highly knowledgeable in treating neurological and gastrointestinal conditions. Applicant's goods are targeted to a sophisticated clientele who are knowledgeable about disabling disorders. These individuals are not in the market for over-the-counter medications for the general public. These physicians, and even their patients, are particularly selective when purchasing innovative medical treatments for patients who suffer from pain and decreased functionality. Applicant's customers would be discerning about the goods they prescribe to their patients. These goods are not the subject of a casual purchase or an impulse buy. The highly sophisticated consumer who would purchase Applicant's goods is not likely to assume that Applicant's sophisticated therapeutic products emanate from the same source as diagnostics or laboratory services, or nutritional supplements, and vice versa. Because of the careful consideration that physicians must use when selecting treatments for their patients,

it is not likely that these consumers would be confused between Applicant's mark and the Cited Marks.

C. Applicant's Mark And The Cited Marks Differ In Overall Commercial Impression

Applicant's mark and the Cited Marks are not similar in overall commercial impression. Consumer confusion, therefore, is not likely. "The points of comparison for a word mark are appearance, sound, meaning and commercial impression. Similarity of the marks in one respect – sight, sound or meaning – will not automatically result in a finding of likelihood of confusion even if the goods are identical or closely related." TMEP § 1207.01(b)(i) (*citing Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee en 1772*, 396 F.3d 1369, 73 U.S.P.Q.2d 1689, 1691 (Fed. Cir. 2005)); *see also First Savs. Bank, F.S.B. v. First Bank Sys., Inc.*, 101 F.3d 645, 40 U.S.P.Q.2d 1865 (10th Cir. 1996) (finding that the marks FIRSTBANK and FIRST BANK SYSTEM for banking services were not likely to be confused).

In *First Savings Bank*, the United States Court of Appeals for the Tenth Circuit compared the marks FIRSTBANK and FIRST BANK SYSTEM and concluded that there were "minimal" similarities between the two. *See First Savings Bank*, 101 F.3d at 653. In its comparison of the marks, the court considered the addition of other words to the mark, and the marks' respective meanings. *Id*. The court concluded that even though the marks contained some identical terms, the marks, when compared in their entireties with the additional term, were not confusingly similar. *Id*.

Applicant's AEON mark consists of a design with a stylized letter A that looks like a double helix or a biological structure. This design element alludes to the type of products Applicant plans to offer – biological drug products for use in innovative biotherapies. There are no similar design elements in the Cited Marks. As such, the design element helps to

distinguish further Applicant's mark from the Cited Marks. Therefore, consumer confusion is not likely because there are differences between Applicant's mark and the Cited Marks.

For these reasons, there is no likelihood of confusion between Applicant's mark and the Cited Marks. Accordingly, Applicant requests that its AEON & Design mark be approved for publication.