

**TRADEMARK SERIAL # 87151268**

**RESPONSE TO OFFICE ACTION**

Applicant hereby responds to the Examiner's Office Action dated December 7, 2016. Applicant has submitted an application for the word mark "Aeon" in standard characters, without claim to any particular font.

The mark is represented as follows:

Applicant Mark	As Used in Commerce
<p style="text-align: center;">Aeon</p>	 <p>The image shows three cans of Aeon beverages. The first can is labeled 'Aeon' and features a pattern of white plus signs on a black background. The second can is labeled 'Aeon Meta' and features a green vertical label with the text 'Apple Cucumber Mint 8.4oz 250ml'. The third can is labeled 'Aeon Bolic' and features a white label with a barcode and nutritional information. The nutritional information includes: 'Lightly Carbonated Water', 'Organic Apple Extract, Organic Cucumber Extract, Organic Mint Extract, Organic Cane Sugar, Citric Acid', 'Nutrition Facts', 'Serving Size: 1 can (8.4oz / 250ml)', 'Amount Per Serving: 100%', 'Total Fat: 0g', 'Sodium: 0g', 'Total Crap: 0g', 'Sugar: 0g', 'Protein: 0g', 'Fruit: 100%', 'Total Crap: 0g', 'Sodium: 0g', 'Total Crap: 0g', 'Sugar: 0g', 'Protein: 0g'. The cans are set against a white background.</p>

Applicant's mark represents the following goods in International Class 032:

“Fruit beverages; Fruit-based beverages; Fruit-flavored beverages; Non-alcoholic fruit juice beverages; Non-alcoholic sparkling fruit juice beverages; Protein-enriched sports beverages”

The Examining Attorney has refused registration of the applicant's mark under Section 2(d) of the Lanham Act because of a perceived likelihood of confusion with existing federal registration for “SAINT BIBIANA'S EON END OF NIGHT CITRUS DRINK” registration number 4323630. As is relevant to the cited refusal, the Cited registration provides lists following goods:

International Class 032: “Non-alcoholic beverages, namely, carbonated beverages”

As to Reg. No. 3462101

The cited registration is represented as follows:

Registration No.	Mark	Mark in Commerce
4323630		

Applicant respectfully submits that confusion between applicants mark and the cited registrations is unlikely, and is non-existent as a matter of law, particularly given the further amendments to the identification of the services entered in this response to office action and the following reasons:

Under Section 2 of the Lanham Act, 15 U.S.C.A. §1052:

“No trademark by which the goods of an applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it . . .

(d) consists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when applied to the good of the applicant to cause confusion, or to cause mistake or to deceive . . .”

Likelihood of confusion is determined on a case-by-case basis by application of the factors identified in *In re E.I. duPont de Nemours & Co.*, 177 U.S.P.Q. 563 (C.C.P.A. 1973). In this case, the following factors are relevant and determinative as to the existence of likelihood of confusion: the dissimilarity of the marks in their entireties, and the dissimilarity of established, likely-to-continue trade channels.

### Dissimilarity of the Marks

This DuPont factor examines "the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression." *In re duPont*, 177 U.S.P.Q. at 567. According to the Federal Circuit,

*"[M]arks must be considered in the way they are perceived by the relevant public in determining likelihood of confusion. Although it is often helpful to the decision maker to analyze marks by separating them into their component words or design elements in order to ascertain which aspects are more or less dominant, such analysis must not contravene law and reason. When it is the entirety of the marks that is perceived by the public, it is the entirety of the marks that must be compared. See Opryland USA, Inc. v. Great American Music Show, Inc., 23 U.S.P.Q.2d 1471, 1473 (Fed. Cir. 1992) (emphasis added)."*

It is well settled that marks are not similar for purposes of assessing likelihood of confusion simply because they contain an identical or nearly identical word. See *Champagne Louis Roederer v. Delicato Vineyards*, 47 U.S.P.Q.2d 1459, 1460 (Fed. Cir. 1998) (contemporaneous use of the marks CRISTAL and CRYSTAL CREEK for wine would not result in a likelihood of confusion, despite the fact that plaintiff's mark was strong and the goods were identical); *Mr. Hero Sandwich Systems, Inc. v. Roman Meal Co.*, 228 U.S.P.Q. 364 (Fed.Cir.1986) (no likelihood of confusion between ROMANBURGER for prepared sandwiches and ROMAN MEAL and related marks for bread and hamburger buns due to differences between the marks); *Keebler Company v. Murray Bakery Products, Inc.*, 9 U.S.P.Q.2d 1736 (Fed. Cir. 1989) (PECAN SHORTEES for cookies not likely to cause confusion with PECAN SANDIES for the same goods); *Kellogg Co. v. Pack 'Em Enterprises, Inc.*, 21 U.S.P.Q.2d 1142 (Fed. Cir. 1991) (FROOTEE ICE and design for flavored ice bars not likely to cause confusion with FROOT LOOPS for breakfast cereal and related products); *General Mills, Inc. v. Health Valley Foods*, 24 U.S.P.Q.2d 1270, 1278 (TTAB 1992) (notwithstanding the identity of the goods, the marks FIBER ONE and FIBER 7 FLAKES are sufficiently dissimilar such that consumers are not likely to be confused). Notably, each of these cases involved identical or closely related products.

Here, while the marks share a singular term "EON," which is the American-English equivalent to the Latin word, and mark for the applicant, "Aeon", they are used in different variations and styles, in entirely different contexts, rendering them completely different in appearance, sound and commercial impression. The Cited Mark is a multi-word mark "SAINT BIBIANA'S EON END OF NIGHT CITRUS DRINK," and the term "EON" as used in this mark, is clearly an acronym for the phrase "End of Night" which appears directly below the term "EON" on cited mark's specimen and in all commercial use of the cited mark. It is clear from the placement of the term "EON" that the cited mark owner fully intended to impress upon the consuming public that the term "EON" is an acronym for "End of Night." The Cited Mark is advertised as a product that prevents hangovers and was sold in liquor stores and bars predominantly the Northeastern Tri-State area (New York, New Jersey, Pennsylvania). This focused marketing gives credence to the importance of the "End of Night" verbiage within the Cited Mark. The Cited Mark Owner wants to end hangovers for the consumers it serves and makes it a point use this as its primary marketing ploy, only to further be embodied in its packaged via an acronym "EON" which stands for "End of Night," a connection that can be readily drawn from any consumer that glances at the Cited Mark, and the products using the Cited Mark.

Further, because cited mark is a multi-word mark, it is likely consumers will pronounce the entirety of the mark when referencing its products.

In sharp contrast, the Applicant mark is a singular term “Aeon” with no alterations given to its meaning. The meaning of the term “Aeon” is an indefinite period of time. The Applicant’s mark is not an acronym, is not a multi-word mark and impresses an entirely different meaning upon the end consumer. Further, the Applicant products are in line with health and wellness products designed to promote a healthy lifestyle, not make it easier to consume alcohol hangover free. Likelihood of confusion generally does not exist when the marks in their entireties project dissimilar commercial impressions. In one illustrative case, Citigroup relied on its prior rights in the CITIBANK family of marks in opposing applications filed by Capital City Bank ( "CCB") to register marks containing the phrase CAPITAL CITY BANK in standard characters. The Federal Circuit found that the dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression weighed heavily against any likelihood of confusion. Quoting the Board's opinion, the court observed: "CAPITAL CITY BANK does not share the characteristics of the CITIBANK family of marks because (1) it starts with the word ‘Capital,’ not CITIBANK, (2) ‘City Bank’ is two words, not a compound word, and (3) applicant's ‘City’ is spelled with a ‘y,’ and not an ‘i.’" *Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 1350, 98 USPQ2d 1253, 1256 (Fed. Cir. 2011). Likewise, the Federal Circuit affirmed the Board's finding that there was no likelihood of confusion between the applied-for mark ARMORSTONE and the registered mark STONSHIELD given the different commercial impressions conveyed by the marks. *Stoncor Group, Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 111 USPQ2d 1649, 1651-52 (Fed. Cir. 2014). Likewise, the Applicant mark does not share any characteristics of the Cited Mark. The applicant mark does not start with the term “Saint Bibianas”, the cited mark is an 8-worded mark with an acronym while the Applicant mark is a singular term, and Applicant’s mark is spelled with an additional letter “a”. Therefore, when viewed in connection with the entire logo design and mark, it is evident that there really is no common term. Truly, when consumers view the Applicant’s Mark in commerce as used in connection with its fruit based beverages, they will understand the important differences in the overall Marks.

### **Dissimilarity of Trade Channels**

Applicant’s goods are all natural, vegan friendly, kosher, low sugar, non-gmo fruit beverages that are rich in specific phytonutrients designed to provide energy, hydration and boost the metabolic core with a focus on targeting inflammation and metabolic syndrome. The nature of the Applicant’s goods and the end consumer reflects the reality of the trade channels for the Applicants goods. Applicant respectively submits that this is an important distinction that acknowledges that goods bearing its trademark will not travel in the same channels of distribution, nor be marketed to the same class of consumers as the goods of the cited registration.

As stated above, Applicant’s mark is used in connection with products that are all natural and health-conscious, making its target retail locations stores that promote the same values – locations such as Whole Foods and other organic and health-conscious food retail locations. In sharp contrast, the trade channels for the cited mark are geared to be marketed to those looking to consume alcohol in excess.

The cited registration exclusively markets itself as a beverage designed to prevent hangovers and is sold in bars and by liquor distributors.

It follows that there is no proximity between the parties' trade channels and the parties can safely co-exist without a hint of possible consumer confusion. Consumers looking to purchase a healthy beverage to boost their metabolism and combat inflammatory issues will not confuse the product with a hangover-prevention beverage. Important federal rulings on the issue of product proximity confirm this to be true. In *Sunenblick v. Harrell*, 895 F. Supp. 616, 628 (S.D.N.Y. 1995), aff'd without op., 101 F.3d 684 (2d Cir. 1996), the court found no likelihood of confusion between the senior user's mark UPTOWN RECORDS, used as a label for jazz recordings, and the junior user's mark MCA/UPTOWN RECORDS, used as a label for rap recordings, primarily based upon the differences in proximity between the two products:

*“Although the products are sold in the same channels of trade, they are not sold side-by-side; rather, they are featured in different sections of the stores in which they are sold, according to genre and not by label name.”*

Hence, absent any evidence that consumers of one will be potential consumers of the other, it is most likely that the consumer entering a record store with the intention of purchasing one of [plaintiff's] products would not even see defendants' products, much less the trademarks appearing thereon. [Cite] at 629-30 (emphasis added). *See also Inc. Pub. Corp. v. Manhattan Magazine*, 227 U.S.P.Q. 257 (S.D.N.Y. 1985) (lack of product proximity and audience appeal reduced likelihood of confusion between two competing business publications).

Second, in *Inc. Pub Corp.*, the publisher of "Inc." magazine, a business oriented publication, was denied a preliminary injunction against defendant's publication of "Manhattan Inc." magazine, a regional business publication, because:

*“The magazines are the same size. Both appear monthly. Both deal in a general sense with the world of “business”; at least “Manhattan, Inc.” does so in part. Both appeal to a sophisticated readership. The demographic studies in evidence show that readers of both magazines tend to be well educated, affluent, and commercially successful. The parties contend for shadings of difference, but the demographics show more similarities than differences. Both magazines attract upscale advertisers. “Inc.” sells for \$3.00 at the newsstands, and “Manhattan, Inc.” for \$2.95. But the differences in editorial content, style, geographical distribution and audience appeal, which we may collect under the caption “Product Proximity,” are significant and readily apparent, and reduce the likelihood of confusion as to the source of these competing publications. 616 F. Supp. at 384-85 (emphasis added).”*

Finally, in *Information Clearing House*, the court found no likelihood of confusion between the senior user's mark "Find/SVP," used as the title for specialized business and industrial publications, and the junior user's mark "Find Magazine," used as the title of a family-oriented publication, based on, inter alia, the difference in the proximity of the products. 492 F. Supp. at 164. According to the court:

*“After considering the topics covered by the parties' respective publications, their prices, methods of distribution and intended and actual readerships, the Court concludes that they appeal to different*

*customers, are sold in entirely different markets, exist for distinct purposes, and thus, are in no sense proximate products.” 492 F. Supp. at 158.*

Such is the case here. The parties’ goods are not likely to be sold in the same trade channels, and even if they were to be sold within the very same retail location, they would be in entirely separate aisles.

Accordingly, this factor favors the Applicant.

Applicant submits that there is no likelihood of confusion between the mark being applied for and the cited references. Reconsideration and an early Notice of Publication are respectfully requested.