

This is in response to the Section 2(d) refusal set forth in the June 20, 2018 Office Action and based on two preexisting registrations. The refusal is respectfully traversed for the reasons set forth below.

In *ex parte* USPTO proceedings six factors are typically considered when evaluating likelihood of confusion. These are: (1) the similarity or dissimilarity of the marks; (2) the relatedness of the goods or services; (3) the similarity or dissimilarity of established, likely to continue channels of trade; (4) the conditions under which and buyers to whom sales are made, i.e., “impulse purchasing vs. careful sophisticated purchasing; (5) the number and nature of similar marks used on similar goods; and (6) whether there is a valid consent agreement. TMEP § 1207.01. On information and belief, the record owner of the two cited registrations (“Registrant”) is a Swiss company that is bankrupt and no longer in business. Applicant also could find no evidence that the Registrant ever conducted any business in the U.S. except to secure the two cited registrations and several others based on international registrations that company secured overseas. In this regard, Applicant notes that the goods listed in the cited registrations generally required FDA approval to be sold in the U.S. A review of the relevant FDA database failed to reveal any approval received by the Registrant to sell any goods in the U.S. As such, there is currently no consent agreement between the Applicant and the Registrant. However, the other five factors listed above all weigh in favor of granting Applicant the registration it seeks. These five factors are discussed below.

1. Dissimilarity of the Marks

When evaluating similarity and dissimilarity, the marks *in their entirety* are to be considered as to appearance, sound, connotation and commercial impression. TMEP § 1207.01(b). Here the marks are different. Applicant’s mark consists of a single word, AEON, which means a unit of time equal to a billion years or an indefinite and very long period of time. The connotation and commercial impression conveyed by Applicant’s mark is that Applicant’s products are very durable.

a. Registration No. 4,853,082 (the ‘082 Registration)

The marks covered by the ‘082 Registration cited by the Examiner is reproduced below:



This mark includes two key elements that readily distinguish this mark from Applicant’s mark. These include the blue graphic element at the beginning reminiscent of the mathematical symbol for infinity ( $\infty$ ), and the word “scientific”. Neither of these elements is found in Applicant’s mark. There is also no element in Applicant’s mark like either of these two distinguishing elements. Thus, this mark and Applicant’s mark are very different in sound and appearance.

This registered mark is also very different from Applicant’s mark in terms of connotation and commercial impression. This cited registration includes the infinity symbol and the word “scientific” suggesting that the owner relies on scientific principles that have existed forever, such as the laws of physics and chemistry. This is very different than the impression created by Applicant’s mark concerning the durability of Applicant’s products.

b. Registration No. 4.848,405 (the '405 Registration)

The '405 Registration cited by the Examiner is for the mark AEON PHOCUS. A key element distinguishes this mark from Applicant's mark, specifically the word "Phocus". This word does not appear in Applicant's mark. Further, no word similar in sound, appearance or meaning is found in Applicant's mark.

It is unclear what meaning Registrant intends to convey by using the word PHOCUS. It could be a reference to an eponymous hero in Greek mythology or it could be a misspelling of the word "focus" which, perhaps, makes more sense in view of the Registrant's description of the goods. These goods include various robotic devices which likely utilize optics that must be precisely focused for positioning of the device. These goods also include endoscopes used to visualize structure inside a body that have elements that must be in focus to make such viewing possible. These goods also include devices that use magnetic fields that must be focused. If the intended meaning is the mythological character, then no similar connotation or commercial impression is conveyed by Applicant's mark. If PHOCUS is used to mean "focus", then the connotation and commercial impression conveyed by the mark, in its entirety, is that accurate focus is maintained over time. Again, Applicant's mark connotes durability which is very different than maintaining accurate focus over time. Also, there is no focusing operation performed with Applicant's staplers or staples.

c. Additional Comments related to Dissimilarity

In some cases, one of the words of a multiple word mark is the dominant term. This is **not** true for the marks covered by the two cited registrations for several reasons. These marks should be considered in their entireties because the words, when read together, provide the observer with the intended connotation and commercial impression. If not, the words SCIENTIFIC and PHOCUS would not have been included in the registered marks. Second, the design element of the first registration cannot be ignored. It is of a color that makes it stand out. It is at least as large as the letters of the text. It precedes the text. It is a symbol that conveys meaning, i.e., infinity, particularly in the context of the words accompanying the symbol. Third, while the word PHOCUS comes second in the other mark, it is an unusual choice that draws attention to itself either by referencing a character from Greek mythology or by employing an unusual spelling.

For each of these reasons, the registered marks cited are dissimilar from Applicant's mark.

2. Dissimilarity of the Goods

Applicant seeks to register its mark for surgical staplers and surgical staples. These specific goods are not listed in either of the cited registrations in the description of the goods. The specific goods listed in each of the two registrations cited are "robotic instruments, namely, surgical robots and robotic arms for surgical purposes for use in human body; magnetic navigation systems for medical use; medical apparatus, namely, systems for steering medical devices within the human body through the use of magnetic fields and magnetic torque and force featuring robotic arms, electro magnets and magnetic medical devices; catheters; rigid and flexible medical endoscopes; magnets and electric magnets for medical applications; atherectomy apparatus; conducting wires for medical use; apparatus for locating medical apparatus in the body; medical electrodes and catheters with electrodes; medical mapping

systems featuring robotic arms, electro magnets and receivers to receive, store and make visible magnetic fields.” As such, Applicant’s goods are very different eliminating any likelihood of confusion.

Initially, both Applicant’s description of the goods and Registrant’s description of the goods included a summarizing statement. In the cited registrations this reads, “Surgical and medical apparatus and instruments for use in surgery.” All of the specific goods listed by Registrant fall within this generic recitation. There is no suggestion that Registrant sells staples or staplers. The summarizing statement has been deleted by amendment from the subject applications to avoid any confusion as to Applicant’s goods sold under the mark, i.e., surgical staplers and staples.

### 3. Channels of Trade

As noted above, Applicant has been unable to uncover any evidence that the Registrant has sold any products in the U.S. Even if Registrant has, it is clear from the description of Registrant’s goods that they are very expensive pieces of equipment sold only to hospitals and only to hospital personnel charged with the responsibility of making expensive capital equipment purchases. Applicant’s goods are much less expensive and purchasing decisions are made at a lower level by persons charged with the responsibility of purchasing supplies rather than capital equipment. Also, Applicant’s channels of trade are broader because of the cost of the staplers and staples. In addition to hospitals, Applicant’s targeted customers include urgent care clinics, outpatient surgery centers and the like. Such facilities would have the budget for, would not have the training or expertise to use, and therefore would have no need for the Registrant’s products. As such, the channels of trade are very different.

As noted above, the Registrant has apparently not received FDA approval to sell any of its products in the U.S. The Registrant did announce receipt of CE Mark approval allowing it to sell in Europe “an electromagnetic system to steer ablation catheters for the treatment of cardiac arrhythmias.” Such goods are used exclusively by electrophysiologists in electrophysiology labs, sometimes referred to as cardiac catheterization labs. Applicant’s goods are not typically used by electrophysiologists or in such labs. For this additional reason the channels of trade are very different. Electrophysiologists are the target of Registrant’s marketing and sales efforts while general surgeons are the target of Applicant’s efforts.

### 4. Conditions Under which and Buyers to Whom Sales are Made

No one is going to buy Registrant’s goods on an impulse. This is because of the nature of the goods, their cost, and their functionality. As noted above, Registrant’s goods are purchased by a team of hospital administrators and physicians, most typically electrophysiologists, responsible for investigating the purchase of capital equipment for a hospital. Clearly, those people are focused on the capabilities, efficacy and safety of such equipment and make their purchasing decisions after careful study over an extended time period. Early on, they clearly identify the available sources of such equipment such that confusion as to source is unlikely and making any differences between two marks highly significant.

Likewise, Applicant’s staplers are not purchased on an impulse. Purchasing decisions related to Applicant’s staplers are typically made by different people than those making purchasing decisions related to Registrant’s goods due to differences with respect to use and cost. Purchasers would not include electrophysiologists because they have no use for Applicant’s products. At the same time, Applicant’s staplers are not purchased on a whim and a significant degree of care is exercised. Likewise,

when Applicant's staples are purchased, they are purchased as a supply for the staplers manufactured and sold by Applicant. Again, sufficient care is exercised to prevent confusion as to source given the differences between Applicant's mark and those of the Registrant.

#### 5. Number and Nature of Similar Marks

A search of the TESS database shows that there are currently more than 40 other registrations of marks including the word AEON. One of these is also for goods falling within International Class 10, the mark Y-AGE AEON for "non-transdermal adhesive patches with a non-porous surface for phototherapy for general wellness." See Exhibit A. Others for health and medical goods and services include: AEON GLOBAL HEALTH (See Exhibit B), and AEON CLINICAL LABORATORIES (See Exhibits C and D). Also, several are related to components that could be used with Registrant's equipment. See, e.g., Exhibit E.

In view of the forgoing, consumers will look at the marks in their entirety and with reference to the goods to identify the source of the goods.

#### Conclusion:

For at least the reasons set forth above, Applicant respectfully submits that no confusion as to source is likely to arise between Applicant's mark and the marks covered by the cited registrations. The marks are dissimilar. The goods are too. The channels of trade are different. The goods are the subject of careful, sophisticated purchasing. Other marks exist including the only feature common to Applicant's mark and the marks covered by the cited registrations. As such, consumers will look to the entirety of the mark, in the context of the goods and services, to identify source. Therefore, Applicant requests that the refusal be withdrawn and that its mark be published for opposition.