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Subject: U.S. Trademark Application Serial No. 88668558 - OPTIMIST BOTANICALS - 233351-00001

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United States Patent and Trademark Office (USPTO)
Office Action (Official Letter) About Applicant's Trademark Application

U.S. Application
Serial No. 88668558

Mark: OPTIMIST
BOTANICALS

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No. 233351-00001

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FINAL OFFICE ACTION

Issue date: December 09, 2020

INTRODUCTION

This Office action is in response to applicant's communication filed on 11/19/2020.

The Trademark Trial and Appeal Board (Board) instituted and suspended appeal; remanded application to trademark examining attorney for review of request for reconsideration. *See* TBMP §1204; TMEP §715.04. On 11/19/2020, applicant filed a notice of appeal to the Board and a request for reconsideration of a final Office action that issued on 5/19/2020. On 11/19/2020, the Board instituted and then suspended the appeal proceeding, remanding the application to the trademark examining attorney for review of the request for reconsideration.

Applicant's request for reconsideration presented an amendment to the Identification of Goods for which new evidence of relatedness was required as this amendment was relevant to an issue on appeal. *See* TBMP §1204; TMEP §715.04(b). Therefore, this new final Office action is being issued to address the amendment, and supersedes the previous final Office action. TMEP §715.04(b). After issuing this new final Office action, the trademark examining attorney will return the application to the Board for resumption of the appeal. *Id.* Any further request for the trademark examining attorney to consider the application must be made in a request for remand to the Board, for which good cause must be shown. *See* TBMP §1204.

The trademark examining attorney accepts the following amendment(s):

The Identification of Goods is amended to read as “Non-alcoholic water-based beverages *made with botanicals.*”

Further, the following refusal(s) and requirement(s) are maintained and continued to be held final:

- REFUSAL – SECTION 2(d) – LIKELIHOOD OF CONFUSION
- REQUIREMENT – DISCLAIMER

REFUSAL – SECTION 2(d) – LIKELIHOOD OF CONFUSION

Registration of the applied-for mark is refused because of a likelihood of confusion with the marks in U.S. Registration No. 5500691 (“OPTIMISM” for “Beer; sparkling water”). Trademark Act Section 2(d), 15 U.S.C. §1052(d); *see* TMEP §§1207.01 *et seq.* See the previously attached registration.

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely a potential consumer would be confused, mistaken, or deceived as to the source of the goods and/or services of the applicant and registrant. *See* 15 U.S.C. §1052(d). A determination of likelihood of confusion under Section 2(d) is made on a case-by case basis and the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973) aid in this determination. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 1349, 98 USPQ2d 1253, 1256 (Fed. Cir. 2011) (citing *On-Line Careline, Inc. v. Am. Online, Inc.*, 229 F.3d 1080, 1085, 56 USPQ2d 1471, 1474 (Fed. Cir. 2000)). Not all the *du Pont* factors, however, are necessarily relevant or of equal weight, and any one of the factors may control in a given case, depending upon the evidence of record. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d at 1355, 98 USPQ2d at 1260; *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003); *see In re E. I. du Pont de Nemours & Co.*, 476 F.2d at 1361-62, 177 USPQ at 567.

The overriding concern is not only to prevent buyer confusion as to the source of the goods and/or services, but to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. *See In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). Therefore, any doubt regarding a likelihood of confusion determination is resolved in favor of the registrant. TMEP §1207.01(d)(i); *see Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464-65, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

In this case, the following factors are the most relevant: similarity of the marks, similarity and nature of the goods and/or services, and similarity of the trade channels of the goods and/or services. *See In re Viterra Inc.*, 671 F.3d 1358, 1361-62, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1595-96 (TTAB 1999); TMEP §§1207.01 *et seq.*

Comparison of the Goods

Applicant's goods are “non-alcoholic water-based beverages made with botanicals.” The goods in the registration include “sparkling water.” These goods are related as the previously attached evidence shows that they emanate from a single source under a single mark and this terminology also often describes the same product as the currently attached evidence shows that it is common for manufacturers to produce sparkling water beverages made with botanicals.

The goods and/or services of the parties need not be identical or even competitive to find a likelihood of confusion. *See On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods.”); TMEP §1207.01(a)(i).

The respective goods and/or services need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the goods and/or services] emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); TMEP §1207.01(a)(i).

The attached Internet evidence consists of screenshots of products from “Active Botanical Co.,” “Aqua Botanical,” “Arrowhead,” “Petal,” “Seasons Sparkling,” “Sparkling Botanicals,” “No.1 Botanicals,” “Aura Bora,” “Hush Aqua”, “Forage & Foster,” “Creative Waters Co.” and “Sweet Reason.” Each of these companies produces non-alcoholic sparkling waters which contain botanicals. This evidence establishes that the same entity commonly produces the relevant goods and markets the goods under the same mark, the relevant goods are sold or provided through the same trade channels and used by the same classes of consumers in the same fields of use and that the goods are similar or complementary in terms of purpose or function since they describe the same beverage product. Therefore, applicant's and registrant's goods are considered related for likelihood of confusion purposes. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009); *In*

re Toshiba Med. Sys. Corp., 91 USPQ2d 1266, 1268-69, 1271-72 (TTAB 2009).

Furthermore, the trademark examining attorney previously attached evidence to this office action from the USPTO's X-Search database consisting of a number of third-party marks registered for use in connection with the same or similar goods and/or services as those of both applicant and registrant in this case. Please see the previously attached U.S. Reg. Nos. 5602982, 5555116, 5708106, 5892146, 5555796, 5886218, 5738698, 5739241, 5753433, 5765702, 5779688, 5891440, 5945324, 6043532 and 6044006. This evidence shows that the goods or similar goods listed therein, namely "sparkling water" as well as the more generalized types of "non-alcoholic water-based beverages," are of a kind that may emanate from a single source under a single mark. The "non-alcoholic water-based beverages" from these registrations are unrestricted in terms of flavorings or ingredients and are presumed to encompass all goods of the type described, including those made with botanicals. See *In re I-Coat Co.*, 126 USPQ2d 1730, 1737 (TTAB 2018) (citing *In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988)); *In re Solid State Design Inc.*, 125 USPQ2d 1409, 1412-15 (TTAB 2018); *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015). TMEP §1207.01(d)(iii).

Thus, applicant's and registrant's goods are related.

Comparison of the Marks

Applicant's applied-for mark is "OPTIMIST BOTANICALS." The registered mark is "OPTIMISM". Both of the marks are in standard character mark form.

Marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)); TMEP §1207.01(b)-(b)(v). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014) (citing *In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007)); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988)); TMEP §1207.01(b).

Where the goods and/or services of an applicant and registrant are "similar in kind and/or closely related," the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as in the case of diverse goods and/or services. *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987); see *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1242, 73 USPQ2d 1350, 1354 (Fed. Cir. 2004); TMEP §1207.01(b).

Although marks are compared in their entireties, one feature of a mark may be more significant or dominant in creating a commercial impression. See *In re Detroit Athletic Co.*, 903 F.3d 1297, 1305, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (citing *In re Dixie Rests.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997)); TMEP §1207.01(b)(viii), (c)(ii). Matter that is descriptive of or generic for a party's goods and/or services is typically less significant or less dominant in relation to other wording in a mark. See *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1824-25 (TTAB 2015) (citing *In re Chatam Int'l Inc.*, 380 F.3d 1340, 1342-43, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004)). In the present case, please see the discussion in the "REQUIREMENT – DISCLAIMER" section of the office action showing that the wording "BOTANICALS" in the applied-for mark is merely descriptive of or generic for applicant's goods. Thus, this wording is less significant in terms of affecting the mark's commercial impression, and renders the wording "OPTIMIST" the more dominant element of the mark.

With respect to the wording "OPTIMISM" in the registered mark, the previously attached evidence from Merriam-Webster Dictionary shows that the word "OPTIMIST" is defined as "person who is inclined to be hopeful and to expect good outcomes" or "someone who is given to optimism," and that the word "OPTIMISM" is defined as "an inclination to put the most favorable construction upon actions and events or to anticipate the best possible outcome." Thus these words have very similar meanings, they share the same first seven letters with the exception of the last letter and the previously attached evidence shows that they are derived from the same root word. Consumer confusion has been held likely for marks that do not physically sound or look alike but that convey the same idea, stimulate the same mental reaction, or may have the same overall meaning. *Proctor & Gamble Co. v. Conway*, 419 F.2d 1332, 1336, 164 USPQ 301, 304 (C.C.P.A. 1970); see *In re M. Serman & Co.*, 223 USPQ 52, 53 (TTAB 1984) (holding CITY WOMAN for ladies' blouses likely to be confused with CITY GIRL for a variety of female clothing); *H. Sichel Sohne, GmbH v. John Gross & Co.*, 204 USPQ 257, 260-61 (TTAB 1979) (holding BLUE NUN for wines likely to be confused with BLUE CHAPEL for the same goods); *Ralston Purina Co. v. Old Ranchers Canning Co.*, 199 USPQ 125, 128 (TTAB 1978); *Downtowner Corp. v. Uptowner Inns, Inc.*, 178 USPQ 105, 109 (TTAB 1973); TMEP §1207.01(b).

Here the registered mark, "OPTIMISM", and the dominant element of the applied-for mark, "OPTIMIST", share the same first seven letters with the exception of the last letter and are derived from the same root word. Marks may be confusingly similar in appearance where similar terms or phrases or similar parts of terms or phrases appear in the compared marks and create a similar overall commercial impression. See *Crocker Nat'l Bank v. Canadian Imperial Bank of Commerce*, 228 USPQ 689, 690-91 (TTAB 1986), *aff'd sub nom. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, Nat'l Ass'n*, 811 F.2d 1490, 1495, 1 USPQ2d 1813, 1817 (Fed. Cir. 1987) (finding COMMERCASH and

COMMUNICASH confusingly similar); *In re Corning Glass Works*, 229 USPQ 65, 66 (TTAB 1985) (finding CONFIRM and CONFIRMCELLS confusingly similar); *In re Pellerin Milnor Corp.*, 221 USPQ 558, 560 (TTAB 1983) (finding MILTRON and MILLTRONICS confusingly similar); TMEP §1207.01(b)(ii)-(iii).

As such, viewed as a whole, applicant's mark is substantially similar in sound, appearance, connotation and commercial impression to the registered mark.

Applicant's Arguments with respect to the Refusal

Applicant makes three main arguments with respect to the refusal:

- *Based on applicant's amendment to the Identification of Goods, the goods have been differentiated*

Applicant states that their amendment to clearly indicate that the applied-for goods are made with botanicals makes it so that that the applicant's goods no longer encompass those of the registrant and therefore the goods are no longer related or confusable. While the amendment does eliminate the overlap or encompassing relationship between the good, the attached evidence clearly shows that it is common in the beverage industry for manufacturers to produce sparkling waters which contains botanicals as an ingredient. As such, while the wording "non-alcoholic water-based beverages made with botanicals" may no longer directly encompass "sparkling waters," the evidence firmly establishes that this language from the application and registration can still refer to the same particular drink and therefore the goods are overlapping in nature, produced by the same entities and consumed by the same target audience. Therefore, applicant's and registrant's goods are considered related for likelihood of confusion purposes. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69, 1271-72 (TTAB 2009).

- *The marks create distinguishable commercial impressions due to the presence of the word "BOTANICALS" in the applied-for mark*

Applicant argues that the additional word "BOTANICALS" in the applicant's mark was not given proper weight in terms of the comparison of the marks. Marks must be compared in their entirety and should not be dissected; however, a trademark examining attorney may weigh the individual components of a mark to determine its overall commercial impression. *In re Detroit Athletic Co.*, 903 F.3d 1297, 1305, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) ("[Regarding the issue of confusion,] there is nothing improper in stating that . . . more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entirety." (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985))).

As was previously noted, the evidence and discussion provided in the "REQUIREMENT – DISCLAIMER" section of the office action shows that the mark as a whole is not unitary and that the wording "BOTANICALS" is less significant in terms of affecting the mark's commercial impression, and renders the wording "OPTIMIST" the more dominant element of the applied-for mark. *See* TMEP §1207.01(b)(viii). Further reinforcing its dominance is the fact that the word "OPTIMIST" appears first in the applied-for mark. Consumers are generally more inclined to focus on the first word in any trademark or service mark. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 876, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *see also In re Detroit Athletic Co.*, 903 F.3d 1297, 1303, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018). Further, applicant has now explicitly made it clear in their Identification of Goods amendment that the goods do in fact contain "BOTANICALS" as a highlighted ingredient, therefore this word is almost certainly generic. The generic name of an ingredient of the goods is incapable of identifying and distinguishing their source and the TTAB has previously stated that generic terms are the antithesis of trademarks. *See In re Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 828 F.2d 1567, 1569; *In re Hask Toiletries, Inc.*, 223 USPQ 1254, 1255 (TTAB 1984); *In re Pepcom Indus., Inc.*, 192 USPQ 400, 402 (TTAB 1976); TMEP §1209.01(c). While the applied-for mark does contain the additional word "BOTANICALS", this wording has next to no source indicating value and would simply be viewed by the relevant purchasing public as primarily being as the name for the featured ingredient of the goods such that they would fully focus on the word "OPTIMIST" as the dominant source indicating element. TMEP §1209.01(c)

Here the dominant wording "OPTIMIST" in the applied-for mark and "OPTIMISM" in the registered mark have very similar meanings since the previously attached evidence establishes that "OPTIMIST" is defined as "someone who is given to optimism." The words may not sound exactly alike but they share the same first seven letters and consumer confusion has been held likely for marks that do not physically sound or look alike but that convey the same idea, stimulate the same mental reaction, or may have the same overall meaning. *See* TMEP §1207.01(b). As such, the marks each create similar commercial impressions and confusion is likely to occur given that the goods in this case are legally identical. Where the goods and/or services of an applicant and registrant are "similar in kind and/or closely related," the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as in the case of diverse goods and/or services. *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987); *see Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1242, 73 USPQ2d 1350, 1354 (Fed. Cir. 2004); TMEP §1207.01(b).

- The wording “OPTIMIST”, “OPTIMISM” and “OPTIMISTIC” is diluted in a crowded field of beverages

Applicant argues that the Federal Register demonstrates co-existence of marks containing the shared root “OPTIM.” However, in this case, the goods in question are “sparkling water” for the registrant and “non-alcoholic water-based beverages made with botanicals” for the applicant. In their response, applicant highlighted “OPTIM-” based mark for various types of alcoholic beverages and had previously submitted printed or electronic copies of third-party registrations for marks containing the root word “OPTIM-” to support the argument that this wording is weak, diluted, or so widely used that it should not be afforded a broad scope of protection. These registrations appear to primarily be for goods and/or services that are predominantly different from or unrelated to those identified in applicant’s application. None of these show that this “OPTIM-” based wording is diluted with respect to water-based beverages.

The weakness or dilution of a particular mark is generally determined in the context of the number and nature of similar marks in use in the marketplace in connection with similar goods and/or services. See *Nat’l Cable Tel. Ass’n, Inc. v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 1579-80, 19 USPQ2d 1424, 1430 (Fed. Cir. 1991); *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973). Evidence of widespread third-party use of similar marks with similar goods and/or services “is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection” in that particular industry or field. *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1324, 128 USPQ2d 1686, 1693 (Fed. Cir. 2018) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee en 1772*, 396 F.3d 1369, 1373, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005)).

Further, evidence comprising third-party registrations for similar marks with different or unrelated goods and/or services, as in the present case, has “no bearing on the strength of the term in the context relevant to this case.” See *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1058 (TTAB 2017) (citing *In re i.am.symbolic, llc*, 866 F.3d at 1328, 123 USPQ2d at 1751). Thus, these third-party registrations submitted by applicant are insufficient to establish that the wording “OPTIMIST” or “OPTIMISM” is weak or diluted.

Applicant also referenced several precedential opinions where the marks contained similar terms but the Section 2(d) refusals were overturned, for example “PEAK PERIOD” for deodorants was found dissimilar from “PEAK” for dentifrices and “PARENTS” was found differentiated from “PARENTS DIGEST” for magazines. None of these decisions that were cited are related to water based beverages or beverages in general and applicants main argument is that marks are not automatically similar if they share the same or similar wording. However, the marks in question in this case do not simply share similar wording, instead they also are being used for overlapping and highly related goods and the determination of confusion here is being made based on this individual evidentiary record and the relatedness of the marks. When determining whether an applied-for mark is eligible for registration, each application must be considered on its own record. *In re Cordua Rests., Inc.*, 823 F.3d 594, 600, 118 USPQ2d 1632, 1635 (Fed. Cir. 2016) (“[The Federal Circuit], like the Board, must evaluate the evidence in the present record to determine whether there is sufficient evidence”); *In re Shinnecock Smoke Shop*, 571 F.3d 1171, 1174, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009) (“Applicant’s allegations regarding similar marks are irrelevant because each application must be considered on its own merits.”); see also *In re Nett Designs, Inc.*, 236 F.3d 1339, 1342, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to Nett Designs’ application, the PTO’s allowance of such prior registrations does not bind the [Trademark Trial and Appeal] Board or this court.”).

Lastly, to support applicant’s arguments, applicant previously submitted evidence of cancelled or expired third-party registrations. However, a cancelled or expired registration is “only evidence that the registration issued and does not afford [an applicant] any legal presumptions under Trademark Act Section 7(b),” including the presumption that the registration is valid, owned by the registrant, and the registrant has the exclusive right to use the mark in commerce in connection with the goods and/or services specified in the registration certificate. *Bond v. Taylor*, 119 USPQ2d 1049, 1054-55 (TTAB 2016) (citing *In re Pedersen*, 109 USPQ2d 1185, 1197 (TTAB 2013)); see *Anderson, Clayton & Co. v. Krier*, 478 F.2d 1246, 1248, 178 USPQ 46, 47 (C.C.P.A. 1973) (statutory benefits of registration disappear when the registration is cancelled); TBMP §704.03(b)(1)(A); TMEP §1207.01(d)(iii), (d)(iv). Nor does a cancelled or expired registration provide constructive notice under Section 22, in which registration serves as constructive notice to the public of a registrant’s ownership of a mark. See *Action Temp. Servs. Inc. v. Labor Force Inc.*, 870 F.2d 1563, 1566, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) (“[A] canceled registration does not provide constructive notice of anything.”). Thus, these third-party registrations have little, if any, probative value with respect to the registrability of applicant’s mark.

- Other registrants have agreed that “OPTIMIST” and “OPTIMISM” marks can coexist

Applicant argues that because the registrants of two “OPTIMIST” and “OPTIMISM” marks agreed that there is no likelihood of confusion between the common terms in their marks, this understanding and treatment should also extend to the applied-for mark. However, the consent agreement in question was an agreement between two private parties in which in which each party consented to the registration of an identical or similar mark by the other party. See TMEP §1207.01(d)(viii). The registrant and applicant only agreed to registration by the other particular party and this consent agreement does not extend to other third parties such as the owner of the applied-for mark. The consent agreement also related to wholly different goods from those in question here, applicant’s own evidence shows that “OPTIM” based marks are relatively common for beer and alcoholic beverages, however, this is not true for water-based beverages where these marks are very strong and unique and where there is no evidence of dilution. Furthermore, this consent agreement was submitted in order to overcome a refusal of registration under §2(d) of the Act

since the marks in question had been found confusingly similar by the trademark examining attorney. In general, prior decisions and actions taken with respect to registering other marks have little evidentiary value and are not binding upon the USPTO or the Trademark Trial and Appeal Board. TMEP §1207.01(d)(vi); see *In re USA Warriors Ice Hockey Program, Inc.*, 122 USPQ2d 1790, 1793 n.10 (TTAB 2017). Each case is decided on its own facts, and each mark stands on its own merits. *In re USA Warriors Ice Hockey Program, Inc.*, 122 USPQ2d at 1793 n.10 (quoting *In re Boulevard Entm't*, 334 F.3d 1336, 1343, 67 USPQ2d 1475, 1480 (Fed. Cir. 2003)). Given the similarity of the marks and the relatedness of the goods, the Section 2(d) refusal is continued and maintained.

Based on the foregoing, the refusal of registration under Trademark Act Section 2(d) is continued to be made FINAL.

REQUIREMENT – DISCLAIMER

Applicant must provide a disclaimer of the unregistrable part(s) of the applied-for mark even though the mark as a whole appears to be registrable. See 15 U.S.C. §1056(a); TMEP §§1213, 1213.03(a). A disclaimer of an unregistrable part of a mark will not affect the mark's appearance. See *Schwarzkopf v. John H. Breck, Inc.*, 340 F.2d 978, 979-80, 144 USPQ 433, 433 (C.C.P.A. 1965).

In this case, applicant must disclaim the wording "BOTANICALS" because it is not inherently distinctive. These unregistrable term(s) at best are merely descriptive of an ingredient, quality, characteristic, function, feature, purpose, or use of applicant's goods and/or services. See 15 U.S.C. §1052(e)(1); *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1251, 103 USPQ2d 1753, 1755 (Fed. Cir. 2012); TMEP §§1213, 1213.03(a).

The previously attached evidence from Merriam-Webster Dictionary shows that "BOTANICAL" means "plant material used as a flavoring agent" and is usually used in the plural, as it is in the applied-for mark. Although each mark must be evaluated on the specific facts of the case, the plural of a descriptive term is generally still descriptive as pluralization usually does not alter the meaning of the term beyond making it plural. See *In re Cordua Rests., Inc.*, 823 F.3d 594, 603, 118 USPQ2d 1632, 1637 (Fed. Cir. 2016) (citing *In re Belgrade Shoe, Co.*, 411 F.2d 1352, 1353, 162 USPQ 227, 227 (C.C.P.A. 1969); *Wilson v. Delauney*, 245 F.2d 877, 878, 114 USPQ 339, 341 (C.C.P.A. 1957)); TMEP §1209.01(c)(1). The previously attached Internet evidence also shows this wording is commonly used to describe a type of ingredient used to enhance flavor in connection with beverages including similar water-based beverages. Please see the previously attached website evidence from "Beverage Industry," "My Drink Powered By BevSource," the "Kerry" Group, "Food Business News," "Drinking in America," "Imbibe: The Drink Tank," "Simply Nature," the "Watson" group, "Javo" Beverages and "No. 1 Botanicals."

Further, the applicant has amended their Identification of Goods in order to explicitly state that their goods are "made with botanicals." A term that describes an ingredient of the goods is at minimum merely descriptive and in this case likely generic. TMEP §1209.01(b); see *In re TriVita, Inc.*, 783 F.3d 872, 114 USPQ2d 1574 (Fed. Cir. 2015) (holding NOPALEA merely descriptive of dietary and nutritional supplements containing nopal juice); *In re Keebler Co.*, 479 F.2d 1405, 178 USPQ 155 (C.C.P.A. 1973) (holding RICH 'N CHIPS merely descriptive of chocolate chip cookies); *In re Andes Candies Inc.*, 478 F.2d 1264, 178 USPQ 156 (C.C.P.A. 1973) (holding CREME DE MENTHE merely descriptive of candy); *In re Entenmann's, Inc.*, 15 USPQ2d 1750 (TTAB 1990) (holding OATNUT merely descriptive of bread containing oats and hazelnuts); *Flowers Indus., Inc. v. Interstate Brands Corp.*, 5 USPQ 2d 1580 (TTAB 1987) (holding HONEY WHEAT merely descriptive of bread containing honey and wheat).

Thus, as the Identification of Goods indicates, the wording merely describes that applicant's identified "non-alcoholic water-based beverages made with botanicals" contain botanicals or plant materials used as a flavoring ingredient.

Applicant may respond to this issue by submitting a disclaimer in the following format:

No claim is made to the exclusive right to use "BOTANICALS" apart from the mark as shown.

For an overview of disclaimers and instructions on how to satisfy this issue using the Trademark Electronic Application System (TEAS), see the [Disclaimer webpage](#).

Applicant's Arguments with respect to the Requirement

Applicant makes one main argument with respect to the requirement which was incorporated from their previous response which was submitted on 5/15/2020:

- *The mark is a unitary mark and therefore no disclaimer is required*

The test for unitariness inquires whether the elements of a mark are so integrated or merged together that they cannot be regarded as separable. See *In re EBS Data Processing*, 212 USPQ 964, 966 (TTAB 1981); *In re Kraft, Inc.*, 218 USPQ 571, 573 (TTAB 1983). The Court of Appeals for the Federal Circuit has set forth the elements of a unitary mark: "A unitary mark has certain observable characteristics. Specifically,

its elements are inseparable. In a unitary mark, these observable characteristics must combine to show that the mark has a distinct meaning of its own independent of the meaning of its constituent elements. In other words, a unitary mark must create a single and distinct commercial impression.” See TMEP §1231.05.

Here the applicant’s mark consists of two nouns, and the previously attached evidence along with applicant’s Identification of Goods shows that the noun “BOTANICALS” is almost certainly generic. The applicant states that the mark “conveys a commercial impression that invokes a sense of hope or favorable outcomes pertaining to plants or plant life.” However, there is no interrelatedness between the two nouns such that one modifies or directly connects with the other. The previously attached evidence from Merriam-Webster Dictionary defines the word “OPTIMIST” as a “person who is inclined to be hopeful and to expect good outcomes.” Applicant’s provided evidence similarly defines the word as meaning “one who habitually or in a particular case expects a favorable outcome” and “a believer in philosophical optimism.” These definitions all state that the word “OPTIMIST” refers to a person who is hopeful, since the word “BOTANICAL” means “plant material used as a flavoring agent” it would be clear to a consumer that the applicant was not stating that that plant material is actually hopeful. Additionally, there is nothing connecting the word such that the consumer would understand the “OPTIMIST” to be particularly hopeful about plant materials since there is no relationship present between the words other than their positioning respective to one another. Since the elements are considered separable, the matter is not unitary and the unregistrable constituent element “BOTANICALS” must be disclaimed. See *In re Ginc UK Ltd.*, 90 USPQ2d 1472, 1477 (TTAB 2007); *In re Brown-Forman Corp.*, 81 USPQ2d 1284, 1288 (TTAB 2006); TMEP §1213.05(b)(iv), (g), (g)(i).

Based on the foregoing, the disclaimer requirement is continued to be made FINAL.

CONCLUSION

As applicant has already filed an appeal with the Trademark Trial and Appeal Board, the Board will be notified to resume the appeal. See TMEP §715.04(a).

/Stefan M. Oehrlein/
Trademark Examining Attorney
Law Office 115
(571) 272-1308
stefan.oehrlein@uspto.gov

RESPONSE GUIDANCE

- **Missing the response deadline to this letter will cause the application to [abandon](#).** A response or notice of appeal must be received by the USPTO before midnight **Eastern Time** of the last day of the response period. TEAS and ESTTA maintenance or [unforeseen circumstances](#) could affect an applicant’s ability to timely respond.
- **[Responses signed by an unauthorized party](#)** are not accepted and can **cause the application to [abandon](#)**. If applicant does not have an attorney, the response must be signed by the individual applicant, all joint applicants, or someone with [legal authority to bind a juristic applicant](#). If applicant has an attorney, the response must be signed by the attorney.
- If needed, **find [contact information for the supervisor](#)** of the office or unit listed in the signature block.



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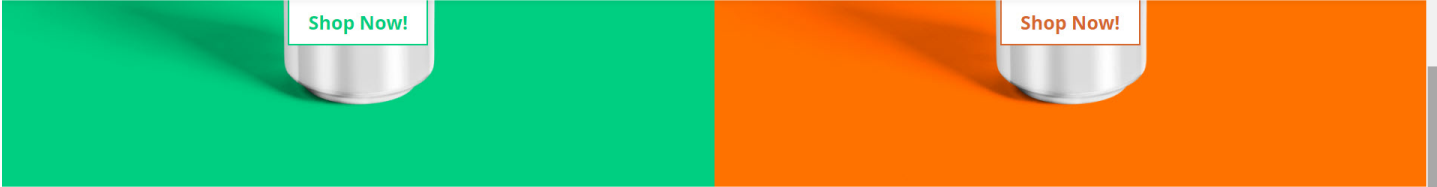
Zero Calories. Zero Sugar.
Zero BS.



100% Organic CBD



9:47:01 AM 11/30/2020



Nutrition Facts

Natural Mango Essenced Sparkling Water

Serving Size: 1 can

Amount Per Serving

Calories 0 Calories from Fat 0

% Daily Value*

Total Fat 0g **0%**

Sodium 0mg **0%**

The FACTS:

- ✓ Three Ingredients
Flavor + CBD + Sparkling Water
- ✓ Zero Calories
- ✓ Highest Quality, Organic CBD
- ✓ Essential Terpene's

Total Carbohydrates Ug **U%**

Sugars 0g

Protein 0g

* Percent Daily Values are based on a 2000 calorie diet.

INGREDIENTS: Carbonated Water, Natural Flavors, CBD

× No Sugar or Sweeteners

× No Artificial Flavors

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Or shoot us a message to info@botanicalwaterco.com.

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7 + 11 =	<input type="text"/> <input type="submit" value="Submit"/>

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Search For Your Product's Lab Results By Entering The Batch Number Located On the Bottom Of The Product Next To The QR Code:

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AQUABOTANICAL SPARKLING WATER 750ML CARTONS (12 BOTTLES)

\$42.00

Minimum order quantity 2 cases.

CASES:

2

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330mL CARTONS (24 bottles)
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WATER 330mL CARTONS (24
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SPARKLING NATURAL SPRING WATER

RASPBERRY ROSE

Tart and sweet raspberries are combined with delicate rose to create a deliciously fresh botanical sparkling water flavor



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INGREDIENTS

THREE SIMPLE INGREDIENTS. JUST WHAT'S REFRESHINGLY REAL.



Natural spring water



Refreshing bubbles



Natural fruit flavors



NUTRITIONAL FACTS

FREE OF CALORIES,
SUGARS,
SWEETENERS, AND
SODIUM.

Amount Per Serving

Calories	0
Total Fat	0%
Sodium	0%
Total Carbohydrates	0g
Sugars	0g
Protein	0g



PRODUCT DETAILS

EVERY BOTTLE AND CAN IS 100% RECYCLABLE.

 product details





SPARKLING WATER MOCKTAIL RECIPE

Raspberry Rose Sangria

Sweet and tart, floral and elegant, this spin on a white sangria is our favorite mocktail of the season.

INGREDIENTS

- 2 12oz. cans Sparkling Arrowhead® brand Raspberry Rose flavored mountain spring water
- Orange Juice
- Pomegranate Juice
- Pomegranate Seeds
- Raspberries

DIRECTIONS

Combine in base of blender, and blend until you have a smoothie consistency. Serve with 1 Frozen Cherry & 1 Frozen Peach Slice.



OUR FLAVORS

EXPLORE THE REST OF OUR SPARKLING WATER FLAVORS



BLACK CHERRY

LIVELY LEMON

LEMON LIME

ZESTY LIME



BLACK CHERRY



LIVELY LEMON



LEMON LIME



ZESTY LIME

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PE TAL

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Level Up Your Sparkling Water

Organic
Low Sugar
Caffeine Free



The image shows a woman with long, dark, curly hair, smiling and looking down at a can of PETAL sparkling water she is holding. The can is white with purple and green floral patterns and the word 'PETAL' in a stylized font. The background is a plain, light color.



Flower-Powered Goodness

Meet Petal, the unique organic beverage experience that sparkles with wild, rebellious, flower-powered goodness. No fake stuff—just crafted from the finest botanical essences and extracts. Stop & sip the botanicals.

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Testimonials



"All I can say is WOW! This drink is incredible! It's light, refreshing and ORGANIC which is amazing!"

Sarah L.



"Thank you for making a sober alternative to White Claw! I don't drink, so whenever I'm out with my friends I carry a can of Petal with me."

Jen F.

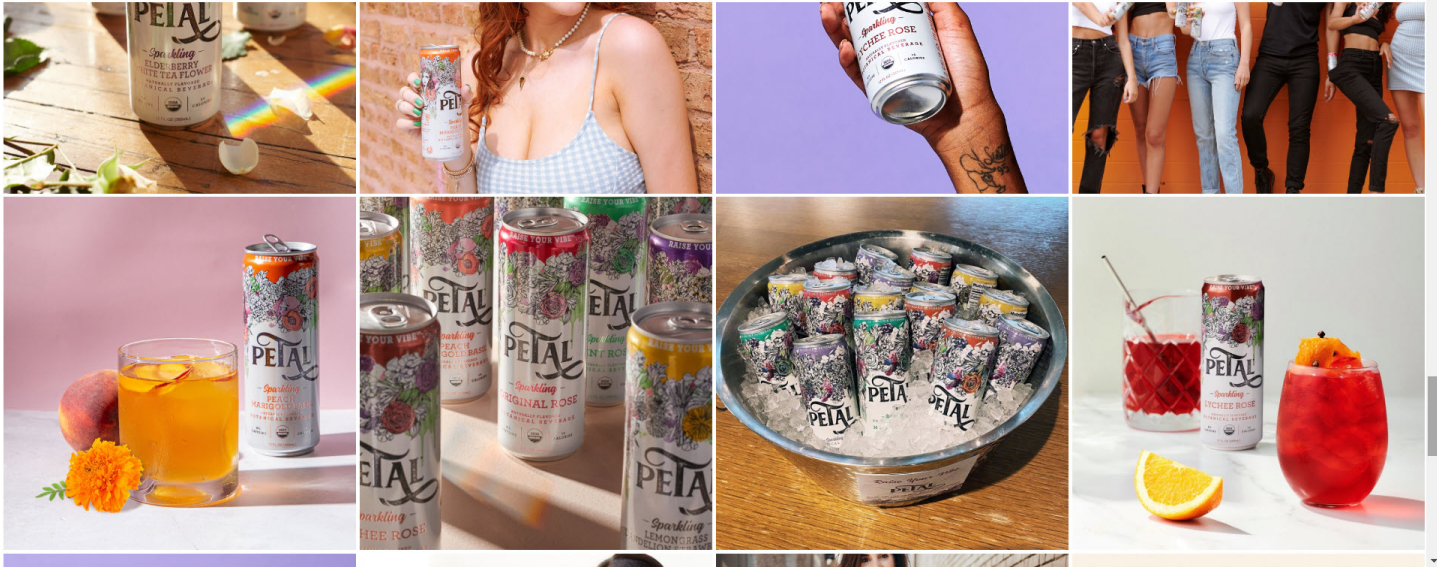


"I always feel like a goddess, but *especially* when I'm Drinking Petal."

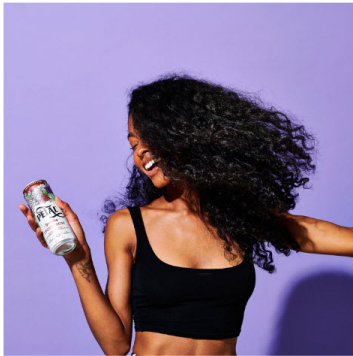
Rachel S.



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9:40:12 AM 11/30/2020

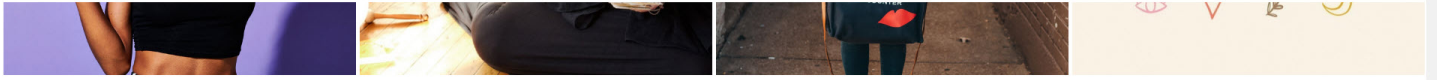


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ABOUT | WHOLESALE



Organic Sparkling Botanical Waters

Made with superfoods, teas & botanicals.

TRY NOW

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ABOUT

WHOLESALE



Sparkling water — elevated.

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ABOUT

WHOLESALE



Sparkling water — elevated.

Discover better-for-you drinks that combine healthy hydration and bright flavors to gently fuel your day — be it with fragrant effervescence or a touch of smooth tea caffeine.

Our sparkling botanical waters are made with organic superfoods, refreshing teas, and delicate botanicals sourced from trusted farmers and suppliers.

EVERYDAY HYDRATION,
WITHOUT THE BAGGAGE

SUGAR

SHOP NOW



ABOUT

WHOLESALE



**0 SUGAR
CALORIES
SODIUM**



No sugar. No calories. Nothing artificial.

PLANT-BASED INGREDIENTS

A symphony of organic superfoods & botanicals in each can.

GENTLE BUBBLES

Lightly carbonated for a delightful dose

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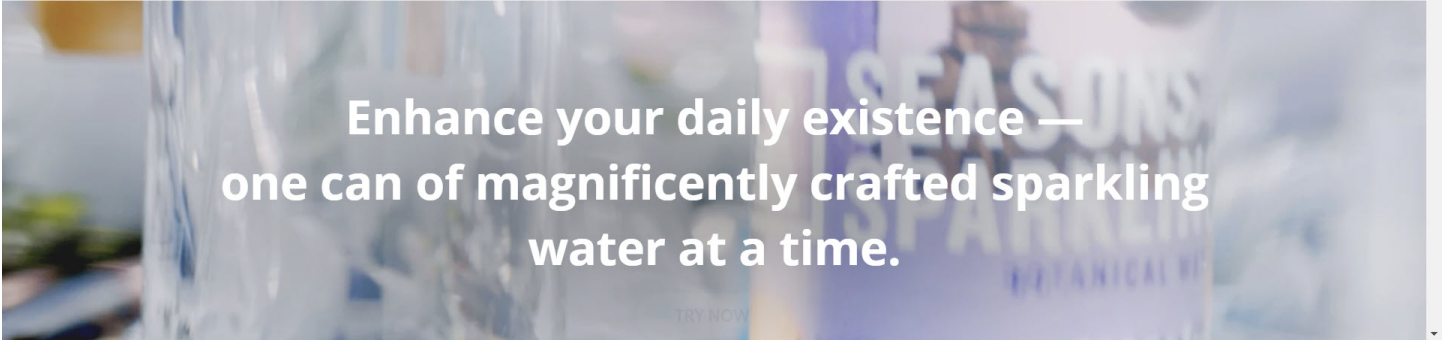


ABOUT WHOLESALE



VERSATILE MIXER

Balanced with aromatic bitters
and smooth quinine.



9:34:24 AM 11/30/2020

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ABOUT WHOLESALE



Grapefruit Rose



Lemon Elderflower

9:34:32 AM 11/30/2020

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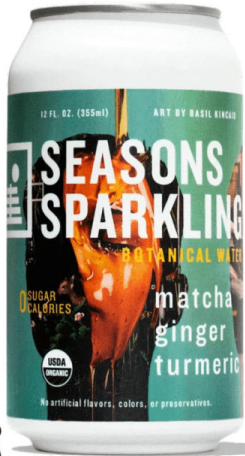


ABOUT WHOLESALE



TRY NOW

TRY NOW



25 MG =  GREEN TEA



25 MG =  GREEN TEA

SHOP NOW



ABOUT WHOLESale



Matcha Ginger Turmeric

TRY NOW

Rooibos Lemon

TRY NOW



This is such a good product! I love the subtle flavors and carbonation. I feel SO much healthier, my skin looks a lot better and I still feel like I'm having a relaxing treat at the end of a long day without any of the calories or alcohol...

— Julia M.



I'm addicted to Seasons Sparkling! All of the flavors are delicious and I love that the sparkling water is organic. The artwork is delicate, bold and unique and i'm always happy to purchase products that support the arts.

— Heather B.



This stuff is so refreshing, you can crush them all day. Really unique flavors and cool art make them a great anytime companion for your fridge or backpack.

— Devon V.H.

SHOP NOW



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WHOLESALE



SEASONS FOR THE ARTS

Seasons Sparkling is committed to supporting artists and arts organizations. We dedicate 1% of our net sales to the arts.



COLLABORATIONS

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★ REVIEWS



TURMERIC SAFFRON - 12 PACK

Inspired by our global travels and remote herb sourcing adventures, Turmeric Saffron is unlike any turmeric drink you've tried before. Tangy Golden Berries from the Amazon, lush California lemons and fragrant saffron are masterfully steeped with the enlivening energies of forest-farmed turmeric from Burma and jungle-grown green cardamom from Guatemala.

**ZERO
ADDED
SUGAR**



INGREDIENTS

Carbonated water, organic goldenberries, organic lemon, organic turmeric, organic cardamom, organic black lemon, organic eucalyptus, organic black pepper, saffron.

\$48.00

\$48.00

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★ REVIEWS

FUNCTIONAL WELLNESS

ANTI-INFLAMMATORY

Curcumin is the anti-inflammatory anti-oxidant compound found in turmeric roots that is useful for recovery from exercise and physical stress. The addition of black pepper enhances the absorption of *Curcumin* into the body.

IMMUNITY



9:52:16 AM 11/30/2020

Turmeric is a vital herb in traditional medicinal cultures for boosting immunity, neutralizing free radicals and providing relief from respiratory illnesses and infections.

WOMEN'S HEALTH

Saffron, used in Cleopatra's ancient beauty tea, contains aromatic anti-oxidant compounds including *crocin*, *crocetin*, *safranal* and *kaempferol*. These compounds appeal to women's health offering relief from menstrual symptoms.

MOOD BOOSTER

Saffron has been cited for its mood boosting effects and its ability to increase serotonin levels in the brain. Saffron tea is noted as a natural anti-depressant that contains the uplifting compounds *fluoxetine*, *imipramine* and *citalopram*.



★ REVIEWS



HERBALIST'S NOTE

Saffron is slowly simmered to bring out its purifying vibes, mystical aroma and brilliant infusion before adding lemons and goldenberries to provide sweetness, acidity and a fresh tangy finish. We mill high-aromatic oil content green cardamom seeds and potent red curcuma turmeric roots together just before the cold crash for a bite of core bitterness and rare spice.

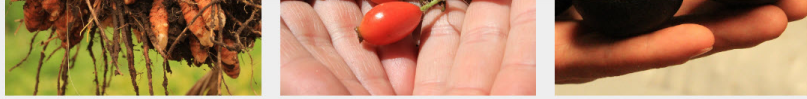


★ REVIEWS

ORIGIN

Goldenberries: Peru **Lemon:** California **Turmeric:** Burma & Guatemala **Cardamom:** Guatemala
Black Lemon: Guatemala **Eucalyptus:** Portugal **Black Pepper:** India **Saffron:** Afghanistan & Morocco





Learn about the benefits of Turmeric

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\$48.00



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★★★★★ 2 Reviews
0 Questions | 0 Answers

ASK A QUESTION

Reviews (2) Questions (0)



Sasha S. Verified Buyer


11/24/20



My very favorite

This is my very favorite sparkling botanical. It's perfect in every way and I can't wait to drink it when I have it in stock in my fridge! It's really wonderful!

Share |

Was This Review Helpful?  0  0



Jeffrey C. Verified Buyer



06/15/20



Love it after workout

This one is so refreshing after a run or workout. Feels very hydrating and quenching and it is not too sweet. The turmeric color is insane and the feeling of cooling the body down after workout is awesome.

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★ REVIEWS

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Reviews (2) Questions (0)



Sasha S. Verified Buyer

11/24/20



My very favorite

This is my very favorite sparkling botanical. It's perfect in every way and I can't wait to drink it when I have it in stock in my fridge! It's really wonderful!

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Was This Review Helpful? 0 0



Jeffrey C. Verified Buyer

06/15/20



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Was This Review Helpful? 6 0

★ REVIEWS

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NO1 BOTANICALS SPARKLING WATER NOW AVAILABLE IN CANS

Try our beautiful new 330ml slimline cans available in 3 flavours: Mint, rosemary and our new, exciting flavour, ginger. Perfect for on-the-go refreshment!

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AURA BORA

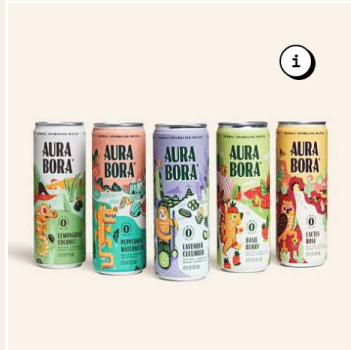


Aura Bora is a sparkling water
made from herbs, fruits, and flowers for
earthly tastes and heavenly feelings.

- 0 Sugar
- 0 Calories
- 0 Sodium
- Whole30
- Non GMO
- Vegan
- Plant based
- No artificial flavors
- 1% for the Planet



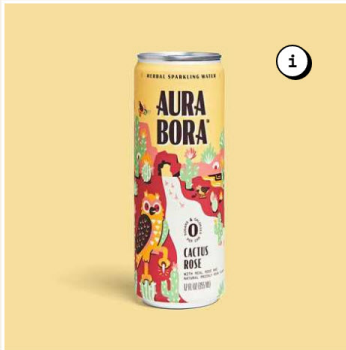
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Variety pack

12x for \$30

Add to bouquet



Cactus Rose

12x for \$30

Add to bouquet

Home / Grapefruit



We've canned (hah! Get it?) your very own mental paradise. A sparkling water that keeps your mind cool, nerves chill, and your body ready to take on the world.

What can HUSH do for you?

- Nano-Amped Hemp Extract: Cools your mind, Stimulates your body.
- Nano-Amped Adaptogens: Decrease Stress, Fights Fatigue, Improves Brain Function.
- Reverse Osmosis Water: Lead Free H2O, Reduces High Blood Pressure & Nerve Damage.

Grapefruit

\$34.99

Add to Cart

PRODUCT INFO

PACK OF 6

WHAT KIND OF HEMP?
10mg Full Spectrum Hemp Plant Extract

INGREDIENTS:
Reverse Osmosis Filtered Carbonated Water, Biotic Grapefruit Extract, Raw Biotic Adaptogens, 100% Biotic Nano-Amplified Full Spectrum Hemp Plant Extract(10mg).

NUTRITIONAL FACTS:
Calories: 0
Yes. You read that right.

ALCOHOL FREE | VEGAN | GLUTEN FREE | NON GMO



BEVERAGE › MARZ BREWING FLOWER POWER CBD ELIXIR 12 PACK



Marz Brewing Flower Power CBD Elixer 12 pack

\$60.00

12 PACK OF 12 OZ CANS

Non-Alcoholic

The Marz Flower Power Elixir is made with chamomile, heather tips, grapefruit, bergamot, and gentian root, complemented by warm spices and a hint of lemon, with no sugar added.

Marz Elixirs are CBD infused beverages that contain organic and certified Non- GMO Hemp grown and processed by Colorado-based Chakra Xtracts. Marz CBD Elixirs are all-natural with no artificial flavoring or additives and contains zero calories. CBD is an abbreviated term for cannabidiol, a type of cannabinoid that makes up 40% of a cannabis plant's extract.

This product is not intended to diagnose, treat, cure or prevent any disease and has not been evaluated by the FDA

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EDIBLE CBD

1:1 Berry Lemon

Creative Waters Co.

Sparkling Water

DESCRIPTION

Besides its delicious Berry Lemon flavor, our 1:1 (CBD:THC) ratio-ed cannabis drink is tried and true, balance is here to be your steady rock. No need to choose between THC or CBD, we've taken the best of both worlds and combined them into our cannabis sparkling waters. They are the perfect cannabis drink if you're looking to level out, need some extra energy, or seek to calm your mind. Three delicious flavors that are far more adventurous than your average sparkling water—breazing in at only 20 calories per can!

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Check availability for 1:1 Berry Lemon

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Lemon Rhubarb

★★★★★ 8 reviews

\$35.99

6 PACK 12 PACK 24 PACK

Free shipping on orders over \$50. Same-day shipping in Manhattan, Brooklyn + LA (excludes merch)

ONE TIME

SUBSCRIBE + SAVE 20%

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SKIP THE CART

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To: Optimist Industries, LLC (trademarks@loeb.com)
Subject: U.S. Trademark Application Serial No. 88668558 - OPTIMIST BOTANICALS - 233351-00001
Sent: December 09, 2020 10:49:49 AM
Sent As: ecom115@uspto.gov
Attachments:

United States Patent and Trademark Office (USPTO)

USPTO OFFICIAL NOTICE

Office Action (Official Letter) has issued
on **December 09, 2020** for
U.S. Trademark Application Serial No. 88668558

Your trademark application has been reviewed by a trademark examining attorney. As part of that review, the assigned attorney has issued an official letter that you must respond to by the specified deadline or your application will be [abandoned](#). Please follow the steps below.

(1) [Read the official letter](#).

(2) **Direct questions** about the contents of the Office action to the assigned attorney below.

/Stefan M. Oehrlein/
Trademark Examining Attorney
Law Office 115
(571) 272-1308
stefan.oehrlein@uspto.gov

Direct questions about navigating USPTO electronic forms, the USPTO [website](#), the application process, the status of your application, and/or whether there are outstanding deadlines or documents related to your file to the [Trademark Assistance Center \(TAC\)](#).

(3) **Respond within 6 months** (or earlier, if required in the Office action) from **December 09, 2020**, using the Trademark Electronic Application System (TEAS). The response must be received by the USPTO before midnight **Eastern Time** of the last day of the response period. See the Office action for more information about how to respond

GENERAL GUIDANCE

- [Check the status of your application periodically](#) in the [Trademark Status & Document Retrieval \(TSDR\)](#) database to avoid missing critical deadlines.
- [Update your correspondence email address](#), if needed, to ensure you receive important USPTO notices about your application.
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