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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	79122787
Applicant	One Zero Pty Limited
Applied for Mark	PAIN AWAY PAIN RELIEF THERAPY
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Submission	Appeal Brief
Attachments	Appeal Brief SPR004 T301.pdf(86256 bytes ) Exhibit 1.pdf(360966 bytes ) Exhibit 2.pdf(54672 bytes )
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Law Office : 107  
TM Attorney : Kevin A. Mittler  
Applicant : One Zero Pty Limited  
Serial No. : 79/122,787  
Filed : March 13, 2008  
Mark : PAIN AWAY PAIN RELIEF THERAPY (and design)

Commissioner for Trademarks  
P.O. Box 1451  
Alexandria, VA 22313-1451

Dear Sir:

BRIEF ON APPEAL

This brief is in furtherance of the Notice of Appeal filed in this case on March 17, 2014.

This brief contains the following headings in the order set forth below:

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*Carefirst of Maryland Inc., v. Firsthealth of the Carolinas, Inc.*, 77 USPQ 2d 1492 (TTAB 2005)

*In re Coors Brewing Company*, 343 F.3d 140 (Fed Cir. 2003)

*In re Cotter and Co.*, 179 USPQ 828 (TTAB 1973)

*Eclipse Assocs., Ltd., v. Data Gen. Corp.*, 894 F.2d 114, 116 (9<sup>th</sup> Cir. 1990)

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*Lever Bros. Co. v. Winzer Co. of Dallas*, 51 CCPA 930 (CCPA 1964)

*Miss. World (UK) Ltd., v. Mrs. America Pageants, Inc.*, 856 S.2d 1445, 1449 (9<sup>th</sup> Cir. 1988)

*In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751-52 (Fed. Cir. 1985)

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*Stouffer Corp., v. Health Valley Natural Foods, Inc.*, 1 USPQ 2d 1900 (TTAB 1986)

*In re Sydel Lingerie Co., Inc.*, 197 U.S.P.Q. 629 (T.T.A.B. 1977)

*V-M Corp. v. Mayfair Sound Prod., Inc.*, 480 F.2d 898, 178 USPQ 477, 477-78 (CCPA 1973)

3. DESCRIPTION OF THE RECORD

The present application was originally filed on January 3, 2013, as a request for extension of protection based on an Australian registration (Reg. No. 1141862 registered October 25, 2012), thereby giving the present application an effective filing date of October 25, 2012 for the mark PAIN AWAY PAIN RELIEF THERAPY (and design) for use in conjunction with pharmaceutical preparations in the form of tablets and capsules for the treatment of arthritis, pain, circulation and inflammation; pharmaceutical preparations for topical use being herbal creams and sprays for the treatment of arthritis, pain, circulation and inflammation in International Class 5.

In an Office Action dated March 1, 2013, the above-identified application was rejected under a Section 2(d) likelihood of confusion refusal based upon Registration No. 1,881,813 for the mark PAIN-AWAY (and design) (the '813 registration) as registered for use in conjunction with oral analgesics in International Class 5.

On July 26, 2013, Applicant conducted a telephone interview with the Examining Attorney.

In a response to the March 1, 2013, Office Action, Applicant argued for allowance of the present application on the grounds that the applied-for mark, and the goods associated therewith, were not in fact confusingly similar to the '813 registration in a response filed September 3, 2013. Applicant argued that the marks existed in a crowded market, for which the variation in the wording of the marks and the different design elements played a significant role in distinguishing the applied-for mark and the '813 registration. Further, in this September 2013 response, Applicant amended the goods to "pharmaceutical preparations for topical use being herbal creams and sprays for the treatment of arthritis, pain, circulation and inflammation" in International Class 5, such that the identification of goods excludes oral analgesics as sold under the '813 registration.

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