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3 May 2012

IP Australia  
PO Box 200  
WODEN, ACT, 2606

**NOTE - EVIDENCE FORWARDED  
TO EXAM SERVICES**

FAO: Phil Clay, Trade Mark Examiner

Dear Mr. Clay

**Trademark Application No. 1456449 for the mark Natural Harmony in the name of Biz-Oz Pty Ltd**

We refer to the above application and are instructed by Biz-Oz Pty Ltd (the Applicant) to respond to the 24 February 2012 adverse report that has been issued.

The Applicant has chosen to provide evidence of prior use and honest concurrent use to address the s44 objections, and evidence of use/intent to use to address the s41 objections. Accordingly, please find **enclosed**:

1. Statutory Declaration of Paul Maiolo, which provides information as to the use of the Trademark; and
2. Exhibits NH-01 through NH-08, forming the evidence as referenced in the Paul Maiolo declaration.

In addition to the formal evidence, the following submissions are made in support of application number 1456449 being accepted for registration:

- As demonstrated in the evidence of use, the Applicant has acquired rights to the earlier trademark number 931574, a substantially identical trademark that has been registered since October 2002, which is at the very least prior to trademark number 1383902. The earlier registration is also information in itself that the trademark may have been in use for almost 10 years now, honestly and concurrently with the earlier registered trademark numbers 757833, 837908 and 900824;
- The Applicant's use of the Trademark NATURAL HARMONY since acquisition in early 2011, in combination with its predecessors use of the substantially similar trademark number 931574 spans a period of at least a decade, which is a substantial period of time and sufficient to apply the provisions of s44(3)(a) and accept the trademark for registration.
- The report issued in the present case appears inconsistent with past practices of the Trade Marks Office. In the present case, a s41 objection has been raised in addition to the issue of conflicting trademarks, yet the cited mark numbers 757833, 837908,

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900824 and 931574 did not have to address an objection under s41. If the simple word HARMONY can found capable of distinguishing the respective class 3 and class 5 goods, then we cannot agree that the term NATURAL HARMONY is incapable of distinguishing such goods. We consider the acceptance of at least 4 trademarks without this issue (we cannot see whether cited mark number 1383902 has received an objection under s41), indicative of the ability of the Applicant's trademark to distinguish its goods from those of other traders. We consider the Applicant's evidence to address this issue also, however, believe that it should be noted for the record that the objection appears inconsistent with past examinations.

- We also find the section 44 objection inconsistent with past decisions. Again looking only to the trademarks cited in the present matter, we note that conflicting mark number 837908 was presented with an objection under s44 (obviously, we cannot see whether the subject of conflicting trademarks was those raised in the present case or others) – however, neither conflicting trademark number 757833 or 900824 received an adverse report. As number 900824 was filed *after* 837908, and each of this only involves the single word Harmony as the main and memorable feature, it is confusing to the Applicant, and to us, as to why there is a perceived conflict between 837908 and 1456449 but there wasn't between these earlier two. We consider there to be a far higher danger between numbers 837908 and 900824 than in the present case. We suggest that in the earlier matters the goods were not perceived to overlap and accordingly should not be in this case. Simply put, we do not consider it appropriate for number 837908 to stand in the way of the Applicant's trademark being approved when it was not even suggested to be an issue for number 900824 at the time it was examined.
- Three of the five trademarks are owned by Martin and Pleasance Wholesale Pty Ltd. We have already explained above why it's simply not appropriate or 'fair' to maintain number 837908 as grounds for objection given the inconsistency with past decisions. The enclosed evidence demonstrates that the Applicant is also the rightful owner of conflicting mark number 931574. We consider honest concurrent use to have been established at the very least with all three of the Martine & Pleasance Wholesale Pty Ltd marks – all of which depict the word Harmony in conjunction with the "female sex sign" and are clearly part of a suite of trademarks and the manner in which they use and promote their brand. There is no known confusion between the Natural Harmony trademarks belonging to the Applicant, and the "Harmony" branding owned by Martin and Pleasance Wholesale Pty Ltd. As the marks have co-existed on the register for many years, and have been available in the marketplace for many years, we consider they are able to co-exist without confusion.

For the reasons outlined above, and in combination with the evidence enclosed, we consider that the Applicant has established its right to register the Natural Harmony trademark and accordingly trust that the objections under s41 and s44 of the *Trade Marks Act 1995* will be withdrawn. We look forward to receiving the Notice of Acceptance in due course.

Yours Faithfully,  
**Complete IP Pty Ltd**

Jacqui Pryor

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AUSTRALIA

THE TRADE MARKS ACT 1995

In the matter of trademark number 1456449

For the mark NATURAL HARMONY

In the Name of Biz-Oz Pty Ltd

**STATUTORY DECLARATION**

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I, Paul Maiolo of [REDACTED] solemnly and sincerely declare as follows:

1. I am the director of Biz-Oz Pty Ltd, (hereinafter referred to as The Applicant). I am authorised to make this declaration on behalf of the Applicant and the information contained herein comes from my own personal knowledge and recollections, and from records of the Applicant to which I have full access.

**Background**

2. In or around February of 2011 the Applicant purchased the remains of a business (hereinafter referred to as the Zappia Business) from a deceased estate in South Australia. The estate belonged to [REDACTED] [REDACTED] being one of the owners of cited trademark number 931574. [REDACTED]  
[REDACTED] This purchase included all remaining 'stock' relating to trademark number 931574 (as well as to other brands operated by the Zappia Business) and related ingredients and materials to continue the manufacture of the associated goods.
3. [REDACTED] was not interested in continuing his mother's business and was quite pleased when we showed an interest in doing so. In fact, he advised that his parents would be supportive of us "continuing their dream

where they had left off". At the time of purchasing the remains of the Zappia Business, promotional materials were also on offer to us to purchase, such as banners promoting the Zappia Business by its Florentine Health name. At that time, we declined the additional materials as a part of our purchase, as we were uncertain whether we would continue with the Florentine Health name. We have since elected to trade as Florentine Gold and have registered this name under trademark number 1423778.

4. As is a matter of IP Australia's own records, the Applicant filed a request to assign trademark number 931574 from the current holders to Biz-Oz Pty Ltd. The request included a statutory declaration setting out the circumstances. Unfortunately, as we are no longer able to contact the executor we have been unable to obtain necessary documentary evidence to support the assignment of trademark number 931574. As was declared in the assignment declaration, we suspect that the executor was unaware that the Zappia Business used and owned the trademark, nor the requirements for effecting assignment of such an asset. I attach and mark as **Exhibit NH-01** a copy of the assignment declaration – the original of which is still held by IP Australia. It is further submitted that the assignment declaration included letters from customers of the Zappia Business to the Applicant in relation to the goods; understanding that the Applicant had in effect 'taken over' the Zappia Business.
5. Accordingly, I consider [REDACTED] to be the Applicant's predecessor in terms of the use of the Trademark. I consider that this declaration and attachments will set out honest and concurrent use, and prior use requirements making it appropriate to accept the Trademark for registration.

#### **Trademark Use**

6. The Trademark has been used since at least as early as October 2002 by the Zappia business and from around February 2011 by the Applicant. The use has been honest and continuous to the present date.

7. The Trademark has been used honestly and continuously since inception to identify natural therapeutic products and natural pain relief products. (The Goods).
8. The Trademark has been promoted by the Applicant and the Zappia Business in the following ways since at least as early as October 2002:
  - On product labels
  - Internet promotions
  - Brochures
  - Promotional leaflets and flyers
  - Samples of Goods
  - Displays in retail environments
9. To demonstrate that the Trademark has been used honestly and continuously:

I have attached and marked as **Exhibit NH-02** a copy of the Applicant's distributor's (Bighead Business Pty Ltd) sales report for the current financial year. This report references the Trademark and also indicates the number of retail locations (via this distribute) where the goods, under the Trademark are found.

Photographs of the Zappia Business brands that the Applicant purchased, which demonstrate the brands to include registration number 931574 along with photographs of the Applicant's product, bearing the Trademark (the labels have been redesigned since acquiring the business) are attached and marked as **Exhibit NH-03**.

The Applicant's pamphlets and promotional materials, advertising goods bearing the Trademark are attached and marked as **Exhibit NH-04**

Copies of the labels that are used on the goods, as well as the packaging used with our 'samples' are attached and marked as **Exhibit NH-05**.

Pages from the Applicant's website at [www.florentinegold.com.au](http://www.florentinegold.com.au) are attached and marked as **Exhibit NH-06**, which demonstrate the Trademark in use in connection with the goods.

10. The goods, bearing the Trademark are available from various Foodland Supermarkets in South Australia. Foodland is a large community supermarket chain in South Australia. Prior to the Applicant purchasing the remaining Zappia Business in early 2011, the goods under Trademark number 931574 were available in Foodland also. Attached and marked as **Exhibit NH-07a** is an email from an Executive Manager of the Chapley Group of the Foodland stores. Unfortunately due to a change in system, and a maximum length of time that Foodland hold data for the Executive Manager has only been able to confirm a date as early as May 2007. Attached and marked as **Exhibit NH-07b** is a supporting statutory declaration from an employee of leading distribution company Metcash Limited attesting to his knowledge of the Predecessor's brand being available from at least as early as the 1990's in Foodland supermarkets, and that he considers the Applicant to have 'taken over' the business and brand.
11. As briefly referenced above at point 4, I now attach and mark as **Exhibit NH-08** are photocopies of letters, orders and similar documents sent to the Applicant directly from consumers. These indicate that the consumer understanding is that the Applicant has 'taken over' the goods bearing the Trademark from the Zappia business and that the Applicant is the subsequent owner of the original trademark.

#### **Turnover & Advertising Figures**

12. The Applicant was not provided with any financial information of the Zappia Business at the time of purchase from the deceased estate in early 2011. Accordingly, I am only able to provide figures for the period of time that the Applicant has been responsible for the use, promotion and sale in relation to the Trademark.

Turnover to date:



Promotional expense to date: [REDACTED] – this figures is made up of advertising materials and labels, however does not include actual bottles that products are packaged into.

I note that the Applicant, which trades as the South Australian business of Florentine Gold produces a number of different products under a number of different brands. The above figures are confirmed as relating to only the Trademark.

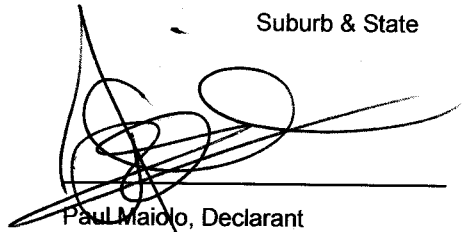
### Other Information

13. At the time of purchasing the Zappia Business, and therefore commencing our own use of the Trademark we were not aware of any of the other trademarks raised during examination of this Trademark application. We were aware only of the Zappia trademark, as we had seen the brand (and used the products) as consumers in the past. The Applicant has not experienced any instances of confusion with any of the cited trademarks.
14. The trademark number 931574, showing [REDACTED] as owners is due for renewal in October 2012. [REDACTED] the mark is not likely to be renewed. As I understand from speaking to the executor of [REDACTED] estate at the time of purchase, the trademark owners would be most upset if their brand and hard work was simply allowed to cease. The Zappia Business invested a great deal of time, and no doubt money, into establishing their various brands and the natural goods identified by these brands.
15. As was declared when requesting assignment of earlier number 931574 to the Applicant, I firmly believe that the Applicant is the subsequent and rightful owner of trademark number 931574 and it is simply unfortunate that documentary proof, such as death certificates, cannot be provided to support these statements. With the understanding that the Applicant is the rightful and subsequent owner of such earlier trademark, it would then be appropriate to accept the current Trademark Application, on the provisions that other circumstances have been provided; that the

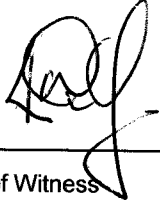
Applicant is the owner of an earlier trademark that is the same or closely similar and is for similar goods.

And, I make this declaration by the virtue of the federal *Statutory Declarations Act* 1959 of the Commonwealth of Australia, and subject to the penalties provided by that Act for the making of false statements in statutory declarations, believing the statements contained in this declaration to be true in every particular.

Declared at CADLEE CREEK this 18 Day of April 2012  
Suburb & State Date Month

  
Paul Maido, Declarant

Before Me:

  
Signature of Witness

KENNETH NEELY - OFFICE MANAGER  
Name, title/capacity of person before whom declaration is made