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

Proceeding	77505597
Applicant	DRHORSEPOWER, INC.
Applied for Mark	DRHORSEPOWER YOUR PRESCRIPTION FOR WINNING!
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Date	10/08/2015

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
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Serial No. 77/505597

Mark: DRHORSEPOWER YOUR PRESCRIPTION FOR WINNING! (&  
Design)

Applicant: DRHORSEPOWER, INC.

Examining Attorney: Anne Gustason  
Law Office 117

**EX PARTE APPEAL**

**APPLICANT'S REPLY BRIEF**

This appeal comes down to comparison of a registered word mark and a very different, highly stylized design mark for which application is sought. The Opposition brief focuses on abstract rules of thumb that, while applicable in some instances, carry very little weight on the facts before the TTAB. Although the issues are adequately addressed in the Opening brief, a brief reply to some of the Opposition arguments is hereby offered:

The Weight Afforded the Stylization Here is Substantial (contrast Opp. 7-8): The Opposition cites to caselaw where less weight was afforded to stylization or design elements, particularly given the lack of a disclaimer of stylization by the registered mark. But contrasted to those cases, the stylization at issue here is not mere minor scripting, font, or the like. Instead, the stylization is highly unique, and includes a custom drawing of a unique man in a unique racecar. The Registrant is not free to use this unique artwork, and in fact would be engaging in copyright infringement to do so. No cases are cited by the Opposition analogous to such situation, or supporting the discounting of such types of unique design elements in the applied-for mark. No discounting of this difference, or over-dissection, can be had here without doing violence to the ultimate question of whether consumers would likely be confused. Hence, the extreme differences by Applicant's highly-stylized applied-for mark warrant a finding of no likely confusion.

Third Party Uses are Meaningful Evidence Against Likely Confusion Here (contrast Opp. p.8): The Opposition brief is incorrect in stating that only third party registrations were provided. As cited in the Opening brief, the third party registrants' evidence of actual use was also included, thus validating that the marks were actually in use in commerce. Regardless, more than minimal weight should be afforded the evidence of third party registrations. Third party registrations are based on declarations of actual use for the specified goods, and the TTAB has

(as the Opposition notes) relied on them for substantive proof of third party use. No conflicting evidence was submitted, and this evidence further confirms that consumers will use even small differences to differentiate between energy drinks with relatively weak terms such as “horsepower.”

Comparison of Marks for Related Goods or Overlapping Marketing Channels Favors A Finding of No Likely Confusion: The Opposition brief gets it wrong on these issues. The case annuls are chalked full of potentially similar marks for related or overlapping goods that were found not to create a likelihood of confusion. *See* Opening brief at Section IV intro. The differences in marks cannot be so quickly discounted at the Opposition would suggest, and the Opposition fails to distinguish the highly-analogous cases cited in the Opening brief. *Id.* And the Opposition also tries to have it both ways, claiming that it is not simply a side-by-side comparison that is to be done, but then claiming that channels of trade are somehow not relevant since neither Registrant nor Applicant disclaim any channels of trade. Either way favors Applicant. If the goods travel in the same channels, then they will be seen side by side and the pronounced differences cannot be ignored by a consumer who sees them to be very different marks on very different types of energy drinks. Likewise, if the goods travel in different channels, then the very unique stylization and imagery of Applicant’s mark will stand out in the consumer’s mind, as will the differences created by the addition of “Dr.” to an otherwise weak and crowded “horsepower” term, and a very clever and pronounced slogan.

In sum, comparing the marks, the marks are not likely to confuse consumers. De minimis confusion, or slight possibilities and hypotheticals, cannot prevent the applied-for mark from registering here. Respectfully, the TTAB should reverse the refusal to register, and instruct the application to proceed to registration.

Dated this 8<sup>th</sup> Day of October, 2015.

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