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Subject: U.S. Trademark Application Serial No. 88876947 - RED MARTIAN - 015397-00058 - Request for Reconsideration Denied - Return to TTAB

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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. 88876947

Mark: RED MARTIAN

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Applicant: Platform Beers, LLC

Reference/Docket No. 015397-00058

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REQUEST FOR RECONSIDERATION
AFTER FINAL ACTION
DENIED

Issue date: **November 17, 2020**

Applicant's request for reconsideration is denied. *See* 37 C.F.R. §2.63(b)(3). The trademark examining attorney has carefully reviewed applicant's request and determined the request did not: (1) raise a new issue, (2) resolve all the outstanding issue(s), (3) provide any new or compelling

evidence with regard to the outstanding issue(s), or (4) present analysis and arguments that were persuasive or shed new light on the outstanding issue(s). TMEP §§715.03(a)(ii)(B), 715.04(a).

Applicant's arguments with respect to the likelihood of confusion with Registration No. 5541881 were not persuasive.

Applicant narrowed the scope of its goods. This amendment is accepted, however, it does not overcome the refusal. Registrant's goods are "beer" which are broad enough to include applicant's more specific "sour fruited beer".

Applicant's arguments attempting to restrict the scope of registrant's goods are not permissible. An applicant may not restrict the scope of its goods and/or the scope of the goods covered in the registration by extrinsic argument or evidence, for example, as to the quality or price of the goods. *See, e.g., In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986). TMEP Section 1207.01(a)(iii). Applicant's listed goods are "beer", not "IPA beer".

Applicant's arguments as to the geographic areas where Registrant markets its goods are not persuasive. There are no geographic restrictions in the registration.

Absence of actual confusion also does not overcome the refusal. "[A] showing of actual confusion is not necessary to establish a likelihood of confusion." *In re i.am.symbolic, llc*, 866 F.3d 1315, 1322, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); TMEP §1207.01(d)(ii). "[T]he relevant test is *likelihood* of confusion, not *actual* confusion." *In re Detroit Athletic Co.*, 903 F.3d 1297, 1309, 128 USPQ2d 1047, 1053 (Fed. Cir. 2018) (emphasis in original). "Uncorroborated statements of no known instances of actual confusion . . . are of little evidentiary value," especially in ex parte examination. *In re Majestic Distilling Co.*, 315 F.3d 1311, 1317, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003).

Accordingly, the following requirement(s) and/or refusal(s) made final in the Office action dated August 4, 2020 are **maintained and continued**:

- Refusal based upon a likelihood of confusion with Registration No. 5541881.

See TMEP §§715.03(a)(ii)(B), 715.04(a).

If 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).

If applicant has not filed an appeal and time remains in the six-month response period, applicant has the remainder of that time to (1) [file another request for reconsideration](#) that complies with and/or overcomes any outstanding final requirement(s) and/or refusal(s), and/or (2) [file a notice of appeal](#) to the Board. TMEP §715.03(a)(ii)(B). Filing a request for reconsideration does not stay or extend the time for filing an appeal. 37 C.F.R. §2.63(b)(3); *see* TMEP §715.03(c).

/wgb/

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informal queries