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UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

VMAS Solutions, LLC,  
Plaintiff,  
v.  
MMJ Labs, LLC,  
Defendant.

2:17-cv-00534 JWS  
ORDER AND OPINION  
[Re: Motion at Docket 18]

**I. MOTION PRESENTED**

At docket 14 plaintiff VMAS Solutions, LLC (“VMAS”) filed a reply in support of its motion for a preliminary injunction. Attached to the reply is the supplemental declaration of Vicki Mayo (“Mayo”) (including two exhibits); the declaration of Jeffrey P. Thennisch (“Thennisch”) (including two exhibits); and the declaration of Marc C. Sanchez (“Sanchez”) (including one exhibit). At docket 18 defendant MMJ Labs, LLC (“MMJ”) moves to strike all of these attachments or, alternatively, for leave to file a sur-response,<sup>1</sup> because the attachments are new evidence submitted for the first time in the reply. VMAS responds at docket 23.

**II. STANDARD OF REVIEW**

“Where new evidence is presented in a reply, the district [court] should either not consider the new evidence, or not consider it without giving the other party the

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<sup>1</sup>MMJ styled this filing as a sur-reply but a sur-reply is filed by the moving party. MMJ’s proposed filing is a sur-response.

1 opportunity to respond.”<sup>2</sup> “However, where evidence is ‘submitted in direct response to  
2 proof adduced in opposition to a motion’ it is not ‘new.’”<sup>3</sup>

### 3 III. DISCUSSION

#### 4 **A. The Supplemental Mayo Declaration**

5 In Mayo’s initial declaration at docket 8-1, Mayo asserts that MMJ’s claim of  
6 trademark infringement is causing VMAS to suffer irreparable harm, including a decline  
7 in web traffic to its fundraising page on Kickstarter.com and decline in sales.<sup>4</sup> In  
8 response, MMJ asserts that VMAS “cannot show that it is likely to suffer irreparable  
9 harm.”<sup>5</sup> Mayo’s supplemental declaration contains two exhibits. According to Mayo,  
10 the first exhibit is a “Google analytics summary demonstrating an 86% decline in  
11 Kickstarter traffic and a 75% reduction in Kickstarter sales in the month immediately  
12 following MMJ’s false and disparaging claim of infringement.”<sup>6</sup> Mayo states that the  
13 second exhibit is “an e-mail from a Kickstarter investor inquiry about the negative legal  
14 notice issued by Kickstarter to all VMAS investors in response to MMJ’s false claim of  
15 infringement.”<sup>7</sup> Paragraphs five through seven of Mayo’s supplemental declaration also  
16 address the issue of harm, and paragraph eight denies various allegations made by  
17 Dr. Amy Baxter (“Baxter”) in her declaration at docket 12-1.

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21 <sup>2</sup>*Zkey Investments, LLC v. Facebook Inc.*, No. CV 16-00782-RSWL-KS, 2016 WL  
22 7046593, at \*8 (C.D. Cal. Dec. 2, 2016) (citing *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir.  
1996)).

23 <sup>3</sup>*Id.* (quoting *Edwards v. Toys "R" Us*, 527 F. Supp. 2d 1197, 1205 n.31 (C.D.  
24 Cal. 2007)).

25 <sup>4</sup>Doc. 8-1 at 6–7.

26 <sup>5</sup>Doc. 12 at 2–3.

27 <sup>6</sup>Doc. 14-1 at 3 ¶ 3.

28 <sup>7</sup>*Id.* ¶ 4.

1 The supplemental Mayo declaration is not new evidence because it is directly  
2 responsive to MMJ's opposition. The court will deny MMJ's motion with regard to this  
3 declaration.

4 **B. The Thennisch Declaration**

5 Thennisch is an attorney who represents VMAS in connection with its trademark  
6 filings before the U.S. Patent & Trademark Office ("PTO"). Baxter's declaration states  
7 that the FDA, "over multiple telephone conversations, provided instructions and advice  
8 to MMJ Labs regarding the facility registration process in 2008, which led to the  
9 determination that because both cold packs and therapeutic massagers, the main  
10 components of the BUZZY device, did not need 510(k) approval, the BUZZY device  
11 was exempt from the FDA's premarket notification requirements."<sup>8</sup> VMAS argues that  
12 the Thennisch declaration is not new evidence because it rebuts Baxter's assertion that  
13 "the FDA verbally issued some type of administrative determination that the MMJ  
14 device was exempt from Section 510(k) premarket clearance via the FDA's toll free  
15 help-line."<sup>9</sup>

16 The court finds that paragraphs eight through twelve of the Thennisch  
17 declaration are not new evidence because they are directly responsive to Baxter's  
18 declaration for the reasons stated in VMAS' opposition. The remainder of Thennisch's  
19 declaration, however, is new evidence because it is not responsive to MMJ's opposition.  
20 Paragraphs four through seven of the Thennisch declaration will be stricken.

21 **C. The Sanchez Declaration**

22 Sanchez states that he is an attorney who specializes in regulatory matters  
23 involving the FDA, an adjunct professor at Northeastern University School of Law, and  
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27 <sup>8</sup>Doc. 12-1 at 4 ¶ 16.

28 <sup>9</sup>Doc. 23 at 5.

1 an FDA regulatory consultant. Sanchez’s declaration includes his “observations and  
2 findings” regarding MMJ’s opposition and Baxter’s declaration.<sup>10</sup>

3 The Sanchez declaration is directly responsive to evidence and arguments  
4 raised in MMJ’s opposition. The court will deny MMJ’s motion with regard to this  
5 declaration.

6 **IV. CONCLUSION**

7 Based on the preceding discussion, the motion at docket 18 is granted in part  
8 and denied in part as follows. Paragraphs four through seven of the Declaration of  
9 Jeffrey P. Thennisch at docket 14-1 are stricken. In all other respects, the motion is  
10 denied.

11 DATED this 18<sup>th</sup> day of April 2017.

12  
13 /s/ JOHN W. SEDWICK  
14 SENIOR JUDGE, UNITED STATES DISTRICT COURT  
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28 <sup>10</sup>Doc. 14-1 at 24 ¶ 4.