

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

E & J GALLO,  
  
Plaintiff,  
  
vs.

CASE NO. CV-F-10-411 LJO JLT  
  
**ORDER ON COUNTERCLAIMANTS’  
MOTION FOR RECONSIDERATION**  
(Doc. 289)

PROXIMO SPIRITS, INC. and AGAVERA  
CAMICHINES, S.A. DE C.V.,  
  
Defendants.

\_\_\_\_\_

and related counterclaims.

\_\_\_\_\_ /

**INTRODUCTION**

Counterclaimants Proximo Spirits, Inc. and Agavera Camichines, S.A. de C.V. (collectively “Proximo plaintiffs”) move for partial reconsideration of this Court’s Order on Motion for Summary Judgment and on Motion to Exclude (“Summary Judgment Order”) (Docs. 275, 276). In the Summary Judgment Order, this Court found in favor of counterclaim defendants E & J Gallo (“Gallo”), Alto Spirits, Ltd., Ecco Domani USA, Inc., Tequila Supremo, S.A. de C.V., and Casa Tequilera Viejo, S.A. de C.V. (collectively “Gallo defendants”), concluding that the Proximo plaintiffs had failed to raise a genuine issue of fact as to their trade dress infringement claims. The Proximo plaintiffs move for reconsideration of this Court’s ruling that the shape of the 1800 Tequila bottle is not inherently

1 distinctive. In this motion, the Proximo plaintiffs impermissibly raise new arguments not raised in  
2 opposition to the Gallo defendants' summary judgment motion and misconstrue the applicable burden  
3 of proof on their counterclaims. For these reasons, this Court DENIES the Proximo plaintiffs'  
4 reconsideration motion.

5 **BACKGROUND**

6 The Proximo plaintiffs' countercomplaint alleged that the trade dress of the Gallo defendants'  
7 Camarena brand tequila infringes on the trade dress of 1800 brand tequila.<sup>1</sup> The Proximo plaintiffs  
8 asserted three trademark infringement counterclaims<sup>2</sup> against the Gallo defendants:

9 (1) the Camarena bottle design infringes the 1800's registered trade dress under the Lanham Act  
10 §32;

11 (2) the Camarena bottle design constitutes a false designation of origin under Lanham Act §43(a);  
12 and

13 (3) the sale of the Camarena bottle design constitutes unfair competition under common law.

14 The Gallo defendants moved for summary judgment in their favor on each of the three Proximo  
15 plaintiffs' trademark infringement claims on two grounds. First, the Gallo defendants argued that the  
16 Proximo plaintiffs cannot raise a triable issue of fact on the distinctiveness of their claimed trade dress.  
17 Second, the Gallo defendants argued that there is no evidence that relevant customers are likely to be  
18 confused, based on the packaging, that Camarena tequila is made or distributed by the same company  
19 that makes 1800 tequila. This Court agreed with the Gallo defendants that the Proximo plaintiffs failed  
20 to raise a genuine issue as to whether their trade dress was distinctive. In addition, this Court agreed that  
21 the Proximo plaintiffs presented no evidence of a likelihood of confusion between the two products.  
22 For these reasons, this Court granted summary judgment in favor of the Gallo defendants as to the  
23 Proximo plaintiffs' counterclaims.

---

24  
25 <sup>1</sup>1800 brand tequila is imported into the United States from Mexico by defendant and counterclaimant Proximo.  
26 Defendant Agavera owns the exclusive United States trademark and trade dress rights to 1800 Tequila in the United States.  
27 Non-party Ex Hacienda Los Camichines, S.A. de C.V. owns the 1800 Tequila trademarks and trade dress rights in Mexico.  
28 Agavera and Hacienda are allegedly part of "Casa Cuervo," which controls the Jose Cuervo network of companies.

<sup>2</sup>The Proximo plaintiffs asserted a fourth counterclaim for fraudulent misrepresentation. That counterclaim is not  
at issue in this motion.

1 The Proximo plaintiffs move for reconsideration of this Court’s ruling related to distinctiveness.  
2 The Proximo plaintiffs argue that the trademark registration of the 1800 Tequila bottle and stopper is  
3 evidence from which a jury could conclude that the bottle alone is distinctive. To put the Proximo  
4 plaintiffs’ argument into context, this Court provides a brief summary of the Summary Judgment Order.

#### 5 **Proximo Plaintiffs’ Counterclaims**

6 In their countercomplaint, the Proximo plaintiffs asserted claims of trademark infringement, false  
7 designation of origin and unfair competition under the Lanham Act section 43(a). To succeed on these  
8 trade dress infringement counterclaims, the Proximo plaintiffs bore the burden to prove each of the  
9 following three elements: (1) the allegedly infringing Camarena trade dress is nonfunctional; (2) the  
10 1800 trade dress serves a source-identifying role either because it is inherently distinctive or has acquired  
11 a secondary meaning; and (3) Gallo's offering and sale of Familia Camarena creates a likelihood of  
12 consumer confusion. *See, Wal-Mart Stores v. Samara Bros.*, 529 U.S. 205, 210 (2000); *Disc Golf Ass’n,*  
13 *Inc. v. Champion Discs, Inc.*, 158 F.3d 1002, 1005 (9th Cir. 1998). To defeat the Gallo defendants’  
14 summary judgment motion, the Proximo plaintiffs had to raise a genuine issue of fact as to at least one  
15 of these elements.

#### 16 **Gallo Defendants’ Motion**

17 The Gallo defendants moved for judgment in their favor, arguing that the Proximo plaintiffs  
18 cannot prove the second two elements of the trade dress infringement claims; namely, that the Proximo  
19 plaintiffs could not establish either distinctiveness or likelihood of confusion. In addition, and  
20 throughout their summary judgment motion, the Gallo defendants challenged the “1800 trade dress” as  
21 a “hypothetical” “hodgepodge” of “cherry-picked” elements that do not appear on a single product.

#### 22 **Proximo Plaintiffs’ Opposition**

23 “In opposition, the Proximo plaintiffs inexplicably ignore[d] the Gallo defendants’  
24 distinctiveness arguments. The Proximo plaintiffs [made] no attempt to oppose the Gallo defendants’  
25 arguments that the 1800 trade dress as defined cannot be protected by the Lanham Act because it lacks  
26 distinctiveness.” Summary Judgment Order, p. 12.

27 “Moreover, and perhaps more confusingly, the Proximo plaintiffs failed to clarify their definition  
28 of the ‘1800 trade dress’ that is the basis of their infringement claims. While maintaining, at times, that

1 the trade dress includes [many elements, which were listed in discovery], the Proximo plaintiffs’  
2 opposition focuses almost exclusively on one element of the trade dress; namely, the trapezoidal shape  
3 of the bottle.” *Id.* Not only did the Proximo plaintiffs fail to define the trade dress that was the subject  
4 of their counterclaims, they were inconsistent in what appeared to be the trade dress asserted. For  
5 example, the Proximo plaintiffs would focus exclusively on the trapezoidal shape of the bottle in some  
6 sections of their argument. As to the other elements of the asserted trade dress, however, the Proximo  
7 plaintiffs discuss them in their argument related to one of eight factors to determine whether there is a  
8 likelihood of confusion between the products. The Court found “this failure to define the trade dress  
9 is even more puzzling considering: (1) the consistent attack of the definition throughout the Gallo  
10 defendants’ motion; and (2) that the Proximo plaintiffs bear the burden to establish the elements of their  
11 claims.” Summary Judgment Motion, pp. 13-14.

#### 12 **Court’s Attempt to Define Trade Dress**

13 Because of the Proximo plaintiffs’ refusal to define the trade dress upon which their claims were  
14 based, this Court undertook to define alternative trade dresses, to be as thorough and lenient as possible  
15 to the Proximo plaintiffs, the non-moving parties. Attempting to define the trade dress was necessary,  
16 because analysis of the elements of the infringement claims began and ended with whether the trade  
17 dress was distinctive and whether there was a likelihood of confusion between the senior and junior trade  
18 dresses. The Court could not consider the multiple elements and sub-elements of each of the claims  
19 without a defined trade dress.

20 First, the Court identified the “broader trade dress.” This trade dress was defined by the Proximo  
21 plaintiffs during discovery as follows:

22 The elements of Agavera’s trade dress which are infringed by the Counterdefendants  
23 include the overall shape of the bottle, a bottle that is wider at its base than it is at the  
24 shoulders from both a front and side view, the wooden closure on the top of the bottle,  
25 the color scheme on the labeling similar to that of the 1800 line of products (e.g.  
26 blue/silver with the Silver product, orange/red and gold with the Reposado product), the  
27 gold highlighting lines for the Reposado product, the silver highlighting lines on the  
28 Silver product, the debossed glass (which in both the 1800 and Camarena products can  
be interpreted to depict leaves of an agave plant), the flange at the top of the neck of the  
bottle (the base of the wooden closure), the neck width, and the family crest. All of these  
are all elements of the 1800 trade dress which are infringed by the Camarena product.

According to this description that the Proximo plaintiffs provided to the Gallo defendants in response

1 to an interrogatory requesting a definition of the trade dress that was claimed to have been infringed,  
2 the “1800 trade dress” would include overall appearance of the following elements, as they appear as  
3 a whole: (1) the shape of the bottle; (2) the wooden closure top; (2) the color scheme on the labeling of  
4 the Silver (blue/silver) and Reposado (orange/red and gold) on the Reposado); (3) highlighting lines  
5 (silver for Silver and gold for Reposado); (4) the debossed glass with an agave plant; (5) the neck width,  
6 and (6) the family crest. The Gallo defendants challenged this definition as a “hodgepodge” of elements  
7 “cherry-picked” from different bottles. The Gallo defendants contend that the Proximo plaintiffs cannot  
8 define the trade dress in this manner, since no product contains all of the elements contained in the  
9 asserted description.

10 The second possible trade dress definition was limited to the trapezoidal shape of the bottle,  
11 which this Court labeled the “bottle shape” trade dress. As to the bottle shape, this Court noted:

12 The Proximo plaintiffs submitted that the 1800 product has used a trapezoidal shaped  
13 bottled design since the product was introduced in the marketplace in the 1970's. The  
14 Proximo plaintiffs assert that the U.S. trademark office has issued a trademark  
15 registration for the shape of the bottle, United States Trademark Registration No.  
16 1,807,855 (“855 Registration”). Based on the 855 Registration, the Proximo plaintiffs  
17 contend that the shape of the bottle has achieved incontestable status. The Proximo  
18 plaintiffs submit evidence that they and their predecessors “have gone to great lengths  
19 to promote and market their unique brand identifier,” the shape of the bottle, as  
20 illustrated in the 855 Registration. Moreover, the Proximo plaintiffs focus their  
21 infringement action on the 2009A bottle, which the Proximo plaintiffs describe as “a  
22 trapezoidal shaped bottle [that] just happens to look an awful lot like the bottle that has  
23 been used with the 1800 product for decades.” Prox. Opp., p. 2. The Proximo plaintiffs  
24 argue that “the undisputable fact is that both parties use the same visual mark to identify  
25 their products—namely, a distinctive trapezoidal shaped bottle to promote a tequila  
26 product.” *Id.*

20 Summary Judgment Order, p. 14.

21 In addition to the broader trade dress and the bottle shape trade dress, the Proximo plaintiffs also  
22 presented a third apparent definition of a trade dress in the context of one of the factors to be considered  
23 under the likelihood of confusion analysis. The Proximo plaintiffs argued that the strength of their 1800  
24 trade dress is high, because the “Agavera trade dress” has achieved incontestable status. The “Agavera  
25 trade dress” was defined as that which has achieved incontestable status based on the 855 Registration.  
26 The 855 Registration includes two elements: (1) the trapezoidal shaped bottle; and (2) the distinctive,  
27 clear, glass, inverted pyramid-shaped “shot glass” top.

28 ///

1 **Court’s Analysis of Distinctiveness**

2 “The general rule regarding distinctiveness is clear: An identifying mark is distinctive and  
3 capable of being protected if it *either* (1) is inherently distinctive *or* (2) has acquired distinctiveness  
4 through secondary meaning.” Summary Judgment Order, p. 15 (citation omitted). The Proximo  
5 plaintiffs were not required to prove both inherent distinctiveness and secondary meaning. They may  
6 establish that their trade dress is protectable under the Lanham Act if the 1800 trade dress has either  
7 inherent or acquired distinctiveness.

8 “In their moving papers, Gallo... anticipated that the Proximo plaintiffs may argue that the  
9 broader 1800 trade dress is inherently distinctive, because the 855 Registration that has attained  
10 ‘incontestable’ status.” Summary Judgment Order, p. 16. The Gallo defendants argued that the 855  
11 Registration did not establish inherent distinctiveness for the following reasons:

12 [The] 855 Registration represents only one element of the broader 1800 Trade Dress that  
13 the Proximo plaintiffs defined. Indeed, the “1800 trade dress,” which includes all of the  
14 elements outlined above, is made up of the 855 Registration, an application (US App.  
15 Serial No. 78,615,293), currently suspended, for a two-dimensional design mark, and the  
16 combination of a trapezoidal bottle shape, embossed stylized agave plant and the wooden  
stopper used only for the 1800 Añejo tequila. Therefore, the incontestable status of the  
855 Registration does not establish that the broader 1800 trade dress, as defined, is  
inherently distinctive, because the Proximo plaintiffs cannot separate out and rely on only  
one incontestable element of the whole.

17 Summary Judgment Order, pp. 16-17. The Court found that this argument “successfully negated an  
18 essential element of the Proximo plaintiffs’ trade dress claims.” *Id.* at 17. With respect to the 855  
19 Registration, this Court found that the Gallo defendant the 855 Registration “does not establish that the  
20 broader 1800 trade dress is inherently distinctive, because the 855 Registration includes only one of the  
21 many elements of the broader 1800 trade dress.” *Id.*

22 Because the Gallo defendants had successfully negated an essential element of the trade dress  
23 infringement claims, the burden shifted to the Proximo plaintiffs to raise a legal or factual issue. The  
24 Proximo plaintiffs failed to satisfy that burden. As the Court explained:

25 The Proximo plaintiffs inexplicably fail to address distinctiveness in their  
26 opposition memorandum. They ignore the Gallo defendants’ arguments related to both  
27 the inherent distinctiveness and acquired distinctiveness, as discussed more fully below,  
28 of the broader 1800 trade dress and the bottle shape. This failure to oppose the Gallo  
defendants’ arguments is perplexing, particularly since distinctiveness is an essential  
element of their infringement claims and the Gallo defendants’ arguments on  
distinctiveness spanned over five pages (or a full one-fifth of the memorandum).

1 Summary Judgment Order, p. 17.

2 Because the Proximo plaintiffs failed to oppose the Gallo defendants' arguments, this Court  
3 applied the applicable standard of review for an unopposed summary judgment to this section only.  
4 According to this standard, the Court "must ensure that the motion itself is supported by evidentiary  
5 materials." *Id.* This Court found that the Gallo defendants' motion was supported, based on the  
6 following analysis:

7 The 855 Registration neither establishes nor raises a question of fact regarding  
8 the distinctiveness of the 1800 trade dress as defined by the Proximo plaintiffs.  
9 "[U]nder the anti-dissection rule, the validity and distinctiveness of a composite  
10 trademark is determined viewing the trademark as a whole, as it appears in the  
11 marketplace." *Official Airline Guides, Inc. v. Goss*, 6 F.3d 1385, 1392 (9th Cir. 1993).  
12 The "critical" inquiry "is the overall appearance of the mark as used in the marketplace,  
13 not a deconstructionist view of the different components of the mark." *Playmakers, LLC*  
14 *v. ESPN, Inc.*, 297 F. Supp. 2d 1277, 1283 (W.D. Wash. 2003). According to the anti-  
15 dissection rule, the 855 Registration, which includes only one element of the 1800 trade  
16 dress, fails to establish that the broader 1800 trade dress is inherently distinctive.  
17 Moreover, the critical inquiry focuses on the overall appearance of the mark as it is used  
18 in the marketplace. As the Gallo defendants point out, the defined broader 1800 trade  
19 dress does not appear in the marketplace, because it includes—and excludes—elements  
20 from all of their product line.

21 Summary Judgment Order, p. 18.

22 Although the Proximo plaintiffs failed to oppose the motion as to distinctiveness, the Court then  
23 addressed the distinctiveness of the bottle shape. The Court ruled:

24 To the extent that the Proximo plaintiffs define their trade dress to be a  
25 trapezoidal-shaped bottle, this Court agrees with the Gallo defendants that there is no  
26 inherent distinctiveness. "A trapezoid is the sort of intuitive, 'ordinary geometric shape'  
27 that courts generally 'regard [] as non-distinctive and protectable only upon proof of  
28 secondary meaning.'" *Mattel, Inc. v. MGA Entertainment, Inc.*, 782 F. Supp. 2d 911, 916  
(C.D. Cal. 2010) (rejecting on summary judgment a claim that a trapezoidal package was  
inherently distinctive). Moreover, as illustrated above, it is an undisputed fact that there  
are several tequila bottles in the market that use a trapezoidal shape. Finally, the 855  
Registration does not establish the inherent distinctiveness of the bottle shape, because  
that "Agavera trade dress" includes the clear "shot glass" top, an element that is not  
asserted to be part of any 1800 trade dress for purposes of this motion. Accordingly, the  
bottle shape alone is not inherently distinctive.

29 *Id.*

30 The Court continued its analysis of whether the alternative trade dress had acquired secondary  
31 meaning. Here, too, "the Proximo plaintiffs remain[ed] silent:"

32 ///

1 Although the Proximo plaintiffs submitted voluminous exhibits and arguments to oppose  
2 the likelihood of confusion element of their claim, the Proximo plaintiffs failed to submit  
3 either direct or indirect evidence to raise a genuine issue of fact as to whether the 1800  
4 trade dress has acquired secondary meaning. Because the Proximo plaintiffs have offered  
no evidence to establish an essential element of their infringement claims, these causes  
of action fail.

5 Summary Judgment Order, p. 19.

### 6 **Court’s Conclusion on Distinctiveness**

7 As to the distinctiveness of the Proximo plaintiffs’ trade dress, considered in the alternative in  
8 the absence of a proposed definition by the parties asserted the claims, this Court concluded:

9 “Only nonfunctional, distinctive trade dress is protected under §43(a).” *Two*  
10 *Pesos*, 505 U.S. at 775. Trade dress may be afforded protection under the Lanham Act  
11 if it is either inherently distinctive or has acquired secondary meaning. *Id.* Here, the  
12 Gallo defendants have established that neither the broader 1800 trade dress nor the bottle  
13 shape are distinctive. The Proximo plaintiffs, perhaps understanding their inability to  
14 establish this essential element of their §43(a) claims, failed to rebut the Gallo  
defendants’ arguments and evidence, and failed to raise disputed questions of material  
fact. Accordingly, for the foregoing reasons, this Court grants summary adjudication  
in favor of the Gallo defendants and against the Proximo plaintiffs on the Proximo  
plaintiffs’ first and second counterclaims.

15 Summary Judgment Order, pp. 19-20.

### 16 **Strength of “Agavera trade dress”**

17 The sole reference to distinctiveness in the Proximo plaintiffs’ opposition arose in the context  
18 of their argument regarding the strength of their trademark, the first factor to consider in a *Sleekcraft*  
19 likelihood of confusion analysis. In that context only, the Proximo plaintiffs abandoned both the broad  
20 trade dress and bottle shape trade dress to argue that the “Agavera trade dress” is “extremely strong”  
21 because it has attained incontestable status. The Proximo plaintiffs asserted that as “the incontestable  
22 status of the ‘855 registration establishes that the Agavera trade dress is inherently distinctive...there  
23 is also a presumption that the registered mark is a strong mark.” SJ Opp., p. 6.

24 This Court noted that although the Proximo plaintiffs presented no evidence of the strength of  
25 the broad trade dress or the bottle shape, this Court agreed that “based on the incontestable status of the  
26 Agavera trade dress, that mark, when viewed together as a whole, is a strong mark.” Summary Judgment  
27 Order, p. 21. That mark “includes the shape of the bottle and the shot glass top.” *Id.*

28 ///





1 evidence of the inherent distinctiveness of the bottle shape. The Proximo plaintiffs argue that while the  
2 855 Registration was for both the bottle shape and crystal stopper, the Gallo defendants failed to prove  
3 “that the prima facie evidence of distinctiveness that the registration establishes evaporates if the crystal  
4 stopper is removed.” The Proximo plaintiffs assert that there was evidence in the record to support its  
5 position that the shape of the 1800 tequila bottle is inherently distinctive. Finally, the Proximo plaintiffs  
6 assert in their reply papers that this Court committed clear error of law by improperly weighing evidence  
7 and deciding a factual issue on summary judgment without considering the evidence that was in the  
8 record.

9         The Proximo plaintiffs arguments are inappropriate in a motion for reconsideration. As set forth  
10 above, a “Rule 59(e) motion may *not* be used to raise arguments or present evidence for the first time  
11 when they could reasonably have been raised earlier in the litigation.” *Kona*, 229 F.3d at 890 (emphasis  
12 in original). The Proximo plaintiffs reasonably could have raised these arguments in opposition to the  
13 Gallo defendants’ summary judgment motion. This is particularly true where, as here, the Gallo  
14 defendants anticipated that the Proximo plaintiffs would rely on the 855 Registration for their  
15 distinctiveness argument and addressed the issue in their opening papers.

16         That this issue was raised in the Gallo defendants’ moving papers in summary judgment defeats  
17 the Proximo plaintiffs’ position that “until the Court failed to recognize that the [855 Registration] for  
18 the shape of the 1800 tequila bottle and stopper constituted evidence of the distinctiveness of the  
19 trapezoidal shape alone and summarily decided to the contrary” they “could not argue that the Court  
20 committed clear error and request that it reconsider its findings.” The moving papers invited the  
21 Proximo plaintiffs to address this precise issue. The Proximo plaintiffs were on notice that this argument  
22 had been raised, yet the Proximo plaintiffs ignored it. In fact, as pointed out in the Summary Judgment  
23 Order, the Proximo plaintiffs failed to address *any* of the Gallo defendants’ arguments related to  
24 distinctiveness. The arguments in this motion should have been raised in an appropriate procedural  
25 manner. A motion for reconsideration pursuant to Fed. R. Civ. P. 59(e) is not the proper procedural  
26 vehicle with which to raise arguments for the first time, absent extraordinary circumstances.

27         The Proximo plaintiffs have identified no extraordinary circumstances that prevented them from  
28 opposing the Gallo defendants’ distinctiveness arguments. In their moving papers, the Proximo

1 plaintiffs address this in a footnote, which reads:

2           Although the Court criticizes the Proximo Defendants for making “no attempt to oppose  
3           the Gallo defendants’ arguments that the 1800 trade dress as defined cannot be protected  
4           by the Lanham Act because it lacks distinctiveness” as Gallo sought a declaration of non-  
          infringement, it had the burden of defining the trade dress it sought a ruling concerning,  
          and of proving its lack of distinctiveness and secondary meaning.

5 Mot. Reconsider, p. 5 n. 1. This footnote demonstrates that the Proximo plaintiffs misunderstand the  
6 summary judgment standards and the burdens of proof applicable to each party. While Gallo did seek  
7 a declaration of non-infringement in its action against Proximo, the Gallo defendants clearly moved for  
8 summary judgment with respect to the Proximo plaintiffs’ counterclaims. This Court’s Summary  
9 Judgment Order addressed only the Proximo plaintiffs’ counterclaims. Neither party moved for  
10 summary judgment as to Gallo’s Declaratory Judgment Act claims. In the countercomplaint, the  
11 Proximo plaintiffs’ asserted affirmative claims of infringement against the Gallo defendants. Because  
12 they were the parties asserting the claims, the Proximo plaintiffs “retain[ed] the ultimate burden of  
13 persuasion in [their] trademark infringement action.” *Tie Tech, Inc. v. Kinedyne Corp.*, 296 F.3d 778,  
14 783 (9th Cir. 2002). To survive summary judgment, the Proximo plaintiffs had the responsibility to  
15 raise genuine issues of material fact or to counter the legal issues raised by the moving party. The  
16 Proximo plaintiffs failed to do so, without explanation. In addition, the Proximo plaintiffs bore the  
17 burden of defining the trade dress that was allegedly infringed. They failed to do so. Though the  
18 Proximo plaintiffs have offered no excuse as to why they failed to address distinctiveness in opposition  
19 to the motion, the failure to do so was inexcusable.

20           The Proximo plaintiffs have further misunderstood the role of this Court when reviewing a  
21 summary judgment motion. They argue that this Court should reconsider its order because there was  
22 evidence in the record to support their position. If there was evidence in the record to support their  
23 position, the duty fell on the Proximo plaintiffs to point it out. When the opposing party fails to oppose  
24 a summary adjudication motion, this Court “need not sua sponte review all of the evidentiary materials  
25 on file at the time the motion is granted, but must ensure that the motion itself is supported by  
26 evidentiary materials.” *United States v. One Piece of Real Property, etc.*, 363 F.3d 1099, 1101 (11th Cir.  
27 2004). Because the Proximo plaintiffs failed to oppose this part of the motion, this Court properly  
28

1 ensured that the Gallo defendants' motion was supported. To go beyond that would place this Court in  
2 the improper position of advocating on behalf of a party.

3 Finally, although they argue that this Court committed clear error of law, the Proximo plaintiffs  
4 fail to address the legal grounds upon which the Gallo defendants rested their claims and upon which  
5 this Court ruled. This Court found that the Gallo defendants had supported their motion on this issue  
6 on two legal grounds. First, to:

7 the extent that the Proximo plaintiffs define their trade dress to be a trapezoidal-shaped  
8 bottle, this Court agrees with the Gallo defendants that there is no inherent  
9 distinctiveness. 'A trapezoid is the sort of intuitive, 'ordinary geometric shape' that  
10 courts generally 'regard [] as non-distinctive and protectable only upon proof of  
secondary meaning.'" *Mattel, Inc. v. MGA Entertainment, Inc.*, 782 F. Supp. 2d 911, 916  
(C.D. Cal. 2010) (rejecting on summary judgment a claim that a trapezoidal package was  
inherently distinctive).

11 Second, the Court found that:

12 the 855 Registration does not establish the inherent distinctiveness of the bottle shape,  
13 because that "Agavera trade dress" includes the clear "shot glass" top, an element that  
14 is not asserted to be part of any 1800 trade dress for purposes of this motion." This  
15 conclusion was based on the anti-dissection rule. "[U]nder the anti-dissection rule, the  
16 validity and distinctiveness of a composite trademark is determined viewing the  
17 trademark as a whole, as it appears in the marketplace." *Official Airline Guides, Inc. v.*  
*Goss*, 6 F.3d 1385, 1392 (9th Cir. 1993). The "critical" inquiry "is the overall  
appearance of the mark as used in the marketplace, not a deconstructionist view of the  
different components of the mark." *Playmakers, LLC v. ESPN, Inc.*, 297 F. Supp. 2d  
1277, 1283 (W.D. Wash. 2003).

18 This Court found that "according to the anti-dissection rule, the 855 Registration, which includes only  
19 one element of the 1800 trade dress, fails to establish that the broader 1800 trade dress is inherently  
20 distinctive." Applying this same rule to the bottle shape, the Court found that "the 855 Registration does  
21 not establish the inherent distinctiveness of the bottle shape, because that 'Agavera trade dress' includes  
22 the clear 'shot glass' top, an element that is not asserted to be part of any 1800 trade dress for purposes  
23 of this motion." This conclusion was based in law. See, e.g., *Igloo Prods. Corp. v. Brandex, Inc.*, 202  
24 F.3d 814, 817 (5th Cir. 2000) (presumption of distinctiveness attaching to "KOOL PAK & Design"  
25 pertained to whole mark, including the design, and not to the works KOOL PAK alone); see also, 15  
26 U.S.C. 1115(a) ("Any registration...shall be prima facie evidence of the validity of the registered  
27 mark...and of the registrant's exclusive right to use the registered mark."). While the Proximo plaintiffs  
28 argue that distinctiveness is a question of fact, they do no address the legal grounds for the Court's

