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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 MEDICAL EXTRUSION
12 TECHNOLOGIES, INC.,

Plaintiff,

13 v.

14 APOLLO MEDICAL EXTRUSION
15 TECHNOLOGIES, INC.,

16 Defendant.
17
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Case No.: 17-cv-2150-AJB (MSB)

ORDER:

**(1) SUA SPONTE AMENDING AND
VACATING APRIL 20, 2020 ORDER,
(Doc. No. 38); AND**

**(2) DENYING PLAINTIFF'S MOTION
FOR PARTIAL SUMMARY
JUDGMENT, (Doc. No. 46)**

19 This case involves the review of the Trademark Trial and Appeal Board's ("TTAB")
20 determination that Plaintiff Medical Extrusion Technologies, Inc.'s ("Plaintiff") trademark
21 is descriptive of its goods, not distinctive, and therefore non-registrable on the Principal
22 Trademark Register. Presently pending before the Court is Plaintiff's motion for partial
23 summary judgment. (Doc. No. 46.) Defendant Apollo Medical Extrusion Technologies,
24 Inc. ("Defendant") opposed the motion. (Doc. No. 48.) Plaintiff also filed a reply in support
25 of its motion. (Doc. No. 49.) For the reasons set forth below, the Court (1) sua sponte
26 **AMENDS** and **VACATES** its April 20, 2020 order, and (2) **DENIES** Plaintiff's motion
27 for partial summary judgment.
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1 **I. BACKGROUND**

2 At the heart of the dispute, Plaintiff alleges Defendant infringed on Plaintiff’s
3 trademark and logo. (Complaint (“Compl.”), Doc. No. 1.) In Plaintiff’s first claim for relief,
4 Plaintiff seeks judicial review pursuant to 15 U.S.C. § 1071(b) of a ruling by the TTAB
5 denying registration of Plaintiff’s trademark. (Compl. ¶¶ 22–25.) Plaintiff’s other claims—
6 which are currently not at issue—are for trademark infringement, unfair competition, and
7 unfair trade practices. (*Id.* ¶¶ 29–39.)

8 On May 7, 2013, Plaintiff filed an application to register “Medical Extrusion
9 Technologies” (hereinafter the “Mark”) on the Principal Register under Section 1(a) of the
10 Trademark Act, 15 U.S.C. § 1051(a) (“Section 1(a)”), on the basis of first use and first use
11 in commerce.¹ (TTAB Decision, Doc. No. 1-2 at 2–3.) The application included an
12 alternative claim that the Mark has acquired distinctiveness under Section 2(f) of the
13 Trademark Act, 15 U.S.C. § 1052(f) (“Section 2(f)").² (*Id.* at 3.) Essentially, this alternative
14 claim meant if the USPTO found the Mark descriptive and non-registrable under Section
15 1(a), then Plaintiff would alternatively proceed under Section 2(f), which would allow
16 registration even if the Mark is descriptive, so long as Plaintiff proved
17 distinctiveness/secondary meaning. After the Mark was approved for publication by the
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20 ¹ Section 1(a) of the Trademark Act of 1946, 15 U.S.C. §1051(a), provides that “[t]he owner of a trademark
21 used in commerce may request registration of its trademark on the principal register.” A mark is deemed
22 in use in commerce on goods when, among other things, “it is placed in any manner on the goods or their
23 containers or the displays associated therewith or on the tags or labels affixed thereto.” *Id.* § 1127. The
24 application must include applicant’s date of first use of the mark and the date of first use of the mark in
25 commerce. *Id.*

26 ² Section 2(f) of the Lanham Act, 15 U.S.C. § 1052(f) provides that a mark that is merely descriptive may
27 nonetheless be registered on the Principal Register if it “has become distinctive of the applicant’s goods
28 [or services] in commerce.” Thus, the mark may be registered on the Principal Register if the applicant
proves that the merely descriptive matter has acquired distinctiveness (also known as “secondary
meaning”) as used on the applicant’s goods and/or services in commerce. *See Coach Servs. Inc. v. Triumph
Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1728-30 (Fed. Cir. 2012). Acquired distinctiveness is
generally understood to mean an acquired “mental association in buyers’ minds between the alleged mark
and a single source of the product.” 2 McCarthy On Trademarks And Unfair Competition § 15:5 (4th ed.,
June 2017 Update).

1 USPTO, Defendant opposed the registration on the ground that Plaintiff’s Mark is merely
2 descriptive of its goods, and so, the claim under Section 2(f) of acquired distinctiveness
3 fails. (*Id.*)

4 On August 18, 2017, the TTAB issued a final ruling on the Opposition Proceeding
5 against Plaintiff, refusing to register the Mark. The TTAB ultimately determined that: (1)
6 the Mark was highly descriptive, and (2) Plaintiff failed to show distinctiveness. The TTAB
7 explained that “[a] mark may be registered on the Principal Register if the applicant proves
8 that the merely descriptive matter has acquired distinctiveness (also known as ‘secondary
9 meaning’) as used on the applicant’s goods and/or services in commerce.” (TTAB
10 Decision, Doc. No. 1-2 at 10 (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668
11 F.3d 1356, 101 USPQ2d 1713, 1728–30 (Fed. Cir. 2012).) However, the TTAB found that
12 because the Mark was “highly descriptive,” much more evidence—especially in the
13 quantity of direct evidence from the relevant purchasing public—would be necessary to
14 show that the designation had become distinctive. (TTAB Decision, Doc. No. 1-2 at 30.)

15 Then, Plaintiff filed a Complaint in this Court appealing the TTAB decision on
16 October 19, 2017. (Doc. No. 1.) On December 4, 2017, Defendant filed a motion to dismiss,
17 which was denied by the Court on April 10, 2018. (Doc. No. 11.) The Court ruled that
18 Plaintiff’s appeal from the TTAB’s decision was timely, but that the trademark
19 infringement, unfair competition, and unfair trade claims should be stayed pending the
20 resolution of Plaintiff’s TTAB appeal. (*Id.* at 7.) The Court held a pretrial conference on
21 December 6, 2019. (Doc. No. 31.) There, the parties represented to the Court that there was
22 a settlement in principle, and the Court issued a briefing schedule for Plaintiff to file its
23 motion for summary judgment to dispose of the appeal claim.

24 On January 31, 2020, Plaintiff filed its first motion for partial summary judgment.
25 (Doc. No. 33.) In the motion, Plaintiff argued the central issue is whether the trademark
26 “Medical Extrusion Technologies” is descriptive of the goods produced and sold by
27 Plaintiff. (Doc. No. 33-1 at 5.) As stated, the TTAB had concluded that “Applicant’s
28 proposed mark [Medical Extrusion Technologies] is highly descriptive of Applicant’s

1 goods under Section 2(e)(1).” (Compl., Ex. A.) Plaintiff argued the TTAB erred, and no
2 reasonable trier of fact could find that “medical extrusion technologies” describes
3 Plaintiff’s products. (Doc. No. 33-1 at 7.) Plaintiff argued “technologies” are not physical
4 products, nor are they descriptive of physical products, including the products sold by
5 Plaintiff. (*Id.* at 5.) To support its position, Plaintiff stated it engaged an expert linguist
6 who concluded “the phrase ‘medical extrusion technologies’ is not descriptive of
7 Applicant’s [Plaintiff’s] products, because it refers to the means of manufacturing those
8 products – a set of specialized processes, procedures, and equipment – rather than the
9 products themselves.” (Disner Declaration, Doc. No. 33-4, Exhibit 1 at 14.) In addition,
10 Plaintiff also pointed out that the Federal Circuit has held in *In re Hutchinson Technology*
11 *Incorporated*, 852 F.2d 552 (Fed. Cir. 1988) that “technology” does not convey an
12 immediate idea of the “ingredients, qualities, or characteristics of the goods” listed.

13 In its statement of non-opposition, Defendant stated that it did not oppose the motion
14 because the parties have agreed in principle to a settlement of the matter, and dismissal of
15 the entire action with prejudice. (Doc. No. 34 at 1.) Defendant further provided notice that
16 “subject to negotiation and execution of the full and final settlement agreement, it does not
17 and shall not oppose the entry of an Order reversing the decision by the Trademark Trial
18 and Appeal Board, nor does it oppose this Court’s finding that the phrase ‘Medical
19 Extrusion Technologies’ is not descriptive of any product or service.” (*Id.* at 1–2.) Based
20 on the unopposed motion, the Court granted Plaintiff’s motion for partial summary
21 judgment on April 20, 2020. (Doc. No. 38.)

22 The Court held another Status Conference on May 11, 2020. Appearing that the
23 parties did not reach settlement, the Court granted Plaintiff’s request to file a second motion
24 for partial summary judgment on its first claim for review of the TTAB decision. (Doc.
25 No. 41.) Plaintiff filed its second motion for partial summary judgment on July 13, 2020,
26 which this time was opposed by Defendant. (Doc. Nos. 46, 48.) The Court held a hearing
27 on Plaintiff’s motion on September 3, 2020. (Doc. No. 57.) This order follows.

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1 II. LEGAL STANDARD

2 Under the Lanham Act, the unsuccessful party before the TTAB may appeal the
3 TTAB's decision to the United States Court of Appeals for the Federal Circuit on the closed
4 record of the TTAB proceedings. *See* 15 U.S.C. § 1071(a)(4). Or, in the alternative, the
5 losing party has the option of presenting additional evidence or raising additional claims in
6 the United States District Court in any district where venue is proper. *See id.* § 1071(b)(1).
7 The United States Supreme Court has held that the appropriate standard of review of
8 findings of fact made by the PTO is not the stricter "clearly erroneous" standard, but instead
9 the more deferential standard of the Administrative Procedures Act, 5 U.S.C. § 706. *See*
10 *Dickinson v. Zurko*, 527 U.S. 150, 159–65 (1999). Although the Supreme Court did not
11 specify whether the appropriate APA standard was "substantial evidence" or "arbitrary and
12 capricious," the Federal Circuit has determined that the "substantial evidence" standard
13 applies to reviews of TTAB decisions. *See On-Line Careline, Inc. v. America Online, Inc.*,
14 229 F.3d 1080, 1085 (Fed. Cir. 2000).

15 In an appeal to the Federal Circuit, the court reviews the TTAB's legal conclusions
16 de novo, and reviews its factual findings for substantial evidence. *See Aycock Eng'ng, Inc.*
17 *v. Airflite, Inc.*, 560 F.3d 1350, 1355 (Fed. Cir. 2009). But in an appeal presented in the
18 district court, the district court is an appellate reviewer of facts found by the TTAB and is
19 also a fact-finder based on new evidence introduced. *See* 3 J. McCarthy, McCarthy on
20 Trademarks and Unfair Competition, § 21:20, at 21–26 (4th ed., updated 2011). Although
21 the district court's review of the TTAB's decision is considered de novo when the parties
22 present new evidence and assert additional claims, the district court also must afford
23 deference to any factual findings already made by the TTAB. *See id.* § 21:21. Findings of
24 fact made by the TTAB are given great weight and are not upset unless supported by
25 substantial evidence. *Id.*; *see also Zurko*, 527 U.S. at 162 (1999).

26 "Substantial evidence is more than a mere scintilla. It means such relevant evidence
27 as a reasonable mind might accept as adequate to support a conclusion." *Consolidated*
28 *Edison Co. of New York v. NLRB*, 305 U.S. 197, 229 (1938). The possibility that

1 inconsistent conclusions may be drawn from the same record does not render the TTAB’s
2 finding unsupported by substantial evidence. *In re Gartside*, 203 F.3d 1305, 1312 (Fed.
3 Cir. 2000). When this standard of review is applied in the context of a motion for summary
4 judgment, the district court applies a deferential standard of review to the TTAB’s findings
5 and views new evidence in the light most favorable to the nonmoving party. *See Bd. of*
6 *Regents of Univ. of Wis. Sys. v. Phoenix Int’l Software, Inc.*, 653 F.3d 448, 452 (7th Cir.
7 2011).

8 **III. DISCUSSION**

9 In determining whether Plaintiff’s motion for partial summary judgment should
10 granted, the Court will analyze: (1) whether this Court’s April 20, 2020 order is still
11 binding, and (2) whether Plaintiff has met its burden in demonstrating it is entitled to
12 summary judgment on its TTAB judicial review claim.

13 **1. This Court’s April 20, 2020**

14 First, in support of its motion, Plaintiff largely relies on this Court’s April 20, 2020
15 order concluding the Mark is not descriptive of Plaintiff’s product. (Doc. No. 38.) Plaintiff
16 contends it originally sought registration of its Mark under Section 1(a), which requires
17 non-descriptiveness, but does not require a showing of secondary meaning/acquired
18 distinctiveness. (Doc. No. 1-2 at 3.) However, Plaintiff explains an examining attorney at
19 the USPTO concluded that the Mark was at least somewhat descriptive of Plaintiff’s
20 products, and so, Plaintiff was “forced” to amend its application and pursue registration
21 under Section 2(f) instead of Section 1(a). (Dirck Edge Declaration (“Edge Decl.”) ¶ 3.)
22 Section 2(f), as noted above, allows registration of a mark that is descriptive as long as the
23 applicant can demonstrate secondary meaning/acquired distinctiveness. Plaintiff argues
24 that because this Court has issued an order concluding that the Mark is *not* descriptive, and
25 because the TTAB’s decision was premised on the assumption that the Mark *is* descriptive,
26 Plaintiff is now entitled to registration under Section 1(a) instead of Section 2(f).

27 In opposition, Defendant contends that because Plaintiff ultimately pursued its
28 registration application under Section 2(f), Plaintiff has abandoned and waived its

1 argument that Section 1(a) should apply. (Doc. No. 48 at 7.) Furthermore, Defendant
2 argues that under Section 2(f), descriptiveness is a non-issue, and Plaintiff has not shown
3 enough to demonstrate distinctiveness/secondary meaning sufficient for summary
4 judgment. (*Id.* at 11.)

5 As a preliminary matter, Plaintiff’s pending motion for partial summary judgment
6 hinges almost entirely on this Court’s April 20, 2020 order. However, that order was issued
7 based on Defendant’s non-opposition to Plaintiff’s first motion for partial summary
8 judgment. Indeed, at the pretrial conference on December 6, 2019, (Doc. No. 31), the
9 parties represented they had an agreement in principle to settle, and the parties suggested
10 that Plaintiff file a motion for partial summary judgment to resolve the TTAB appeal and
11 dismiss the matter entirely. Accordingly, on January 31, 2020, Plaintiff filed its first motion
12 for partial summary judgment. (Doc. No. 33.) Defendant filed a statement of non-
13 opposition. (Doc. No. 34.) Critically, in Defendant’s non-opposition, Defendant explained
14 “[h]aving agreed in principal with Plaintiff and its counsel to a full and final settlement of
15 this matter, a settlement which shall include a dismissal of the entire action with prejudice
16 and mutual general releases of all claims, [Defendant] hereby submits its Statement of Non-
17 Opposition. . . .” (*Id.* at 1.) Defendant further provided notice that, “subject to negotiation
18 and execution of the full and final settlement agreement, it does not and shall not oppose
19 the entry of an Order reversing the decision by the [TTAB], nor does it oppose this Court’s
20 finding that the phrase ‘Medical Extrusion Technologies’ is not descriptive of any product
21 or service.” (*Id.* at 1–2.)

22 Based on the motion and non-opposition, the Court held “in light of the parties’
23 briefing, particularly Defendant’s non-opposition to Plaintiff’s motion for partial summary
24 judgment, the Court **GRANTS** Plaintiff’s motion for partial summary judgment. The Court
25 concludes the phrase ‘medical extrusion technologies’ is not descriptive of Plaintiff’s
26 products. Such a finding is established and binding on all further proceedings in this
27 matter.” (Doc. No. 38 at 4 (emphasis in original).) Now, it is apparent that the matter did
28 not settle. (Doc. No. 48 at 5 n.2.) Nevertheless, Plaintiff still seeks to use the Court’s order

1 as a sword to argue that it is entitled to summary judgment because the Court found that its
2 Mark is not descriptive. However, the Court's order was issued based on Defendant's non-
3 opposition and the understanding that the order would work towards a final settlement of
4 the case. The Court did not engage in a full analysis of whether the Mark was descriptive.
5 And, Defendant's non-opposition was expressly conditioned on the consummation of a
6 settlement.

7 Appearing that this settlement did not occur, the Court recognizes the injustice to
8 allow such an order to disadvantage Defendant without a full and fair opportunity to oppose
9 Plaintiff's first motion for summary judgment. Therefore, in the interest of justice, the
10 Court clarifies that its previous order was issued conditionally, based on the condition that
11 the parties would settle. Because the condition has not occurred, the Court, on its own
12 motion, **AMENDS** and **VACATES** its April 20, 2020 order. *See* Federal Rule of Civil
13 Procedure 60 (a court may sua sponte correct and vacate an order); *Wellisch v.*
14 *Pennsylvania Higher Educ. Assistance Agency*, Case No. 17-CV-00213-BLF, 2018 WL
15 2463088, at *2 (N.D. Cal. June 1, 2018) (noting the Court sua sponte amended its order);
16 *Straube v. Chertoff*, Case No. 07-CV-1751-JMN-LS, 2008 WL 3925680, at *4 (S.D. Cal.
17 Aug. 22, 2008) (modifying order sua sponte); *Straight Path IP Grp., Inc. v. Apple Inc.*,
18 Case No. 16-CV-03582-WHA, 2017 WL 3967864, at *5 (N.D. Cal. Sept. 9, 2017)
19 (granting the plaintiff's unopposed motion based on the conditions). Thus, the Court's
20 April 20, 2020 order will no longer have a binding effect in this litigation, and the order
21 finding that the Mark is not descriptive is hereby **VACATED**.

22 **2. Whether Plaintiff is Entitled to Summary Judgment**

23 Now, having vacated its previous order, the Court will turn to the merits of Plaintiff's
24 instant motion, and whether Plaintiff is entitled to summary judgment based on either
25 Section 1(a) or Section 2(f).

26 **a) Section 1(a)**

27 The Court will first review whether the TTAB erred in its determination that Plaintiff
28 could not proceed with registration under Section 1(a), requiring non-descriptiveness.

1 Without the benefit of a ruling that its Mark is not descriptive, Plaintiff has not shown
2 enough to establish that it is entitled to summary judgment based on Section 1(a). The
3 TTAB found that Plaintiff had conceded descriptiveness because it pursued its application
4 under Section 2(f). As noted above, Plaintiff initially applied for registration under Section
5 1(a). However, Plaintiff states that an examining attorney at the USPTO concluded that the
6 Mark was at least somewhat descriptive of Plaintiff's products, and so, refused the
7 registration. Because of this refusal, Plaintiff contends it was "forced" to amend its
8 application and pursue registration under Section 2(f) instead. (Doc. No. 46-1 at 7; Edge
9 Decl. ¶ 3.)

10 When an applicant responds to a registration refusal based on mere descriptiveness
11 of a mark by claiming acquired distinctiveness, such amendment to seek registration under
12 Section 2(f) is considered an admission that the proposed mark is merely descriptive. *See*
13 *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed.
14 Cir. 1988). However, when a claim under Section 2(f) is presented in the alternative, it
15 does not serve as an admission of mere descriptiveness. *See In re Thomas Nelson, Inc.*, 97
16 USPQ2d 1712, 1713 (TTAB 2011). Indeed, "[a]n applicant can avoid the admission that
17 its mark is not inherently distinctive if it makes the claim of acquired distinctiveness in the
18 alternative *and* files an appeal of the refusal on the basis that the mark is not inherently
19 distinctive (e.g., the mark is merely descriptive)." *Id.* "If an appeal in the alternative results
20 in a finding of descriptiveness, and also the presence of acquired distinctiveness, then
21 descriptiveness, though not conceded by the applicant, would be present." (*Id.*)

22 Originally, Plaintiff claimed registration under Section 2(f) in the alternative. (Doc.
23 No. 1-2 at 12 n.7.) The examining attorney at the USPTO refused registration based on a
24 finding that the Mark was descriptive, and Plaintiff amended its application to pursue
25 registration under Section 2(f) instead. As set forth above, generally the pursuit of an
26 application under Section 2(f) is an admission of descriptiveness. This admission can be
27 avoided if Section 2(f) was pled in the alternative. Plaintiff now argues it never conceded
28 descriptiveness because it pursued its Section 2(f) claim in the alternative. But this

1 “alternative” position was waived when Plaintiff chose “not to appeal the mere
2 descriptiveness refusal and allowed the application to be published for opposition with a
3 Section 2(f) claim.” (*Id.*) Thus, upon review of the law, the Court concludes the TTAB did
4 not err when it concluded that Plaintiff conceded descriptiveness. *See The Cold War*
5 *Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 92 USPQ2d 1626, 1629 (Fed.
6 Cir. 2009) (“[W]here an applicant seeks registration on the basis of Section 2(f), the mark’s
7 descriptiveness is a nonissue; an applicant’s reliance on Section 2(f) during prosecution
8 presumes that the mark is descriptive.”). Accordingly, the Court **DENIES** Plaintiff’s
9 summary judgment to the extent it is based on Section 1(a).

10 **3. Section 2(f)**

11 Next, having determined that Plaintiff is not entitled to summary judgment based on
12 Section 1(a), the Court next addresses whether Plaintiff prevails under Section 2(f). An
13 applicant seeking registration of a mark under Section 2(f) bears the ultimate burden of
14 establishing acquired distinctiveness or secondary meaning. *See Yamaha Int’l Corp. v.*
15 *Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988). “To show that
16 a mark has acquired distinctiveness, an applicant must demonstrate that the relevant public
17 understands the primary significance of the mark as identifying the source of a product or
18 service rather than the product or service itself.” *In re Steelbuilding.com*, 75 USPQ2d at
19 1422. “[T]he applicant’s burden of showing acquired distinctiveness increases with the
20 level of descriptiveness; a more descriptive term requires more evidence of secondary
21 meaning.” *In re Steelbuilding.com*, 75 USPQ2d at 1424. A plaintiff may establish
22 secondary meaning through direct and circumstantial evidence. *See* 2 J. Thomas McCarthy,
23 McCarthy on Trademarks and Unfair Competition § 15:30 (4th ed. 2000). Direct evidence,
24 such as consumer surveys and direct consumer testimony, often provides the strongest
25 evidence of secondary meaning. *See Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352,
26 1358 (9th Cir. 1985). A plaintiff may also establish secondary meaning through
27 circumstantial evidence, such as: exclusivity, manner, and length of use, amount and
28 manner of advertising, amount of sales and the number of customers, and plaintiff’s

1 established place in the market. *See Filipino Yellow Pages v. Asian Journal Publications*,
2 198 F.3d 1143, 1151 (9th Cir. 1999).

3 Secondary meaning or distinctiveness is a question of fact. *See Japan Telecom, Inc.*
4 *v. Japan Telecom Am. Inc.*, 287 F.3d 866, 873 (9th Cir. 2002). Here, the TTAB “examine[d]
5 the evidence of record, including any evidence of advertising expenditures, sales success,
6 length and exclusivity of use, unsolicited media coverage, and consumer studies (linking
7 the name to a source).” (TTAB Decision, Doc. 1-2 at 18.) The TTAB weighed the evidence
8 in the record and found that much more evidence was needed to support a finding of
9 secondary meaning. In particular, because the Mark was highly descriptive, much more
10 evidence, especially in the form of direct evidence from the relevant purchasing public
11 would be necessary to show distinctiveness. *See, e.g., Levi Strauss*, 778 F.2d at 1358 (“An
12 expert survey of purchasers typically provides the most persuasive evidence of secondary
13 meaning.”).


14 Here, Plaintiff has offered the declarations of its counsel, Dirck Edge, and Plaintiff’s
15 owner, Tom Bauer, in support of its motion for partial summary judgment. But Plaintiff
16 has not specifically offered any new evidence in either of these two declarations. Instead,
17 Plaintiff states in its brief it has “identified several other witnesses to testify at trial on the
18 issues affecting this case, including the appeal of the TTAB decision.” (Doc. No. 49 at 2.)
19 However, Plaintiff does not give any further information about these new witnesses, or
20 what information they will testify about. Therefore, although Plaintiff states it has new
21 evidence to offer, the Court cannot, at this stage, conduct a de novo review of evidence that
22 is not currently before the Court. *See 3 J. McCarthy, McCarthy on Trademarks and Unfair*
23 *Competition*, § 21:21 (4th ed., updated 2011). Thus, by Plaintiff’s own admission that there
24 are new facts for the Court to consider, Plaintiff has not demonstrated that there is no
25 genuine dispute as to any material fact sufficient for summary judgment. As such, in light
26 of Plaintiff’s intention to offer in new evidence to support its TTAB appeal claim, it would
27 be inappropriate for the Court to grant Plaintiff’s motion for partial summary judgment at
28 this time.

1 **IV. CONCLUSION**

2 Based on the foregoing, the Court (1) sua sponte **AMENDS** and **VACATES** its
3 April 20, 2020 order (Doc. No. 38), and (2) **DENIES** Plaintiff's motion for partial
4 summary judgment, (Doc. No. 46).

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6 **IT IS SO ORDERED.**

7 Dated: September 24, 2020

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9 Hon. Anthony J. Battaglia
United States District Judge

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