

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 06-cv-00605-PAB-KMT
(Consolidated with Civil Action No. 16-cv-02004-PAB-KMT)

Civil Action No. 06-cv-00605-PAB-KMT

CROCS, INC.,

Plaintiff,

v.

EFFERVESCENT, INC.;
HOLEY SOLES HOLDINGS, LTD.;
DOUBLE DIAMOND DISTRIBUTION, LTD., and
U.S.A. DAWGS, INC.,

Defendants.

Civil Action No. 16-cv-02004-PAB-KMT

U.S.A. DAWGS, INC. and
DOUBLE DIAMOND DISTRIBUTION, LTD.,

Plaintiffs,

v.

RONALD SNYDER,
DANIEL HART,
THOMAS J. SMACH,
ANDREW REES,
GREGG RIBATT
ANDREW REDDYHOFF,
GEORGE B. BOEDECKER, JR.,
LYNDON HANSON,
DONALD LOCOCO,
RAYMOND CROGHAN,
RONALD FRASCH,
MICHAEL MARGOLIS,
JEFFREY LASHER,
MICHAEL E. MARKS,

**PRAKASH MELWANI,
JOHN P. MCCARVEL,
ERIK REBICH,
SARA HOVERSTOCK, and
JOHN AND JANE DOE DEFENDANTS 1-30,**

Defendants.

CROCS, INC.’S SECOND AMENDED COMPLAINT

Plaintiff, Crocs, Inc., through undersigned counsel, brings the following Second Amended Complaint against Defendants Effervescent, Inc., Holey Soles Holdings, Ltd.,¹ Double Diamond Distribution, Ltd. and U.S.A. Dawgs, Inc., collectively “Defendants,” as follows:

THE PARTIES

1. Crocs, Inc. (“Crocs”) is a Delaware corporation having its principal place of business at 6273 Monarch Park Place, Niwot, Colorado 80503.

2. On information and belief, Effervescent, Inc. (“Effervescent”) is a Delaware corporation with its principal place of business at 24 Scott Road, Fitchburg, Massachusetts 01420.

3. On information and belief, Holey Soles Holdings, Ltd. (“Holey Soles”), is a Canadian federally incorporated company which is provincially registered in British Columbia. Holey Soles’ principal place of business is 1628 West 75th Avenue, Vancouver, Canada V6P 6G2. On information and belief, Holey Soles is undergoing or has completed bankruptcy proceedings under Canadian law.

4. On information and belief, Double Diamond Distribution, Ltd., (“DDD”) is a Canadian corporation with its principal place of business at 3533 Idylwyld Drive North, Bay A, Saskatoon, Saskatchewan S7L 6B5, Canada.

¹ The Court entered default as to Effervescent and Holey Soles Holdings. ECF Nos. 454, 455.

5. On information and belief, U.S.A. DAWGS, Inc. (“USA DAWGS”), is a Nevada corporation with its principal place of business at 4120 W Windmill Lane, Unit 106, Las Vegas, NV 89139-5852.

JURISDICTION AND VENUE

6. The Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. §§ 1331, 1332, and 1338(a). This case presents federal questions arising under the Patent Act, 35 U.S.C. §§ 1, *et seq.*

7. On information and belief, Defendants knowingly and purposefully import infringing products, as described below, that are distributed throughout the United States, including into the State of Colorado.

8. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) and (d) and 28 U.S.C. § 1400(b).

GENERAL ALLEGATIONS

9. Crocs is a designer, manufacturer and marketer of Crocs-branded footwear for men, women and children, which incorporate Crocs’s proprietary closed-cell resin material, Croslite™ – a substantial innovation in footwear comfort and functionality. This proprietary material enables Crocs to produce soft and lightweight, non-marking, slip and odor-resistant shoes, which are ideal for casual wear and recreational uses such as boating, hiking, fishing and gardening. By the Spring of 2006, Crocs offered 11 different models in up to 18 colors, and expected to offer 20 different models by the end of the year.

10. Crocs was formed in July 2002, when its founders decided to market an innovative shoe developed and manufactured by Foam Creations, Inc. In November 2002, Crocs introduced its first model, originally intended as a boating or outdoor shoe; however, by 2003, Crocs brand footwear were universally accepted as all purpose footwear for comfort and fashion.

In 2003-2004, Crocs expanded its product line, acquired Foam Creations, and added warehouses and shipping programs for speedy assembly and delivery.

11. Crocs's footwear is sold through a wide range of distribution channels, including department stores, specialty footwear stores, sporting good and outdoor retailers. Crocs brand footwear are also sold through a variety of specialty channels, including gift shops, uniform suppliers, independent bicycle dealers, specialty food retailers, and health and beauty stores. Crocs has distributed its products through over 6,500 store locations domestically and in over 40 countries worldwide. In addition, Crocs sells its footwear through its website www.crocs.com and in kiosks and retail stores in shopping malls throughout the country.

12. Following its formation, Crocs's sales increased dramatically. Crocs recorded \$1.2 million in revenues in 2003, which grew to \$13.5 million in 2004. In 2005, Crocs recorded over \$108 million in revenues from sales of its footwear.

CROCS'S PATENTS

THE '858 PATENT

13. On February 7, 2006, the U.S. Patent and Trademark Office duly, properly and legally issued U.S. Patent No. 6,993,858 B2, entitled "Breathable Footwear Pieces," with Crocs as the assignee. A copy of the '858 Patent is submitted with this Complaint as Exhibit 1.

14. The '858 Patent claims various footwear pieces. The claimed invention consists of comfortable footwear that is compatible with various work environments, such as a hospital setting, which may require secure and waterproof footwear. In some cases, the footwear pieces are molded from a lofted material. In some embodiments, the shoes also include liquid conductors formed around ventilators or openings that disperse liquids away from the individual's feet. The '858 discloses several embodiments of the claimed invention, including models that contain liquid conductors on the upper portion of the base section, and others that

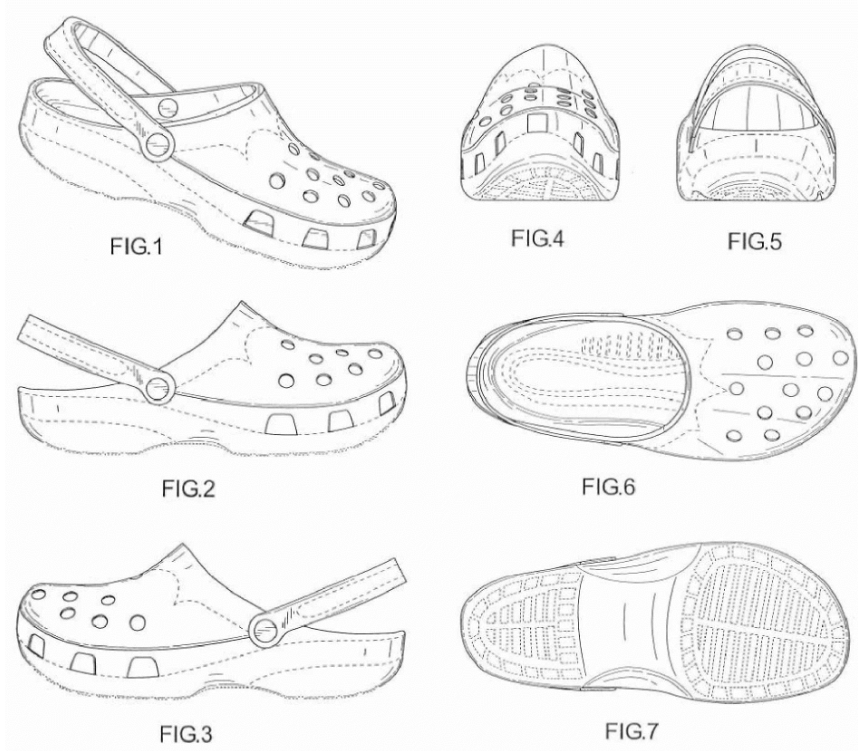
include a solid base section to protect the feet from direct contact with spilled liquids, for example. Other embodiments include models with an adjustable strap and/or open-toe.

15. The '858 Patent contains two independent claims. Claim 1 recites a footwear piece comprising a base section that is formed as a single part manufactured from a moldable foam material; a pivoting strap section formed of moldable foam material that is attached to opposite ends of the upper base section and is held in place by frictional forces at the contact points; an open rear region; and an upper region that forms a toe region which follows the contour of a human foot. Claim 2 additionally claims a decorative pattern of bumps in the upper opening perimeter; a plurality of ventilators in the substantially vertical and horizontal portions; and a sole that includes tread patterns and a foot base including a raised pattern.

THE '789 PATENT

16. On March 28, 2006, the U.S. Patent and Trademark Office duly, properly and legally issued U.S. Patent No. D 517,789, entitled "Footwear," with Crocs as the assignee. A copy of the '789 Patent is submitted with this Complaint as Exhibit 2.

17. The '789 Patent claims an ornamental design for footwear as shown and described in the following figures:



THE '465 PATENT

18. On February 15, 2011, the U.S. Patent and Trademark Office duly, properly and legally issued U.S. Patent No. D 632,465 S, entitled “Footwear,” with Crocs as the assignee. A copy of the '465 Patent is submitted with this Complaint as Exhibit 3.

19. The '465 Patent claims an ornamental design for footwear as shown and described in the following figures:

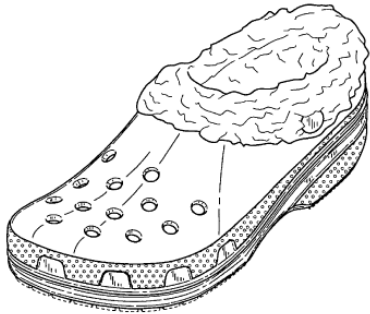


FIG. 1

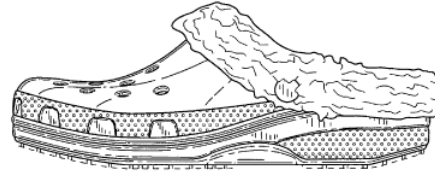


FIG. 4

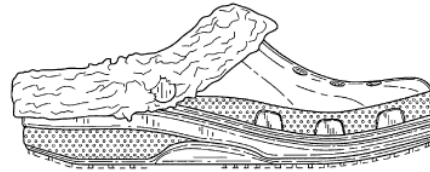


FIG. 5

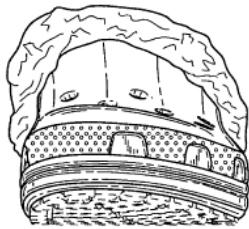


FIG. 2

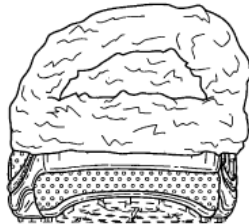


FIG. 3



FIG. 6

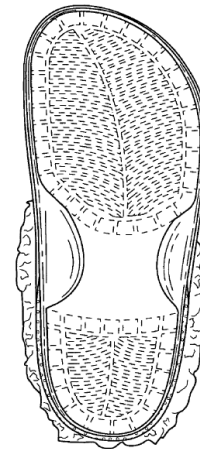


FIG. 7

DEFENDANTS' INFRINGING ACTIVITIES

DEFENDANT EFFERVESCENT INC.

20. On information and belief, Effervescent manufactures, distributes, markets and sells a line of footwear called Waldies worldwide, including in the U.S. On information and belief, Effervescent also sells its Waldies footwear through its website, www.waldies.net.

21. On information and belief, Waldies footwear are manufactured in China and imported for sale in the U.S.

22. Effervescent's Waldies footwear infringe claims 1 and 2 of the '858 Patent, and the '789 Patent.

DEFENDANT HOLEY SOLES HOLDINGS LTD.

23. On information and belief, Holey Soles is a developer, manufacturer, and distributor of injection molded footwear, including its Explorer model.

24. On information and belief, Holey Soles footwear is manufactured in China. According to its earlier website, www.holeysoles.com, "The original product that was available on the market was made by a Canadian manufacturer. . . . Back in 2004, we created our own models and started producing in China. We visit the factory regularly and are constantly improving our processes."

25. On information and belief, Holey Soles sells its footwear throughout the world, including in the United States. On information and belief, Holey Soles has offered its footwear for sale through its website, www.holeysoles.com, where consumers can place an order via e-mail or phone.

26. Holey Soles footwear infringes claims 1 and 2 of the '858 Patent, and the '789 Patent.

DEFENDANTS DOUBLE DIAMOND DISTRIBUTION LTD. AND U.S.A. DAWGS, INC.

27. On information and belief, DDD and USA DAWGS are related entities that manufacture, distribute, market and sell a line of footwear called Dawgs Clogs, including a line of "fleece" clogs, including but not limited to "Fleece-lined Doggers."

28. On information and belief, DDD and USA DAWGS also manufacture, distribute, market and sell a line of fleece-line clogs sold under the "Hounds" brand ("Fleece-lined Hounds").

29. On information and belief, Dawgs Clogs and Fleece-lined Hounds are manufactured in China and imported for sale into the U.S. On information and belief, Dawgs Clogs and Fleece-lined Hounds can be purchased through the DDD/USA DAWGS website, www.dawgsclogs.com, and via retailers such as CVS Pharmacy, Inc. and Walgreens Co., both in this District and in other retail locations in the United States.

30. DDD and USA DAWGS's Dawgs Clogs footwear infringes claims 1 and 2 of the '858 Patent and the '789 Patent, and their "fleece" clogs such as Fleece-lined Doggers and Fleece-lined Hounds infringe the '465 Patent.

INTERNATIONAL TRADE COMMISSION DETERMINATION OF VIOLATION

31. On July 15, 2011, after a multi-year process including a decision by the United States Court of Appeals for the Federal Circuit in *Crocs, Inc. v. United States Int'l Trade Comm'n*, 598 F.3d 1294, 1311 (Fed. Cir. 2010), the United States International Trade Commission (the "Commission") issued a Final Commission Determination of Violation. The Commission found a violation of 19 U.S.C. § 1337 by DDD, Effervescent and Holey Soles. The violation was predicated on infringement of the '858 Patent by DDD and Effervescent and on infringement of the '789 Patent by DDD, Effervescent and Holey Soles.

COUNT I

INFRINGEMENT OF THE '858 PATENT

32. Crocs hereby incorporates by reference the foregoing paragraphs.

33. All defendants infringe claims 1 and 2 of the '858 Patent with certain products manufactured, offered for sale, or sold within the United States, or imported into the United States, including but not limited to: Holey Soles's Explorer, Effervescent's Waldies, and DDD and USA DAWGS's Dawgs Clogs.

34. Defendants' patent infringement is willful, in bad faith and continuing, and Plaintiff has no adequate remedy at law for such infringement.

COUNT II

INFRINGEMENT OF THE '789 PATENT

35. Crocs hereby incorporates by reference the foregoing paragraphs.

36. All defendants infringe the '789 Patent with certain products manufactured, offered for sale, or sold within the United States, or imported into the United States, including but not limited to: Holey Soles's Explorer, Effervescent's Waldies, DDD's and USA DAWGS's Dawgs Clogs.

37. Defendants' patent infringement is willful, in bad faith and continuing, and Plaintiff has no adequate remedy at law for such infringement.

COUNT III

INFRINGEMENT OF THE '465 PATENT

38. Crocs hereby incorporates by reference the foregoing paragraphs.

39. Defendants DDD and USA DAWGS infringe the '465 Patent with certain products manufactured, offered for sale, or sold within the United States, or imported into the United States, including but not limited to DAWGS's line of Fleece-lined Dawgs clogs and Fleece-lined Hounds, which are distributed throughout the United States by USA DAWGS.

40. Defendants' patent infringement is willful, in bad faith and continuing, and Plaintiff has no adequate remedy at law for such infringement.

JURY DEMAND

Crocs demands a trial by jury on all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, by reason of the foregoing, Crocs requests that this Court enter judgment in its favor and for relief against Defendants, and each of them, as follows:

A. That all Defendants be immediately and preliminary enjoined from all further manufacturing, use, marketing, distribution, sale, offers to sell, and importation of any shoes that infringe the '858 Patent or the '789 Patent;

B. That Defendants DDD and USA DAWGS be immediately and preliminary enjoined from all further manufacturing, use, marketing, distribution, sale, offers to sell, and importation of any shoes that infringe the '465 Patent;

C. That Crocs be awarded its actual damages in an amount according to proof;

D. That Defendants' infringement and other wrongful acts herein alleged be determined deliberate, willful, and in conscious disregard of Crocs's rights pursuant to 35 U.S.C. § 284 and at common law;

E. That Crocs be awarded Defendants' profits after an accounting pursuant to 35 U.S.C. § 289;

F. That Crocs be awarded treble or punitive damages, as applicable, against Defendants;

G. That the Court award Crocs pre-judgment and post-judgment interest as allowed by law;

H. That Crocs be awarded all of its litigation expenses, including without limitation, its reasonable attorney's fees and costs because Defendants' willful infringement makes this an exceptional case warranting an award of Crocs's reasonable attorney's fees and costs under 35 U.S.C. § 285, and;

I. That the Court order such other relief as it deems proper and just.

Dated: February 24, 2017

Respectfully submitted,

/s/ Michael A. Berta

Michael A. Berta

ARNOLD & PORTER KAYE SCHOLER
LLP

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Attorneys For Plaintiff, CROCS, INC.

CERTIFICATE OF SERVICE

The undersigned certifies that on the 24th day of February, the foregoing **CROCS, INC.'S SECOND AMENDED COMPLAINT** was filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Michael A. Berta _____

Michael A. Berta