

Docket No. 2022-2160

In the
United States Court of Appeals
For the
Federal Circuit

CROCS, INC.,

Plaintiff-Appellee,

v.

EFFERVESCENT, INC., HOLEY SOLES HOLDINGS, LTD.,

Defendants,

DOUBLE DIAMOND DISTRIBUTION, LTD.,
U.S.A. DAWGS, INC., MOJAVE DESERT HOLDINGS, LLC,

Defendants-Appellants.

*Appeal from the United States District Court for the District of Colorado
in Case No. 1:06-cv-00605-PAB-MDB · Judge Philip A. Brimmer.*

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**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF INTEREST

Case Number 2022-2160

Short Case Caption CROCS, INC., v. EFFERVESCENT, INC

Filing Party/Entity Double Diamond Distribution, Ltd., U.S.A. Dawgs, Inc. and Mojave Desert Holdings, LLC

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I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 03/01/2023

Signature: /s/ Matthew G. Berkowitz

Name: Matthew G. Berkowitz

FORM 9. Certificate of Interest

Form 9 (p. 2)
March 2023

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).	3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. <input type="checkbox"/> None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. <input checked="" type="checkbox"/> None/Not Applicable
U.S.A. Dawgs, Inc.	Mojave Desert Holdings, LLC	
Mojave Desert Holdings, LLC	Mojave Desert Holdings, LLC	
Double Diamond Distribution, Ltd.	Double Diamond Distribution, Ltd.	

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Yes (file separate notice; see below) No N/A (amicus/movant)

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STATEMENT OF RELATED CASES

The following appeals were previously before this Court and involved patents originally at issue in the underlying trial court action: *Crocs, Inc. v. Int'l Trade Comm'n*, 598 F.3d 1294 (Fed. Cir. Feb. 24, 2010); *Mojave Desert Holdings, LLC v. Crocs, Inc.*, 995 F.3d 969 (Fed. Cir. Apr. 21, 2021).

This appeal arises from a consolidated action before the United States District Court for the District of Colorado: *Crocs, Inc. v. Effervescent et al.*, Case No. 06-cv-00605-PAB-KMT (D. Colo.) (“-00605 case”) and *U.S.A. Dawgs, Inc. v. Snyder et al.*, Case No. 16-cv-02004-PAB-KMT (D. Colo.) (“-02004 case.”) (consolidated). Final judgment in this case was entered on July 11, 2022. Appx23. On November 29, 2022, this Court dismissed Appellants’ appeal in the -02004 case. ECF No. 19. The appeal from the district court’s decision in the -00605 case remains.

There are no other appeals pending in this action. Appellants are not aware of any other cases pending in any court or agency that will directly affect or be affected by the Federal Circuit’s decision in the appeal being briefed.

INTRODUCTION

Appellee Crocs is an admitted false advertiser. As the district court recognized, “Crocs admits that its advertisements have ‘linked’ such terms as ‘patented,’ ‘proprietary,’ and ‘exclusive’ to features, characteristics, and qualities of [its footwear] product material, and that Crocs’ goal in its Croslite messaging was to imply that its products have ‘superior characteristics, qualities, and features.’” Appx3 (internal citations omitted). But Crocs’ material (Croslite™) is not patented, and never has been. This alone should have been enough to defeat Crocs’ motion for summary judgment on Dawgs’¹ Lanham Act claim.

But, the district court nevertheless held that Dawgs’ false advertising claim under 15 U.S.C. § 1125(a)(1)(B) was barred by *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), and this Court’s subsequent decision in *Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d 1300 (Fed. Cir. 2009). The district court held that “[f]alsely claiming to have ‘patented’ something is akin to claiming to have ‘invented’ it [citing *Baden Sports*], and to plagiarizing or reverse passing off, which *Dastar* held not to be covered by the Lanham Act’s false advertising prohibition.” Appx14. The court reasoned that Dawgs’ claim was really nothing more than a false claim of authorship “i.e., that Crocs falsely

¹ “Dawgs” refers individually and/or collectively to Appellants U.S.A. Dawg’s Inc., Double Diamond Distribution, Ltd., and Mojave Desert Holdings, LLC.

claimed it created Croslite, when, in fact, Croslite is ‘merely the common ethyl vinyl acetate used by many footwear companies around the world.’” Appx14.

The district court’s decision is erroneous as a matter of law. Linking the term “patented” to product qualities and characteristics is not the same as calling it innovative—the issue addressed in *Baden Sports*. Indeed, in *Baden Sports* “the *only* thing” that plaintiff Baden was alleging was that defendant Molten falsely claimed to have innovated certain products when, in fact, it was Baden who had done the innovation. *Baden Sports*, 556 F.3d at 1308 (emphasis added). There was no dispute that the allegedly falsely advertised product was, in fact, innovative.

In this case, there is no question of “who” patented Crocs’ Croslite™ material. The falsity here is that the material was not patented *at all*. Crocs’ material was not new or non-obvious, like an actual patented material would be. And it was not exclusive to Crocs, as it would have been had it been patented.

Accordingly, the district court erroneously equated the false “patented” advertising to a dispute about authorship or “credit,” as was the case in *Baden Sports* and *Dastar*. As the evidence showed (all of which the district court ignored in its opinion), consumers understand “patented” to imply uniqueness, exclusivity, superiority, and benefits vis-à-vis competitors in terms of a range of product qualities and characteristics. Croslite™ is none of these things—it is a generic material with properties that competitors can and do replicate. Crocs’ false

advertising, therefore, gave consumers the false impression, and lent credibility to Crocs' claims, that Croslite™ had qualities and characteristics that were exclusive to Crocs and that were superior to those of competitors.

At the very least, the district court was not entitled to simply decide the meaning of "patented" as if it were a matter of law like claim construction or contract interpretation. The relevant question under the Lanham Act is what the advertising means to *consumers*, which is undisputedly a fact question. To this end, Dawgs submitted survey evidence from *both* parties' experts showing that consumers believe that "patented," in the context of the accused footwear, connotes some degree of superiority, durability, and/or other beneficial qualities. The district court refused to consider it, ruling that it was submitted too late, notwithstanding the fact that the survey evidence was developed during expert discovery and did not exist at the time of summary judgment briefing. Instead, the court simply decided on its own, and without so much as a dictionary citation, what it believed "patented" meant to consumers in the context of the accused advertising.

For these reasons and those set out below, this Court should reverse the district court's summary judgment ruling. The advertising at issue is nothing like that in *Dastar* or *Baden Sports*. Instead, it falls squarely within the four corners of 15 U.S.C. § 1125(a)(1)(B).

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331, which grants the district courts “original jurisdiction of all civil actions arising under the . . . laws . . . of the United States,” and 28 U.S.C § 1338, which provides jurisdiction for “any civil action arising under any Act of Congress relating to patents.” On September 14, 2021, the United States District Court for the District of Colorado granted summary judgment on Dawgs’ Lanham Act counterclaims under 15 U.S.C. § 1125(a)(1)(B)² against Crocs. Appx1-22. In the same Order, the district court denied Dawgs’ motion for leave to supplement its summary judgment opposition with new survey evidence from both parties, developed after the original summary judgment briefing was completed, showing how consumers understand the term “patented.” Appx15-17. On October 11, 2021, Dawgs requested, *inter alia*, reconsideration of the summary judgment decision. Appx1884-1886. On July 1, 2022, the district court denied the motion for reconsideration. Appx1966-1981. On July 12, 2022, the district court issued its only Final Judgment in the action, disposing of all claims between the parties, including Crocs’ separate patent infringement claims against Dawgs. Appx23.

² Dawgs may refer to 15 U.S.C. § 1125(a) as Section § 43(a) throughout this Brief.

Dawgs timely filed its Notice of Appeal on July 12, 2022. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1295(a)(1).

STATEMENT OF THE ISSUES

Whether the district court—which found that “Crocs admits that its advertisements have ‘linked’ such terms as ‘patented,’ ‘proprietary,’ and ‘exclusive’ to features, characteristics, and qualities of the product material, and that Crocs’ goal in its Croslite messaging was to imply that its products have ‘superior characteristics, qualities, and features’”—erred in granting summary judgment in favor of Crocs on Dawgs’ false advertising counterclaims under Section 43(a)(1)(B) of the Lanham Act.

STATEMENT OF THE CASE

Dawgs files this appeal from the District Court for the District of Colorado’s Order granting summary judgment in favor of Crocs, dismissing Dawgs’ false advertising claims under 15 U.S.C. § 1125(a)(1)(B). Appx1. The court erred in holding that, as a matter of law, Dawgs’ false advertising claims were outside the coverage of the Lanham Act and foreclosed by *Dastar* and *Baden Sports*. Appx13-15.

I. THE ADVERTISING AT ISSUE

Crocs and Dawgs compete in the molded footwear business. Appx984. From its inception in 2002, Crocs has advertised that its footwear products are

made of a “patented” (and sometimes “proprietary”) closed-cell resin, which it later branded as “Croslite.” Appx3. Per at least one of Crocs’ statements, “All Crocs shoes feature Croslite material.” Appx1429. Crocs’ advertising, which has taken various forms over the years, has consistently linked the alleged “patented” and “proprietary” nature of the closed-cell resin material, Croslite™, to various product qualities. Appx3. The following are exemplary:

- “The special Patented Closed Cell Resin (PCCR) warms and softens with your body heat and molds to your feet.” Appx1449.
- “We’ve discussed our Proven comfort from our patented Croslite™ material to certifications with the U.S. Ergonomics Council, American Podiatric Medical Associations, and others.” Appx1451.
- A Crocs founder and executive wrote to a customer: “The reason the shoes are so comfortable is that they are made of a patented ‘closed cell’ resin. This resin has many positive aspects including the fact that bacteria and fungus can’t stick to the material so they won’t get that bad ‘boat shoe’ smell.” Appx1457.
- Crocs’ website stating shoes are “Built for your job with the comfort of our patented Croslite™ material.” Appx601.
- Crocs Investors Press Release stating that “The Crocs @work™ collection is built with the patented Croslite™ material to provide all-day, on-the-job comfort.” Appx603.

Internally, Crocs emphasized the importance of differentiating the Croslite™ material from competitors’ materials as a way to sell its products. For example, Crocs’ former Senior Vice President of Global Sales and Marketing stated: “Our hope is to link Croslite to the brand and position it as a superior product/material . .

..” Appx1437. Crocs wanted consumers to believe that Croslite™ was technologically advanced, like GORE-TEX and Lycra. Appx1441. Numerous other documents and communications suggest the same, emphasizing the importance of the alleged “unique,” “patented” or “proprietary” nature of the material to drive an image of superiority. *See, e.g.*, Appx1483 (Crocs’ former General Counsel states, “The unique Croslite material is one of many key differentiators that enable Crocs to successfully market its footwear products to a broad range of consumers worldwide to set itself apart from imitators”).

As it turns out, Crocs’ advertising was always false. *See* Appx493 (discussing Crocs’ SEC filings, in which Crocs disclosed that it has never “attempted to seek patent protection for the formula . . .”). And Crocs has admitted as much. *See* Appx1548 (“The documents referenced in Paragraph 47 [of Appx493] speak for themselves.”).

The effect of Crocs’ false advertising on consumers was (and still is) profound. Over time, consumers were misled into believing that Crocs’ shoe material was better than comparable shoes on the market because it was advertised as being made of a superior, patented, proprietary, and/or exclusive material that no other competitor could use. The following examples illustrate how consumers and the media alike were misled into believing that Crocs’ Croslite™ material was superior, patented, or proprietary:

- One consumer asked, in a Quora.com post: “Are fake crocs as good as real crocs?” Appx1461. Another consumer responded: “No. Fake Crocs are not as good as the real brand. There are many cheap brands knocking off the look of the original Crocs beach clog, but they are not made from the same durable odor reducing and comfortable patented Croslite material.” Appx1461.
- In an Amazon.com customer review, a customer wrote: “I prefer Crocs to their \$1 to \$7 knock-offs. The patented Croslite material of Crocs conform to your feet after a day or two, and is much more durable than the material used in inexpensive knock-offs.” Appx1465.
- One Crocs customer wrote, in a Facebook.com post: “the patented technology that you see in the inside insert is what makes these shoes so comfortable . . .”). Appx1467.
- On an open forum website, “DISboards.com,” one customer asked: “Are real crocs worth the money?” Another consumer responded, “Real crocs are made of a special material that is patented, they aren’t just rubber, so I think that makes a difference.” Appx1469.
- One customer wrote, in a TripAdvisor.com forum: “I walked on wet tile, wet cement, hot sand, and even floated them in the pool. Mine are crocs brand, which I believe are patented.” Appx1475.
- In an internal Crocs email, one employee forwarded an article stating “[b]elow is an article in yesterday’s Finger Lake[s] Times (circ. 12,000) located on the west side of upstate New York. The journalist captures the buzz of CROCS and does an excellent job of differentiating between the materials used in knock-offs vs.[] CROCS.” Appx595.
 - The Finger Lakes Times article stated that “[t]he biggest difference between Crocs and their distant cousins are their make-up. The Boulder, Colo.-based company uses a patented closed-cell resin. The compound allows Crocs to stay free of bacteria and foot odor and makes them easy to clean” Appx597.

Furthermore, both parties' experts conducted consumer surveys (after fact discovery and after the briefing on Crocs' summary judgment was complete) testing the meaning of the term "patented" amongst consumers. The results show that many actual and/or likely Crocs consumers understood the term "patented" to imply superior product qualities and characteristics. Appx1661-1664. For example, in the survey conducted by Dawgs' expert, Dr. Lynne Weber, consumers were asked the following question:

Q. 13. Suppose that when you were considering the purchase of this pair of Crocs, you learned that the material was patented, i.e., suppose it had been described as:

"Patented material which softens as it warms to better conform to your feet."

"What advantages or disadvantages, if any, do you perceive because the material is "patented"?"

Appx1661; Appx1692. In response, numerous survey participants stated that they perceived advantages related to product characteristics, attributes, and/or qualities. See Appx1685-1687. The following responses are exemplary:

- **Mold to my fee[t] better/fits better/better comfort/softer.** Answers included: (1) "it should fit better by conforming to the shape of your foot"; (2) "I think it makes it more customized to my feet, which makes them fit perfectly"; (3) "better comfort"; (4) "Fit better"; (5) "Keep the shoes from rubbing blisters"; and (6) "I perceive that it is softer than the average foot wear."

- **Unique, special.** Answers included: (1) “I would think the material is special and proprietary therefore providing a special level of comfort not available anywhere else”; (2) “Unique, knock off ones don’t feel the same as the real ones”; (3) “no other brands have this type of material”; (4) “Makes me think it is unique”; (5) “that it’s a one of a kind product [sic]”; and (6) “The advantage of patented is that it makes the product seem special and unique, that is, you won’t find that feature in competitive footwear.”
- **Superior to other brands.** Answers included: (1) “I love the material of Crocs and by that brand for its patented material;” (2) “they are made of better material than other ones”; (3) “the material is of better quality”; (4) “makes me feel its better quality”; (5) “The material being patented makes me more likely to buy from Crocs because I know I cannot get that exact comfort level just anywhere”; (6) “Patented sounds fancy and premium”; and (7) “A material patented [sic] could assure more quality.”
- **Technologically advanced/innovative.** Answers included: (1) “It is a new material having some new properties”; (2) “A patent suggests that the technology is new and demonstrably separate from other brands’ offerings”; and (3) “If a material is patented then I think it would have advantages since they have come up with a new or better way to help conform and comfort your feet.”
- **Last longer, more durable.** Answers included: (1) “they’re long lasting & comfortable”; (2) “It is more durable than cheap sandals”; and (3) “something that should be high quality and durable.”
- **Tested/trustworthy.** Answers included: (1) “It has been rigorously tested in a lab”; (2) “Patented means the materials are tested and approved”; (3) “There has been a lot of research and testing done on the material”; (4) “Trustworthy and original”; (5) “I believe if the material is patented he’s going through rigorous studies and is more conditioned to do a better job for their products so I’d be more inclined to want to purchase”; and (6) “The advantage of this is that it is more formal and feels like it has been researched and proven.”

Appx1662; see Appx1685-1688.

Crocs' survey expert, Sarah Butler, obtained similar results. Appx1663. Specifically, some test group participants were shown an advertisement describing Crocs' shoes as made of "patented Croslite™" material. Appx1663; Appx1697-1698. They were then asked to indicate which of several features—including, for example, price and color—were important to them (selecting all that apply). Appx1663; Appx1718-1719. 21.3% of participants indicated that "Patented Croslite™" material was important. Appx1663. These 21.3% of respondents were then asked, "What does Patented Croslite™ material mean to you"? Appx1663; Appx1719. Participants' responses included the following:

- "lightweight and indestructible"
- "yeh [sic] it is very high quality"
- "it is a famous brand so I like that it has the patented croslite material. It speaks quality to me."
- "It means it is high quality and is a good value."
- "It means comfort which is important."
- "because they are durable but comfortable at the same time."
- "This material makes the crocs lightweight, ergonomic and odor resistant!"
- "It means they feel goof [sic] on my feet and they protect from bad odor"
- "does not wear out or break down"
- "waterproof and sturdy"
- "It's a light weight material that provides comfort to your feet."
- "very lightweight but durable"

Appx1663.

Moreover, Crocs' expert obtained similar results from a second test group that was shown "proprietary" messaging instead of "patented." Appx1664.

II. THE LAWSUIT AND CURRENT PROCEDURAL POSTURE

The parties' dispute began on April 3, 2006, when Crocs sued Double Diamond Distribution Ltd. (and several other shoe distributors) and, later, U.S.A. Dawgs, LLC, for alleged patent infringement, in both the district court and in the United States International Trade Commission. *Crocs, Inc. v. Effervescent, Inc.*, Civ. Action No. 06-cv-00605-PAB-KMT (D. Colo. Apr. 3, 2006); *In the Matter of Certain Foam Footwear*, 71 Fed. Reg. 27514-15 (May 11, 2006).

In between various procedural detours³ and amended pleadings, Dawgs filed its operative counterclaim against Crocs under the Lanham Act. Appx469. As Dawgs alleged in its pleadings, "Double Diamond and USA Dawgs have been manufacturing and selling a variety of footwear, including molded clog footwear in Canada since 2005 and in the United States since 2006." Appx495.

Dawgs' counterclaim alleged that Croslite™ "was merely a run-of-the-mill common rubber-like copolymer EVA used by many footwear companies, including Double Diamond, USA Dawgs," and others. Appx493. "Crocs has consistently and persistently falsely claimed in promotional materials over the

³ Those procedural detours are not relevant to this appeal, but are generally set forth in Dawgs' brief before this Court filed on December 9, 2019 in Appeal No. 20-1167. *U.S.A. Dawgs, Inc. v. Crocs, Inc.*, No. 20-1167, 2020 WL 2111215, at *6-25 (Fed. Cir. 2020) (summarizing procedural history).

course of thirteen years, that Crocs owns patent rights in the ‘Croslite material’, including the statement on its website that [Crocs are] ‘[b]uilt for your job with the comfort of our patented Croslite™ material’” Appx494 (incorporating by reference Appx599). The counterclaim further alleged that “Crocs actively misled its own customers to believe that Croslite was patented and therefore contained some unique or special properties, when it did not.” Appx493. Specifically, “Crocs’ promotional materials touted Croslite was unique enough to be ‘patented’, but in truth Crocs never sought a patent. Nor was Croslite ‘proprietary’ or ‘exclusive’—as Crocs has claimed—when Crocs just copied it from FinProject N.A. Crocs perpetuated this decade-old fraud against its own consumers . . . and in turn denigrate[d] the foam materials its competitors used” Appx481. And Dawgs provided support for these allegations with specificity, incorporating exhibits by reference in its pleading. *See, e.g.*, Appx602-604 (Crocs’ company news release publicizing that “[t]he Crocs @ Work™ collection is built with the patented Croslite™ material”); Appx605-606 (Crocs touting its “proprietary Croslite™ material”); Appx607-608 (Crocs’ website claiming “All Crocs™ shoes feature Croslite™ material, a proprietary, revolutionary technology”).

III. THE ARGUMENTS AND DECISIONS BEFORE THE DISTRICT COURT

A. Crocs' Motion for Summary Judgment

On November 25, 2020, Crocs moved for summary judgment on Dawgs' counterclaims under the Lanham Act. Appx1393.

Crocs did not dispute that the terms "patented," "proprietary" or "exclusive" are false when referring to Croslite™. Rather, Crocs argued that, as a matter of law, the Lanham Act cannot reach claims premised on false statements that products are "patented," "proprietary," and "exclusive," no matter the context of the advertising, no matter the effect on a competitor's products, and no matter how consumers actually understand those terms. Appx1393-1395, Appx1398-1399.

Without citing any evidence, Crocs argued that the "plain meaning" of these terms were centered on "authorship, inventorship, or ownership of rights in the Croslite material." Appx1398-1399. Accordingly, Crocs argued that Dawgs' Lanham Act claims were barred under barred by *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003) and its progeny. Appx1398-1399.

B. Dawgs' Response to Summary Judgment

On December 16, 2020, Dawgs opposed Crocs' motion for summary judgment ("Dawgs' Opposition"). Appx1409.

Dawgs disputed Crocs' characterization of Dawgs' Lanham Act claims and explained that Crocs improperly linked the false "proprietary," "exclusive" and

“patented” narrative to product qualities. Appx1411. Dawgs referenced its operative counterclaim to explain that its allegations were directed to Crocs’ intentional use of false statements (including that Croslite™ was “patented”) to bolster the credibility of its product superiority claims. Appx1411-1412. The following arguments are exemplary:

Crocs has, for much of its existence, falsely advertised Croslite as patented, proprietary, and/or exclusive **in order to create the false impression** that specific qualities and characteristics of its shoe material (including, for example, odor and slip resistance, comfort, and warming and softening qualities) are superior to the shoe materials used by its competitors. Crocs’ advertisements explicitly state as much. For example, a 2013 Crocs press release states that “The Crocs @ Work collection is **built with the patented Croslite material to provide all-day, on the job comfort** . . . These work shoes are also odor-resistant and easy to clean”)

* * *

Worse, Crocs knew that this advertising was false, but nonetheless used it to build the brand image and drive a price premium. *See* Berkowitz Decl., Ex. E (“Our hope is to link Croslite to the brand and **position it as a superior product/material**”). Crocs wanted consumers to believe that Croslite was technologically advanced, like GORE-TEX and Lycra. *See* Berkowitz Decl., Ex. F. **This false advertising created a reputation of superiority for Crocs and Croslite that persists to this day, and Crocs continues to drive a price premium.**

* * *

[Crocs] claimed Croslite had unique characteristics that its competitors could not offer. As late as June 2016, Crocs’ promotional materials touted that Croslite was **unique**

enough to be ‘patented’ . . . Crocs perpetuated this decade-old fraud against its own consumers to drive brand loyalty, increase sales, and in turn denigrate the foam materials its competitors used, thereby depriving them of sales.

Appx1409-1412 (emphases added) (internal citations omitted).

In addition to referencing its Second Amended Complaint and Counterclaim, Dawgs pointed to its interrogatory responses (attached as an exhibit), which further detailed Dawgs’ false advertising theory with supporting evidence. Appx1414; Appx1499-1506 (“Crocs used the terms patented, proprietary, and/or exclusive to create the false impression that the nature, characteristics, and/or quality of the Croslite material was superior to that of its competitors . . .”).

Dawgs then referenced, cited, and attached as exhibits several documents showing that Crocs’ advertisements linked the terms “patented” “proprietary” and “exclusive” to the material’s “soft, comfortable, lightweight, non-marking and odor-resistant qualities.” Appx1412-1414; Appx1449 (Crocs.com advertisement stating “CROCS brand shoes are a new breed of shoe that mixes the comfort of clogs with a space age material that has incredible benefits. The Patented Closed Cell Resin (PCCR) warms and softens with your body heat and molds to your feet.”); Appx1451-1452; Appx1454 (“CROCS Key Messaging” document stating “CROCS shoes are made up of Croslite, a proprietary closed cell resin. CROCS resin is a unique, lightweight, slip resistant, non-marking” material); Appx1457.

Additionally, Dawgs submitted evidence that it was Crocs' *goal* to create an image that its material has superior characteristics, qualities, and features.

Appx1413; Appx1454 (“What differentiates CROCS from other competitors . . . [o]nly CROCS shoes are made of Croslite . . . the unprecedented benefits of CROCS resin can only be found in CROCS shoes.”); Appx1482-1484; Appx1487; Appx1490.

Finally, Dawgs cited evidence showing that, as a result of Crocs' false advertising, consumers have been misled into believing Crocs' material has various superior qualities. Appx1413; Appx1431; Appx1433; Appx1435; Appx1459; Appx1461; Appx1465; Appx1467; Appx1469; Appx1475.

Dawgs argued that *Dastar* and its progeny simply stand for the proposition that false designations of authorship, and misrepresentations about the intellectual origin of a product, are not, by themselves, within the literal scope of the Lanham Act. Appx1411, Appx1415-1421. Dawgs explained that Crocs' advertising was nothing like that in *Dastar* or *Baden Sports*, and that the *Dastar* Court explicitly stated that its holding did not extend to misrepresentations relating to the nature of a product itself. Appx1416 (internal citations omitted). In support, Dawgs cited numerous district court cases distinguishing *Dastar* and holding that misrepresentations about whether a company was the “first” to develop technology

and whether a purported “innovation” had uniquely superior characteristics, are actionable under the Lanham Act. Appx1419-1420.

C. Dawgs’ Motion For Leave To File A Supplemental Opposition

On June 30, 2021, Dawgs moved for leave to supplement its opposition based upon newly-developed survey evidence from both parties’ experts. Appx1658. Specifically, Dawgs presented evidence from its expert, Dr. Lynne Weber, that actual or likely Crocs consumers perceived certain advantages from the term “patented” as it relates to Crocs’ material, including, but not limited to, better comfort, better quality, uniqueness, technological advancements, and durability. Appx1661-1662. Dawgs also presented evidence that Crocs’ expert, Sarah Butler, obtained similar results from participants in her own survey, which asked certain respondents “What does Patented Croslite™ material mean to you?” Appx1663. Responses included, but were not limited to, that the material is lightweight, indestructible, higher quality, durable, comfortable, waterproof, sturdy, and protective from bad odor. Appx1661-1663.

D. The Court’s Decision on Summary Judgment

The district court found that “Crocs admits that its advertisements have ‘linked’ such terms as ‘patented,’ ‘proprietary,’ and ‘exclusive’ to features, characteristics, and qualities of the product material . . . and that Crocs’ goal in its Croslite messaging was to imply that its products have ‘superior characteristics,

qualities, and features.” Appx3. The district court accepted, however, Crocs’ characterization of Dawgs’ counterclaims and its unsupported definition of “patented,” finding that “Dawgs has alleged nothing more than a false designation of authorship, i.e., that Crocs falsely claimed it created Croslite, when, in fact, Croslite is ‘merely the common ethyl vinyl acetate used by many footwear companies around the world.’” Appx13. Furthermore, the district court held that “Dawgs did not mention [in its pleadings] anything about Croslite being soft, comfortable, lightweight, odor-resistant, or nonmarking” and thus failed to plead an actionable Lanham Act allegation. Appx12.

The district court overlooked significant portions of Dawgs’ counterclaims, all of which were cited in the parties’ briefing (including, for example, Appx481), specifically alleging that Crocs’ advertising touted its material as unique. The court also overlooked the exhibits cited therein, including, for example, Appx603, a Crocs press release stating “The Crocs @ Work™ collection is built with the patented Croslite™ material to provide all-day, on-the-job comfort,” and Appx608, stating “All Crocs™ shoes feature Croslite™ material, a proprietary, revolutionary technology that gives each pair of shoes the soft, comfortable, lightweight, non-marking and odor-resistant qualities[.]”

The district court also overlooked the evidence referenced and cited in Dawgs’ statement of additional facts, and the exhibits (including Crocs-produced

documents, Dawgs-produced documents, and interrogatory responses detailing Dawgs’ Lanham Act theory) cited therein. Appx1411-1415. In a footnote, the district court agreed with Crocs’ objection that certain of these exhibits were inadmissible, and summarily rejected the exhibits, finding that the evidence “cannot create a genuine issue of material fact to overcome summary judgment.” Appx13.

Furthermore, after acknowledging that “neither the Supreme Court in *Dastar* nor the Federal Circuit in *Baden Sports* considered the use of the word ‘patented,’” the district court simply interpreted the term on its own, and without any evidentiary citation, holding that “[f]alsely claiming to have ‘patented’ something is akin to claiming to have ‘invented’ it . . . [and] to plagiarizing or reverse passing off, which *Dastar* held not to be covered by the Lanham Act’s false advertising prohibition.” Appx14. The district court did not consider Dawgs’ evidence of how customers understand the accused advertising, including both direct evidence (such as consumer reviews) and the survey evidence from both parties. Appx17.

E. Dawgs’ Motion for Reconsideration

On October 11, 2021, Dawgs sought reconsideration of the district court’s summary judgment order (the “Motion for Reconsideration”). Appx1869.

Dawgs argued that the district court had taken a narrow view of Dawgs’ Lanham Act claims and counterclaims and that, by overlooking key allegations

cited in the parties' summary judgment briefing, the court found the present facts akin to those in *Baden*, when the facts and issues in this case are very different. Appx1871-1874.

F. The Court's Decision on Reconsideration

The district court denied Dawgs' Motion for Reconsideration. Appx1966. This time, however, the district court addressed some of the allegations in Dawgs' counterclaim (as discussed above) but found that they still failed to do more than allege misrepresentations about authorship. Appx1973-1978. The court also again failed to explain its admissibility ruling as to certain of the exhibits Dawgs provided in summary judgment ruling.

SUMMARY OF THE ARGUMENT

The district court misapplied *Dastar* and *Baden Sports* in granting Crocs' motion for summary judgment. The advertising in each of those cases was expressly directed to the intellectual origin of a product, and not the nature, qualities, or characteristics of the goods, as it is here. In other words, the questions in *Dastar* and *Baden Sports* were about whether an action could be sustained under the Lanham Act where a company misrepresents the source of an innovation or copyrighted work, *i.e.*, "who" came up with the idea for a product or work of art. Here, Croslite™ was never "patented"—not by Crocs and not by anybody else. Croslite™ is little more than a common material that all competitors can and do

use; there is nothing unique or differentiated about Croslite™ that would justify Crocs' advertising. Crocs' advertising, which, per the district court, admittedly linked the term "patented" to product qualities and characteristics, lent credibility to its product attribute claims, and misled consumers into believing that Crocs' products were superior, and were the *only ones* that had, or legally could have, the advertised properties. Appx3.

Dastar involved Section 43(a)(1)(A) of the Lanham Act (which is not at issue here) and concerned the question of whether the word "origin" in the statute refers only to the manufacturer, or whether it also covers the intellectual creator of the underlying copyrighted work that *Dastar* copied. *Dastar*, 539 U.S. at 30-35. The Court held that "origin" in the statute refers only to the manufacturer, and that the particular intellectual origin of a product is "typically of no consequence to purchasers." *Id.* at 32-33. The Court, however, was clear that its ruling did not touch misrepresentations about product qualities, explaining that had the Defendant given purchasers the impression that the product at issue was quite different from the original source, then the plaintiff may have had "a cause of action—not for reverse passing off under the 'confusion . . . as to the origin' provision of 43(a)(1)(A), but for misrepresentation under the 'misrepresents the nature, characteristics [or] qualities' provision of 43(a)(1)(B)." *Id.* at 38.

Baden Sports is fundamentally no different than *Dastar*. It involved Section 43(a)(1)(B) of the Lanham Act, but equally involved an alleged misrepresentation about the source of a product's innovation. *Baden Sports*, 556 F.3d at 1307-08. In other words, in *Baden Sports*, there was no dispute about *whether* the advertised product was actually innovative; to the contrary, plaintiff Baden admitted that it was innovative, arguing only that defendant Molten had misrepresented *who* innovated it. *Id.* at 1308. This Court held that the answer is “no,” and that “to allow Baden to proceed with a false advertising claim that is fundamentally about the origin of an idea, is contrary to the Ninth Circuit’s interpretation of *Dastar*.” *Id.*

The facts in this case should have led to a different result than in *Baden Sports*. Crocs advertised its shoes as being made of a “patented” material and, as the district court already found, admittedly “linked such terms as ‘patented,’ . . . to features, characteristics, and qualities of the product material.” Appx3. Crocs’ goal in its Croslite™ messaging was to imply that its products have superior characteristics, qualities, and features. Appx1437 (The goal was to “position it as a superior product/material due to all these magical elements to it”). Accordingly, this is not a question of *who owns* a patent on Croslite™; there simply is *no patent at all on Croslite™*, and there never was. Croslite™ is functionally no different than a common material used by all competitors such as Dawgs. And, the

evidence in the case, which the district court never discussed, demonstrates that consumers view “patented” products as superior in numerous ways to their non-patented counterparts. Appx1413-1414; Appx1661-1663; Appx1683-1693 (Dawgs’ survey expert’s findings); Appx1694-1730 (Crocs’ survey expert’s findings). Indeed, that view was always what Crocs intended to leverage. Appx1441 (“Croslite . . . one of many olefin foamed resins . . . it can be much more. Most people still do not know yet what EVA foam is. They could learn Croslite instead of EVA . . . it is up to us.”).

Accordingly, the district court erred in holding on summary judgment that “as in *Baden Sports*, Dawgs has alleged nothing more than a false designation of authorship[.]” Appx14. To the contrary, this case has nothing to do with authorship; this case is about Crocs’ linkage of false terms like “patented,” “proprietary” and “exclusive” to build credibility for its product attribute claims, and to differentiate Croslite™ in the minds of consumers from the material offered by competitors. Appx3. This is what Dawgs alleged in its counterclaim, it is what the evidence shows, and it is consistent with the district court’s factual findings that Crocs “linked” its advertising to product qualities. Appx3.

Even setting aside the clear evidence submitted, the district court was not entitled to simply decide the meaning of the term “patented” to consumers, in the context of the advertising, as a matter of law. Appx14. It is well-established that

the meaning of advertising to consumers is a question of fact, and to this end, all of the evidence demonstrates that consumers understood “patented” to imply superiority.⁴ See *Bell v. Publix Super Mkts., Inc.*, 982 F.3d 468, 479 (7th Cir. 2020) (“Regardless of the [false advertising] theory advanced by the plaintiff . . . ‘It is not for the judge to determine, based solely upon his or her own intuitive reaction, whether the advertisement is deceptive.’ . . . Rather, the question is ‘what does the person to whom the advertisement is addressed find to be the message? That is, what does the public perceive the message to be?’”) (internal citations omitted); *Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc.*, 653 F.3d 241, 254-55 (3d Cir. 1993); *Berner Int’l Corp. v. Mars Sales Co.*, 987 F.2d 975, 982-84 (3d Cir. 1993); *Abdallah v. Pileggi*, No. 97-1581, 1998 WL 180491, at *3 (Fed. Cir. 1998).

After acknowledging that “neither the Supreme Court in *Dastar* nor the Federal Circuit in *Baden Sports* considered the use of the word ‘patented,’” the district court should have considered the plain meaning of the term, direct evidence, including consumer reviews, and the parties’ respective survey evidence, which Dawgs submitted via a motion to supplement its opposition papers.

Appx14. For example, one survey participant wrote, “The material patented [sic]

⁴ The district court also ignored the plain meaning of “patented,” which, by definition, is novel, non-obvious, and exclusive to the patent owner.

could assure more quality.” Appx1662. Another wrote, “Patented means the materials are tested and approved.” Appx1662. Other examples abound. Appx1661-1663; Appx1683-1693; Appx1694-1730. But the district court ignored all of it, and instead decided as a matter of law that “patented” means nothing other than a source of authorship. Appx14. The decision should be reversed.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews a “trial court’s grant of summary judgment *de novo*, with all justifiable factual inferences being drawn in favor of the party opposing the motion.” *Mann v. United States*, 334 F.3d 1048, 1050 (Fed. Cir. 2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). “Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Id.*

Moreover, this Court will “apply the law of the regional circuit on non-patent issues.” *Baden Sports*, 556 F.3d at 1304 (citing *Research Corp. Techs. v. Microsoft Corp.*, 536 F.3d 1247, 1255 (Fed. Cir. 2008)). The Tenth Circuit “review[s] a district court’s grant of summary judgment *de novo*, applying the same legal standard used by the district court, drawing all reasonable inferences in favor of the nonmoving party[.]” *Hull v. IRS*, 656 F.3d 1174, 1177 (10th Cir. Aug. 31, 2011).

II. CROCS' FALSE ADVERTISING IS ACTIONABLE UNDER THE LANHAM ACT

The advertising in this case is actionable under the Lanham Act because Crocs misrepresented the nature, qualities, and characteristics of the material (Croslite™) in its footwear. The false advertising lent credibility to Crocs' product attribute claims and led consumers to believe that Crocs' material was unique, superior to competitors, and had qualities that, given the exclusive nature of a "patent," no other competitor could provide. That is what it means to claim something is patented. Accordingly, the district court erred in granting Crocs' motion for summary judgment.

A. *Dastar* and Its Progeny Are Limited to Misrepresentations About the Authorship or Intellectual Origin of a Product or Service; They Do Not Address False Patent Claims.

None of *Dastar*, *Baden Sports*, or *Kehoe Component Sales* is on point to the instant dispute because these cases only concern misrepresentations about authorship.

Dastar was effectively a "plagiarism" case. *Dastar*, 539 U.S. at 39. The defendant (*Dastar*) purchased tapes of an original TV series (which were in the public domain), made some minor modifications to them, including a new opening sequence, credit pages, and final closing, and sold those slightly revised tapes under its own name without any attribution to the original series creator. *Id.* at 24. The issue before the Supreme Court was whether *Dastar* had made a "false

designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion . . . as to the origin . . . of his or her goods” under Section 43(a)(1)(A) of the Lanham Act. *Id.* at 31.

Framed more precisely, there was no dispute that Dastar itself actually manufactured, produced, and sold the physical copies of the modified version of the TV series; the question was whether the word “origin” in the statute refers only to the manufacturer, or whether it also covers misrepresentations about the *intellectual* creator of the underlying work that Dastar copied. *Id.* (“If ‘origin’ refers only to the manufacturer or producer of the physical ‘goods’ that are made available to the public (in this case the videotapes), Dastar was the origin. If, however, ‘origin’ includes the creator of the underlying work that Dastar copied, then someone else (perhaps Fox) was the origin of Dastar’s product.”).

The Supreme Court held that the “phrase ‘origin of goods’ is incapable of connoting the person or entity that originated the ideas or communications that ‘goods’ embody or contain. Such an extension would not only stretch the text, but it would be out of accord with the history and purpose of the Lanham Act and inconsistent with precedent.” *Id.* at 32. The Court reasoned that for some products, including “communicative product[s],” such as the TV series at issue, consumer concern may be more focused on the identity of the creator of the story it conveys. *Id.* at 33. For instance, the “purchaser of a novel is interested . . . in the

identity of the creator of the story [the author]” more so than the identity of the producer of the physical book. But, construing the Lanham Act to cover intellectual misrepresentations about the identity of an author would conflict with copyright laws, which address the right to copy without attribution. *Id.* at 33-34.

The Court was clear, however, that its holding was limited solely to misrepresentations of intellectual content. *Id.* at 36. Specifically, the Court explained that if “the producer of a video that substantially copied the [original] series were, in advertising or promotion, to give purchasers the impression that the video was quite different from that series, then one or more the respondents might have a cause of action—not for reverse passing off under the ‘confusion . . . as to the origin’ provision of 43(a)(1)(A), but for misrepresentation under the ‘misrepresents the nature, characteristics [or] qualities’ provision of 43(a)(1)(B).” *Id.*

Baden Sports was based on fundamentally the same “plagiarism” facts as *Dastar*. Like *Dastar*, the *Baden Sports* decision focused *solely* on advertising relating to the creative origin of the falsely advertised product. *Baden Sports*, 556 F.3d at 1307-08. Indeed, this court explicitly limited its ruling and analysis to advertising related to “authorship” of a product idea, which it held was “not a nature, characteristic, or quality” under Section 1125(a)(1)(B) of the Lanham Act. *Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d 1300, 1307 (Fed. Cir. 2009). *Id.*

Plaintiff Baden Sports and Defendant Molten USA, Inc., were competitors in the high-end basketball business. *Baden*, 556 F.3d at 1302. In the underlying district court action, Baden accused Molten of patent infringement and false advertising for its use of Baden technology, which Molten advertised as “innovative,” “proprietary,” and “exclusive.” *Id.* at 1303. The district court granted Molten’s motion for summary judgment as it concerned “proprietary” and “exclusive,” holding that those terms, *in the context of the advertising at issue*, were directed to authorship and creative origins, and thus precluded by *Dastar*.⁵ *Id.* The district court allowed Baden to pursue its claim with respect to advertising of the word “innovative,” which the district court held could be related to the “nature, characteristics, or qualities of the basketballs themselves.” *Id.* Baden was successful at trial and was awarded more than \$8 million for Molten’s false advertising. *Id.* at 1304.

Addressing just the “innovative” advertising, the Federal Circuit reversed, citing *Dastar*, and held that in actual effect Baden’s arguments on appeal and at trial were simply that Molten misrepresented authorship and intellectual origin of

⁵ The “proprietary” and “exclusive” advertising was not before the Federal Circuit on appeal, and there is no indication that Molten used those terms in the manner that Crocs did, *i.e.*, to differentiate the qualities and characteristics of the products. *See Baden*, 556 F.3d at 1303, 1306-07.

the technology, and that this was not a “nature, characteristic or quality” of the product. *Id.* at 1307. The facts and history of the case factored heavily into the Court’s holding. Specifically, “throughout the trial, Baden steadfastly argued that Molten’s advertisements were false precisely because Molten was not the *source* of the innovation.” *Id.* (emphasis added). The Court confirmed this with Baden’s counsel during oral argument:

The Court: “So the only thing you’re really saying they offended is by saying, ‘We, Molten, made these innovations’?”

Counsel for Baden: “*That’s correct.* What we’re saying is Baden developed this technology.”

Id. at 1308 (emphasis in original). Further, Baden “waived any [] argument about novelty or newness, as Baden [] limited its arguments to Molten’s claims to be the innovator of dual-cushion technology.” *Id.* at 1307.

In other words, unlike the case at bar, there was no dispute about *whether* the advertised basketballs were, in fact, innovative; the dispute was just about *who* innovated them. *See id.* at 1306-08. Given the limited scope of Baden’s arguments and the advertising at issue, the Court concluded that “to allow Baden to proceed with a false advertising claim that is fundamentally about the *origin of an*

idea, is contrary to the Ninth Circuit’s interpretation of *Dastar*.” *Id.* at 1308 (emphasis added).⁶

The district court here also relied on *Kehoe Component Sales Inc. v. Best Lighting Prods., Inc.*, but that case was no different than *Dastar* or *Baden Sports*, and again just addressed misrepresentations of the intellectual origins of a product. 796 F.3d 576 (6th Cir. 2015). More specifically, it was undisputed in *Kehoe Component Sales* that the false advertising was that defendant in the case (Pace) manufactured the physical products at issue. *Id.* at 587. The *Kehoe Component Sales* court simply held, as in *Dastar*, that the origin of the “initial ideas” for the products was irrelevant and not covered by the letter of the Lanham Act. *Id.* at 587-88.

To Dawgs’ knowledge, the district court’s summary judgment ruling in favor of Crocs stands alone—no other court has ever expanded the logic of *Dastar* and *Baden Sports* to false claims about a product being “patented,” particularly in the circumstances here, where the advertising at issue explicitly linked the term “patented” to unique product attributes. Appx3; Appx13-14. To the contrary, several other courts have recognized the distinction between the type of advertising

⁶ The court further explained that it was not addressing any claim about “novelty or newness” of the falsely advertised product—Baden had waived that argument on appeal. *Id.* at 1307.

at issue in *Dastar* and *Baden Sports* and advertising going to the nature, characteristics, or qualities of a product, as is the case here.

For example, in *Zobmondo Entertainment LLC v. Imagination Int'l Corp.*, the court denied a motion to dismiss where the defendant was accused of falsely and deceptively advertising its board game as the “first, and original, board game based on the ‘would you rather concept.’” No. CV-09-02235-ABC, 2009 WL 8714439, at *3 (C.D. Cal. June 23, 2009). The court held that *Dastar* was “not directly on-point” because the plaintiff’s claim was based on Section 1125(a)(1)(B) concerning the “nature, characteristics, [and] qualities” of the product, and the defendant’s advertising (arguably) conveyed that its own game was the first to be made. *Id.* at *3-4.

Similarly, in *Blue Spike, LLC v. Texas Instruments, Inc.*, the court denied the plaintiff’s motion to dismiss the defendant’s Lanham Act counterclaims, which alleged that the plaintiff made false and misleading statements that it was “the ‘first to create’ content ‘fingerprinting’ technology.” *See* No. 6:12-cv-499, 2014 WL 11848751, at *4 (E.D. Tex. July 25, 2014). The court distinguished *Baden Sports* on the grounds that it “involved an idea and authorship, issues not involved here.” *Id.* Rather, the court held that plaintiff’s advertising (i) “connote[s] to the public who was the first to use the technology in a product,” (ii) concerned

the “nature, characteristics, [and] qualities” of the product, and (iii) therefore fell outside of *Baden Sports*. *Id.*

The court in *Nippon Steel v. Sumitomo Metal Corp.* also rejected a very similar argument to the one Crocs is now making. No. 12-2429 (DMC)(MF), 2013 WL 3285206, at *1 (D.N.J. June 27, 2013). Nippon alleged that defendant POSCO’s statements about its own products were “false or misleading because POSCO represent[ed] to customers that because of POSCO’s own innovation, POSCO’s GOES products have uniquely superior characteristics and qualities, such as ‘excellent performance and high energy efficiency,’ ‘superior electric and magnetic property,’ and ‘consistent quality improvement’ such that ‘customers prefer products made by POSCO.’” *Id.* at *3. The court denied POSCO’s motion to dismiss and rejected its argument based on *Dastar* and *Baden Sports*. *Id.* at *4. The court reasoned that “Nippon’s allegations go further than simply claiming that POSCO ‘substantially copied’ Nippon’s technology, as was the case in *Dastar*, 539 U.S. at 38. Nippon also alleges that POSCO falsely promoted its products as the customer choice based on false statements of uniquely superior characteristics and qualities.” *Id.* The court also distinguished *Baden Sports* on the grounds that the allegations in that case were directed to “false designation of authorship. In contrast, Nippon alleged that POSCO has made false statements pertaining to the physical or functional attributes of its products.” *Id.*

The Lanham Act provides a remedy where a company misrepresents the “nature, characteristics, [or] qualities . . . of his or her or another person's goods, services, or commercial activities.” 15 U.S.C. § 1125(a)(1)(B). *Dastar* and *Baden Sports* hold that misrepresentations about authorship—effectively “plagiarism”—are not actionable under either subsections (A) or (B) of the statute. *Dastar*, 539 U.S. at 36. But that is *all* they hold. They do not, and cannot, given the statutory language, immunize other advertising that misrepresents to consumers the nature, characteristics, or qualities of a product. That includes, as other district courts have found, misrepresentations that a party was “first” to introduce a new product. And it certainly includes misrepresentations that a product is “patented,” when, in fact, it is not. In that regard, the district court’s decision stands alone, without statutory or precedential support.

B. The Advertising at Issue Is Not About Authorship as Was the Case in *Dastar* and *Baden Sports* and Instead Falls Squarely Within the Language of Section 1125(a)(1)(B).

The district court ignored evidence demonstrating that the advertising at issue misled consumers about the nature, qualities, and characteristics of Crocs’ shoe material, Croslite™. Appx13. Indeed, the district court found that “Crocs admits that its advertisements have ‘linked’ such terms as ‘patented,’ ‘proprietary,’ and ‘exclusive’ to features, characteristics, and qualities of the product material, and that Crocs’ goal in Croslite™ messaging was to imply that its products have

‘superior characteristics, qualities, and features.’” Appx3. This undoubtedly should have ended any question about whether the advertising affected the “nature, characteristics, and qualities” of Crocs’ shoes and alone should have precluded summary judgment.

To be clear, and as set out above, the evidence was overwhelming that “patented” means more than just authorship to consumers, particularly in the context of Crocs’ false advertising. Dawgs presented evidence to the district court that Crocs tied product benefits to the purported “patented” nature of Croslite™. For example, a 2013 Crocs press release, attached to Dawgs’ counterclaim and referenced in its summary judgment opposition, states: “The Crocs @ Work collection is built with the patented Croslite material to provide all-day, on-the-job comfort . . . These work shoes are also odor-resistant and easy to clean . . .” Appx494 (citing Appx603); Appx1410. Other advertisements presented to the district court in summary judgment briefing included:

- “The special Patented Closed Cell Resin (PCCR) warms and softens with your body heat and molds to your feet.” Appx1449.
- “We’ve discussed our Proven comfort from our patented Croslite™ material to certifications with the U.S. Ergonomics Council, American Podiatric Medical Associations, and others.” Appx1451.
- “The reason the shoes are so comfortable is that they are made of a patented ‘closed cell’ resin. This resin has many positive aspects including the fact that bacteria and fungus can’t stick to the material so they won’t get that bad ‘boat shoe’ smell.” Appx1457.

Crocs' false advertising was intentional; its stated goal was to "link Croslite to the brand and position it as a superior product/material" Appx1437. Crocs wanted consumers to believe that Croslite was technologically advanced, like GORE-TEX and Lycra. Appx1441 (email comparing CROSLITE to GORE-TEX and LYCRA and stating, "Most people still do not yet know what EVA foam is. They could learn Croslite instead of EVA . . . It is up to us"). Another Crocs executive told the media, "If I took Croslite away to lower the price, I don't have a reason to exist." Appx1490.

Consumers bit on Crocs' advertising. An Amazon customer asked, "Are these shoes made of the patented Croslite for which Crocs is known"? Another customer asked and another responded: "Are fake crocs as good as real crocs? . . . No. Fake Crocs are not as good as the real brand. There are many cheap brands knocking off the look of the original Crocs beach clog, but they are not made from the same durable odor reducing and comfortable patented Croslite material." Appx1461. An Amazon reviewer wrote: "I prefer Crocs to their \$1 to \$7 knock-offs. The patented Croslite material of Crocs conform to your feet after a day or two, and is much more durable than the material used in inexpensive knock-offs." Appx1465; see also Appx1478 (Crocs' shoes are "made from the instantly recognizable Croslite foam material that put Crocs on the map a dozen years ago.").

The district court ignored all of this. Even though Dawgs cited all of it in its summary judgment opposition, the district court never so much as mentioned one piece of this evidence. *See generally* Appx1-22.

As if this wasn't enough, *both* parties conducted surveys demonstrating that the term "patented" affects consumers' views of the nature, qualities, and characteristics of the products. Appx1661-1663. For example, Dawgs' expert, Dr. Lynne Weber, asked participants to consider the following phrase in the context of a potential Crocs' footwear purchase: "Patented material which softens as it warms to better conform to your feet." Appx1661; *see* Appx1684-1693. Dr. Weber then asked, "What advantages or disadvantages, if any, do you perceive because the material is 'patented'?" Appx1661. The answers were telling. Numerous consumers thought it had improved comfort and softness properties, with better fit and feel. Appx1662. Others thought it was unique and special, or superior to other brands. Appx1662. Still, others thought it would last longer and was more durable, or was tested and trustworthy, presumably given the government stamp of approval. Appx1662.

Crocs' survey expert uncovered similar results. Appx1663; *see* Appx1695-1730. Responses to her questions included comments that "Patented Croslite™ material" meant: (i) "lightweight and indestructible"; (ii) "high quality"; (iii) "speak quality"; (iv) "high quality"; (v) "comfort, which is important"; and (vi)

“This material makes the crocs lightweight, ergonomic, and odor resistant!”

Appx1663. The results included many other similar examples. Appx1663.

Nonetheless, the district court refused to consider this evidence, holding that Dawgs submitted it too late, notwithstanding the fact that the surveys were all conducted after summary judgment briefing was complete and Dawgs could not have predicted any of the results (or even that Crocs was planning to conduct its own survey). Appx15-17.

Given the evidence, there can be little doubt that Crocs’ “patented” advertising was directed to the “nature, characteristics, [and] qualities” of its footwear, and falls squarely within the four corners of the Lanham Act. A product that is “patented” is, by definition, new and non-obvious, and gives the patent owner the right to exclude others (including competitors) from making, using, or selling the same invention. 35 U.S.C. § 101 et seq. This is far different than a mere misrepresentation of authorship. Croslite™ is not patented to *anyone*; it is not new, non-obvious, or even unique. Nor does Crocs have the exclusive right to sell the ethyl-vinyl acetate (EVA) material that is the foundation of Croslite™. Other competitors, including Dawgs, can offer a material with the same or better softness, odor-resistant, durability and other properties.

At least one prominent commentator agrees that the district court misapplied the law and should have denied Crocs’ summary judgment motion. Harvard

Professor Rebecca Tushnet wrote on her blog⁷ with respect to the district court’s decision:

The court found that *Dastar* barred the §43(a)(1)(B) claims as well as the §43(a)(1)(A) claims. I think this is wrong—the patented/proprietary/exclusive language here is not the same as claiming authorship; it’s claiming uniqueness as a reason for consumers to believe that Crocs possess superior product characteristics to those of competitors’ products. To the extent that the claims lead consumers to believe that Crocs are “made of a material ‘different than any other footwear,’” a difference made credible to consumers by reference to patents and/or proprietary knowledge, that is a claim about the physical nature of specific product components, not about authorship. When the Supreme Court left 43(a)(1)(B) claims open in *Dastar*, this is the kind of thing that fits well.

Rebecca Tushnet, *Falsely Advertising “Proprietary” and “Exclusive” Material*

Isn’t Actionable Under Dastar, Rebecca Tushnet’s 43(B)log (Sept. 28, 2021, 12:09 PM), <https://tushnet.com/2021/09/28/falsely-advertising-proprietary-and->

⁷ Professor Tushnet is a former clerk for Justice Souter and focuses her research and teaching on copyright, trademark, First Amendment, and false advertising law. *About Rebecca Tushnet*, Rebecca Tushnet, <https://tushnet.com/about/> (last visited Feb. 26, 2023). Her blog, *Rebecca Tushnet’s 43(B)log*, has been inducted into the ABA hall of fame. Sarah Mui, Molly McDonough & Lee Rawles, *Blawg 100 Hall of Fame* (2018), https://www.abajournal.com/magazine/article/blawg_hall_of_fame (last visited Feb 26, 2023). Her articles on copyright and Lanham Act issues have been cited by numerous courts of appeals. *See, e.g., Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc.*, 653 F.3d 241, 252 (3d Cir. 2011); *GI Sportz Inc. v. APX Gear LLC*, 692 Fed. App’x 839, 840 (9th Cir. 2017); *In re Jackson*, 972 F.3d 25, 35 (2d Cir. 2020); *Blanch v. Koons*, 467 F.3d 244, 252, n. 3 (2d Cir. 2006); *Cambridge University Press v. Patton*, 769 F.3d 1232, 1270, n. 28 (11th Cir. 2014).

exclusive-material-isnt-actionable-under-dastar/. Professor Tushnet further agreed that *Baden* is not applicable, commenting that:

Baden’s claim was different than Dawgs’ claim here: Baden claimed it was falsely losing credit which really does sound like *Dastar*. Dawgs’ claim is that Crocs falsely claimed to have a unique material, which it does not in fact use. It’s not about credit or source of the idea at all.

Id. Professor Tushnet is correct. Crocs’ advertising is nothing like what was at issue in *Baden Sports* or *Dastar*.

The district court erred in granting summary judgment in view of the mounds of evidence showing that (i) Crocs falsely advertised its products as “exclusive,” “proprietary,” and “patented”; (ii) Crocs intentionally linked the false advertising to the nature, qualities and characteristics of its shoe material; and (iii) consumers were misled about the qualities and characteristics of Crocs’ footwear vis-à-vis competitors, as evidenced both by the parties’ surveys, and by direct evidence from consumer reviews and the like.

Accordingly, the district court erred as a matter of law and its decision should be reversed.

C. The District Court Erred in Construing the Advertising as if It Was a Question of Law, and Refusing to Consider Overwhelming Evidence Showing that “Patented” Means Unique Product Superiority to Consumers.

The district court also erred as a matter of law in construing the false advertising as if it was a matter of law, like it might be with respect to a question of

contract interpretation or patent claim construction. Specifically, the district court held that “Dawgs has alleged nothing more than a false designation of authorship, i.e., that Crocs falsely claimed it created Croslite when, in fact, Croslite is ‘merely the common ethyl vinyl acetate used by many footwear companies around the world.’” Appx14. The Court also rejected Dawgs’ argument that Crocs’ advertising amounts to a superiority claim on the grounds that it does not concern the nature, characteristics, or qualities of Crocs’ footwear and is also puffery. Appx15.

Implicit in the district court’s holding and reasoning is the assumption that “patented,” in the context of the advertising at issue, simply means “created,” as if all that Crocs was saying was that it was the one who “created” common ethyl vinyl acetate (EVA) when, in fact, someone else had. Appx14. This interpretation is inconsistent with the plain meaning of “patented” (and proprietary and exclusive) and is also inconsistent with the factual evidence. “Patented” means that a product is new and non-obvious (35 U.S.C. §§ 102, 103) and gives a patent owner the right to exclude others. 35 U.S.C. § 271. “Patented,” and even

“proprietary” and “exclusive” mean far more than just “created” and are, of course, not puffery.⁸

Regardless, the question of the meaning of advertising is one of fact and the district court erred in simply applying its own interpretation to the false advertising at issue, in conflict with the plain meaning of the false terms and without consideration of actual consumer evidence. *Bell v. Publix Super Mkts., Inc.*, 982 F.3d at 479 (“It is not for the judge to determine, based solely upon his or her own intuitive reaction, whether the advertisement is deceptive.’ . . . Rather, the question is ‘what does the person to whom the advertisement is addressed find to be the message? That is, what does the public perceive the message to be?’”) (internal citations omitted); *see also Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc.*, 653 F.3d at 254-255; *Berner Intern. Corp. v. Mars Sales Co.*, 987 F.2d at 982-84 (legal error for the district court not to “determine what the term ‘air door’ means to [the relevant] consumers”); *Abdallah v. Pileggi*, 1998 WL 180491, at *3 (stating that “[defendant’s] subjective belief is largely irrelevant to the meaning of the word ‘patented’ means to the relevant consumer” . . . and moreover if the Court applied

⁸ They are statements of fact that are verifiably false (and Crocs has admitted that there is no patent on Croslite). *Intermountain Stroke Ctr., Inc. v. Intermountain Health Care, Inc.*, 638 Fed. App’x 778, 786-87 (10th Cir. 2016) (“Puffery is a term of art used to characterize those vague generalities that no reasonable person would rely on as assertions of particular facts.”) (internal citations omitted).

the “legal definition” as “the *only* basis for concluding that the challenged statements were literally false we would be cautious.”) (emphases added).

To this end, Dawgs submitted numerous documents in its summary judgment opposition brief showing that, as Crocs intended, consumers interpret “patented” much differently than just “created” or “invented,” including both parties’ survey evidence (which the district court refused to consider, as set out above). *See also* Appx1465; Appx1457 (in response to direct email from a customer stating “they are the most comfortable versatile shoe I have[,]” Crocs executive responds “[t]he reason the shoes are so comfortable is that they are made of a patented ‘closed-cell’ resin.”). Indeed, the district court’s interpretation of “patented” is inconsistent with its own factual finding that its advertisements have “linked” such terms as “patented,” “proprietary,” and “exclusive” to features, characteristics, and qualities of the product material. Appx3, Appx14.

Further, and even if Dawgs had not cited direct evidence of consumer understanding, because Crocs’ advertising was willfully false, and designed to create a false impression of superiority, the district court should have presumed that consumers were misled about Croslite™ qualities. *William H Morris Co. v. Group W, Inc.*, 66 F.3d 255, 258 (9th Cir. 1995) (“If Omicron intentionally misled consumers, we would presume consumers were in fact deceived and [defendant] Omicron would have the burden of demonstrating otherwise.”) (citations omitted);

see also Merck Eprova AG v. Gnosis S.p.A., 760 F.3d 247, 256 (2d Cir. 2014); Appx1437 (“Our hope is to link Croslite to the brand and position it as a superior product/material . . .”).

D. The District Court’s Statements About the Sufficiency of Dawgs Pleadings and Citations in Its Opposition Brief Are Incorrect and Cannot Justify Summary Judgment in Crocs’ Favor

Part of the district court’s errors stems from its misapprehension of Dawgs’ pleadings, which it held precluded Dawgs’ opposition arguments. The district court acknowledged Dawgs’ arguments in response to summary judgment, but effectively dismissed them, and apparently all of the supporting evidence, on the grounds that Dawgs:

did not make these arguments in its claim or counterclaim. In its claim and counterclaim, Dawgs argued that Croslite is merely a variation of ethyl vinyl acetate used by many footwear companies around the world and that, by Crocs claiming to have invented Croslite, Crocs has implied that Dawgs’ footwear is inferior. Dawgs did not mention anything about Croslite being soft, comfortable, lightweight, odor-resistant, or non-marking.

Appx12.

The district court was wrong, even aside from the fact that re-interpretation of a pleading should not be the basis for summary judgment in view of overwhelming evidence and disputed facts concerning issues the parties had been litigating for years. Fed. R. Civ. P. 15(a); *see also Foman v. Davis*, 371 U.S. 178, 181-82 (1962) (“The Federal Rules reject the approach that pleading is a game of

skill in which one misstep by counsel may be decisive to the outcome . . . the purpose of pleading is to facilitate a proper decision on the merits,” and courts cannot avoid decisions on the merits “on the basis of [] mere technicalities”).

For example, Dawgs specifically alleged in its counterclaim that “Crocs actively misled its own customers to believe that Croslite was patented *and therefore contained some unique or special properties*, when it did not.” Appx493 (emphasis added). In connection with this allegation, Dawgs’ counterclaim incorporated by reference a Crocs email where “Crocs’ entire senior staff, including all executives, shared a false newspaper article touting that Croslite was patented.” *Id*; *see also* Appx595-597. In connection with this shared newspaper article, Crocs’ senior team celebrated that “[t]he journalist captures the buzz of CROCS and does an excellent job of differentiating between the material used in knock-offs vs. CROCS.” Appx595-597.

It is clear from this paragraph in the counterclaim and the exhibit thereto, all of which are incorporated into Dawgs’ Lanham Act claim (Appx493), that Dawgs is not simply complaining about misrepresentations of intellectual origin or authorship, as was the case in *Baden Sports*. The essence of Dawgs’ claim is that Crocs falsely advertised its products in order to build credibility for its product quality and differentiation claims; the term “patented” in this context implies that

its product features—its odor and bacteria-free properties—are better than those in competitor shoes and lend credibility to the same.

Dawgs’ counterclaim provides more detail and cites additional examples, all of which the district court overlooked in its summary judgment Order. For example, in paragraph 7 of Dawgs’ counterclaim, Dawgs alleged that Crocs:

claimed Croslite had unique characteristics that its competitors could not offer. As late as June 2016, Crocs’ promotional materials touted Croslite was unique enough to be “patented”, but in truth Crocs never sought a patent. Nor was Croslite “proprietary” or “exclusive” – as Crocs had claimed – when Crocs just copied it from FinProject N.A. Crocs perpetuated this decade-old fraud against its own consumers to drive brand loyalty, increase sales, and in turn denigrate the foam materials its competitors used, thereby depriving them of sales.

Appx481.

This, alone, should have been enough to avoid summary judgment on the grounds of a purported pleading failure by the non-moving party.

Additionally, in paragraph 49 of Dawgs’ counterclaim, Dawgs alleged that Crocs made false claims in its promotional material including: “Complete with our proprietary Croslite material foot bed, these lightweight shoes keep up with you whether you’re running around the restaurant or standing for long periods of time.”

Appx494. Dawgs further alleged that “Crocs advertises that its Croslite™ material is superior to the materials competitors use because competitors’ molded clogs are made of harmful material which cause various infections and also they produce heat to feet, which effects your foot skin and which Crocs won’t.” Appx494.

Dawgs also incorporated by reference numerous additional exhibits, including Exhibits 20-23 to the counterclaim, which specifically recite the *exact* advertising that the Court held was missing from Dawgs' counterclaim. Appx598-608. For example, Exhibit 21 is a 2013 Crocs press release stating that “[t]he Crocs @ Work™ collection is built with the patented Croslite™ material to provide all-day, on-the-job comfort.” Appx603-604. This is not a misrepresentation about the intellectual origin of Croslite™; it is a false statement that ties the term “patented” to the stated benefits. The term “patented” enhances consumer views and lends credibility to the comfort claim. As another example, Exhibit 23, which is a 2013 Crocs webpage, states that “[a]ll Crocs shoes feature Croslite material, a proprietary, revolutionary technology that *gives* each pair of shoes the soft, comfortable, lightweight, non-marking and odor resistant qualities that Crocs fans know and love.” Appx608.

Again, these are the exact product attributes and characteristics at issue that the Court held were missing from Dawgs' allegations. And, the various paragraphs articulate the theory that Dawgs was pursuing—that Crocs' lied about the fact that Croslite™ was patented, intentionally tied that lie to various product

attributes, and that this caused consumers to believe that Crocs' material was unique and superior to competitors' material in various ways.⁹

Even assuming that Dawgs' initial allegations were not enough, the district court erred in ruling against Dawgs on the grounds that "Dawgs did not make these arguments in its claim or counterclaim." Appx12. A party need not (and probably should not) make "arguments" in a claim or counterclaim. A complaint serves a notice function and is supposed to set out the facts (and not theories or arguments) upon which the party may be entitled to relief. Fed. R. Civ. P. 8(a)(2) (requiring only a "short and plain statement of the claim showing that the pleader is entitled to relief."). The federal pleading standard only requires that a complaint "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. *Id.*; see also *Zokari v. Gates*, 561 F.3d 1076 (10th Cir. 2009) (without deciding the issue, recognizing "that most

⁹ On reconsideration, the district court walked through some of Dawgs' counterclaims, but still found that Dawgs did not state a claim under the Lanham Act.

of our sister circuits have stated the general rule that a complaint need not set forth the plaintiff's legal theories.”).

Accordingly, the district court was both factually and legally wrong in granting summary judgment based on the perceived lack of “arguments” that Dawgs made in its counterclaim. The court overlooked paragraphs and incorporated documents alleging *exactly* what the court said was missing, and further erred as a matter of law in holding Dawgs to an “argument” standard when the facts pled support the claim that Dawgs was making under Fed. R. Civ. P. 8(a).

Separately, the district court also faulted Dawgs for a court-specific procedural requirement, holding that Dawgs’ summary judgment response failed to identify the particular paragraphs from its counterclaim setting out its “arguments” with specificity, and that this perceived failure justified granting Crocs’ summary judgment motion. The district court doubled down on that assertion in its Order denying reconsideration, adding yet another procedural hurdle (this one not found in any rules or practice standards), reasoning that Dawgs’ summary judgment response “did not connect these allegations [in its counterclaim] to any Lanham Act argument on summary judgment.” Appx1973. Even assuming that the

Court's particular procedural citation preferences could justify summary judgment,¹⁰ the district court was, again, simply wrong.

Crocs' opening brief cited paragraphs 46, 47, 49 and 50 of its counterclaims in its statement of undisputed material facts as reflecting Dawgs' allegations in its counterclaim. Appx1394. Dawgs responded by *admitting* that its allegations were in these paragraphs (as cited by Crocs). Appx1411. This complied with the court's individual practices, which require either an admission or denial of purported material facts. Further, these paragraphs collectively include a plethora of alleged facts, and incorporated by reference documents (including specific false advertisements), spelling out Dawgs' position, as set out above. Appx1411-1415.

¹⁰ "A dismissal for violation of a local rule is a severe sanction reserved for the extreme case, and is only appropriate where a lesser sanction would not serve the ends of justice." *Cooper v. Saffle*, 30 F. App'x 865, 865 (10th Cir. 2002) (internal alterations and citations omitted) (reviewing Oklahoma local rule). "Accordingly, this court requires district courts to analyze three factors before dismissing a complaint for failure to comply with the local court rules." *Id.* "The court must consider '(1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; and (3) the culpability of the litigant.'" *Id.* (quoting *Hancock v. City of Okla. City*, 857 F.2d 1394, 1936 (10th Cir. 1988)) (internal alteration omitted). "**The complaint should be dismissed with prejudice only when these aggravating factors outweighed the judicial system's strong predisposition to resolve cases on their merits.**" *Id.* (internal quotation marks omitted) (emphasis added). The court in *Cooper* held that the district court "abused its discretion when it dismissed Cooper's complaint" for failing to follow a local rule. *Id.* at 867.

If that was not enough, Dawgs further responded in its summary judgment opposition brief that its allegations were contained in its counterclaim generally, none of which should be ignored, and specifically described the allegations in paragraph 7 of the counterclaim, which, as noted above, articulate more than sufficient facts and “arguments,” standing alone, to support Dawgs’ position.

Appx1412-1414. Specifically, Dawgs wrote, referencing its counterclaim:

Dawgs also alleged, for example, “[Crocs] claimed Croslite had unique characteristics that its competitors could not offer. As late as June 2016, Crocs’ promotional materials touted that Croslite was unique enough to be ‘patented’ . . . Crocs perpetuated this decade-old fraud against its own consumers to drive brand loyalty, increase sales, and in turn denigrate the foam materials its competitors used, thereby depriving them of sales.” Dkt. No. 487, ¶ 7 (on p. 13).

Appx1411-12. Dawgs did not need to regurgitate its entire counterclaim. Its opposition brief summarized its positions, referenced the false claim at issue, and explained how its allegations touched on false impressions of “unique[ness]” and how Crocs “denigrate[d] the foam materials [of] its competitors.” Appx1411-1412. The district court was not entitled to simply disregard Dawgs’ counterclaim, or the paragraphs it specifically cited in its opposition brief, and grant summary judgment without consideration of the actual evidence.

The district court levied one final procedural hurdle on Dawgs, noting in a footnote that certain documents cited in Dawgs’ response are inadmissible.

Appx13. The district court did not explain the reasons for this statement, but

possibly agreed with Crocs that certain documents, namely, Exhibits B, C, D, K, L, M, N, O, and P (the “Exhibits”) to Dawgs’ summary judgment opposition, are unauthenticated and double hearsay. *Id.*; see Appx1411-1412; Appx1430-1435, Appx1458-1475. This is wrong for a few reasons.

First, evidence submitted in connection with summary judgment does not have to be presented in an admissible form and the trial court may consider the evidence on summary judgment provided the submitting party demonstrates that it would be possible to present the evidence in admissible form at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Thomas v. Int’l Bus. Machs.*, 48 F.3d 478, 485 (10th Cir. 1995) (“[T]he nonmoving party need not produce evidence ‘in a form that would be admissible at trial’ . . . [only] the content or substance of the evidence must be admissible.”) (emphasis added); *Law Co., Inc. v Mohawk Const. & Supply Co., Inc.*, 577 F.3d 1164, 1170-71 (10th Cir. 2009). This was in error. *See id.*

Second, the documents are not hearsay—obviously, Dawgs was offering them to show consumer state of mind, and not for the *truth* of the matter (that Crocs *actually* have superior qualities because they are patented).

Third, the documents were authenticated. Documents can be authenticated based on their distinctive characteristics, such as “appearance, contents, substance, [or] patterns” considered together with all the circumstances. Fed. R. Evid.

901(b)(4); *Law Co.*, 577 F.3d at 1170 (10th Cir. 2009). Distinctive characteristics can include “identifiable content, logos and titles.” *Matrai v. DirecTV, LLC*, 168 F. Supp. 3d 1347, n.1 (D. Kan. 2016). The nine Exhibits, each of them being Crocs-consumer reviews that were publicly available online, contained circumstantial indicia of authenticity through their distinct characteristics, including as follows:

- **Exhibit K** contained an Amazon.com URL, Amazon’s logo and distinct interface, and “Deliver to Steven” (the would-be authenticating witness) in the top left corner. Appx1459.
- **Exhibits C and M** contained Amazon.com URLs, print dates, and distinct and identifiable interface of Amazon.com review pages. Appx1433, Appx1465.
- **Exhibit B** contained no URL, but per its appearance and contents (including a date), and the fact that Exhibits K, C, and M contained the same distinct and identifiable features as the Exhibits with the Amazon.com URL, it was clearly a customer review from Amazon.com. Appx1431.
- **Exhibits D, L, and P**, per their distinct and identifiable contents were public reviews on Yelp.com (*e.g.*, red star review system, city and state of reviewer, Yelp.com’s “Elite” icon), Quora.com (*e.g.*, overarching question in black, bold and large font at the top, “Related Questions” on the right panel, indication of total number of answers), and TripAdvisor.com (*e.g.*, green “Level 6 Contributor” distinction, icons for number of posts, reviews and votes, heart icon for “Save” feature), respectively. Appx1435, Appx1461-1463, Appx1475.

The district court erred here because “[r]ather than considering each document to determine whether it was authenticated, the district court summarily disregarded these exhibits” with no explanation or apparent consideration of their distinct characteristics under these circumstances (*i.e.*, a claim involving customer

confusion). *See Law Co.*, 577 F.3d at 1170-71; *see Evanston Ins. Co. v. Desert State Life Mgmt.*, 434 F. Supp. 3d 1051, 1060, n.6 (D.N.M. Jan. 16, 2020), *aff'd in part, rev'd on other grounds*, 56 F.4th 899 (10th Cir. 2022) (“[A]uthentication ‘is not a high threshold,’ at the summary judgment stage especially where the party objecting to the evidence’s authenticity ‘gives the Court no evidence to question’ the evidence’s ‘genuineness.’ . . . Reviewing the[se] records online reveals no difference between the records attached as an exhibit . . . and the records that are publicly available online.”) (internal citations omitted).

In any event, the district court’s procedural criticism is irrelevant to the issue at hand. Crocs objected to just a subset of Dawgs’ evidence. Appx1516. Dawgs submitted other similar documents, without objection from Crocs, including, for example, one article (Appx1481-Appx1484) quoting Crocs’ then general counsel as stating, “The unique Croslite material is one of many key differentiations that enable Crocs to successfully market its footwear products to a broad range of consumers worldwide and set itself apart from imitators.” Appx1483. Further, Dawgs identified numerous Crocs advertisements that are from Crocs’ own production, that were not the subject of the Court’s evidentiary criticism, and that outline the exact false advertising that Dawgs accuses. Appx1457; Appx1449; Appx1429.

CONCLUSION

The district court erred in granting Crocs' summary judgment motion. The false advertising at issue in this case is nothing like the advertising in *Dastar* or *Baden Sports*. As Professor Tushnet wrote on her blog:

Baden's claim was different than Dawgs' claim here: Baden claimed it was falsely losing credit which really does sound like *Dastar*. Dawgs' claim is that Crocs falsely claimed to have a unique material, which it does not in fact use. It's not about credit or source of the idea at all.

The Lanham Act explicitly provides a remedy to Dawgs for Crocs' years of intentional false advertising to differentiate its otherwise undifferentiated products. Accordingly, this Court should reverse.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing filing complies with the type-volume limitations of the Federal Rules of Appellate Procedure and Federal Circuit Rules. The brief contains 12,980 words (as calculated using Microsoft Word's Word Count feature), excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally-spaced typeface using Microsoft Word for Office 365 in Times New Roman 14-point type.

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