

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.*

APPELLANTS' REPLY BRIEF

NAVID C. BAYAR, ESQ.
REICHMAN JORGENSEN LEHMAN
& FELDBERG LLP
7500 Rialto Blvd., Suite 1-250
Austin, Texas 78735
Telephone: (530) 220-4586
nbayar@reichmanjorgensen.com

MATTHEW G. BERKOWITZ, ESQ.
REICHMAN JORGENSEN LEHMAN
& FELDBERG LLP
100 Marine Parkway, Suite 300
Redwood Shores, California 94065
Telephone: (650) 623-1401
mberkowitz@reichmanjorgensen.com

*Attorneys for Defendants-Appellants Double Diamond Distribution, Ltd.,
U.S.A. Dawgs, Inc. and Mojave Desert Holdings, LLC*



TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTRODUCTION	1
ARGUMENT	3
I. The District Court Overextended <i>Dastar/Baden/Kehoe</i>	3
II. Dawgs Properly Pled Its Counterclaims and Opposed Summary Judgment	8
A. Dawgs Consistently Pled And Argued That Crocs Misrepresented the Nature, Quality, And Characteristics of Its Footwear	8
B. Dawgs Properly Presented Evidence to Defeat Summary Judgment	15
1. The Court Need Not Address Crocs’ Procedural Arguments.....	15
2. Dawgs Properly Presented Its Evidence.....	18
III. Crocs’ Remaining Arguments Fail	24
CONCLUSION.....	26
CERTIFICATE OF COMPLIANCE.....	27

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Autozone, Inc. v. Strick</i> , 543 F.3d 923 (7th Cir. 2008)	3
<i>Big O Tire Dealers, Inc. v. Big O Warehouse</i> , 741 F.2d 160 (7th Cir. 1984).....	18
<i>Clorox Co. Puerto Rico v. Proctor Gamble</i> , 228 F.3d 24 (1st Cir. 2000)	7
<i>Eisenhour v. Weber Cnty.</i> , 744 F.3d 1220 (10th Cir. 2014).....	19
<i>Evans v. McDonald’s Corp.</i> , 936 F.2d 1087 (10th Cir. 1991).....	12
<i>Foman v. Davis</i> , 371 U.S. 178 (1962).....	13
<i>Hall v. Bed Bath & Beyond, Inc.</i> , 705 F.3d 1357 (Fed. Cir. 2013).....	3
<i>Hayes v. Whitman</i> , 264 F.3d 1017 (10th Cir. 2001).....	14
<i>Intermountain Stroke Ctr., Inc. v. Intermountain Health Care, Inc.</i> , 638 Fed. App’x 778 (10th Cir. 2016) (unpublished)	25
<i>Ironhawk Tech. v. Dropbox, Inc.</i> , 994 F.3d 1107 (9th Cir. 2021).....	19
<i>Johnson & Johnson * Merck Consumer Pharms. Co. v. Smithkline Beecham Corp.</i> , 960 F.2d 294 (2d Cir. 1992).....	7
<i>Johnson v. City of Shelby, Miss.</i> , 574 U.S. 10 (2014).....	13
<i>Lillibridge Health Care Services v. Hunton Brady Arch</i> , No. 6:08-cv-1028, 2010 WL 1417193 (M.D. Fla. Apr. 7, 2010)	13
<i>Martz v. Union Labor Life Ins. Co.</i> , 757 F.2d 135 (7th Cir. 1985).....	23
<i>Newcal Industries, Inc. v. IKON Office Solution</i> , 513 F.3d 1038 (9th Cir. 2008).....	25

Ortiz v. Norton,
254 F.3d 889 (10th Cir. 2001)..... 21

Proportion–Air, Inc. v. Buzmatics, Inc.,
57 F.3d 1085 (Fed. Cir. 1995)..... 5

Reed v. Bennett,
312 F.3d 1190 (10th Cir. 2002)..... 15, 18

Romans v. Michigan Dep’t of Human Servs.,
668 F.3d 826 (6th Cir. 2012)..... 16

Thomas v. Int’l Bus. Machs.,
48 F.3d 478 (10th Cir. 1995)..... 23

Tobar v. United States,
07-cv-817, 2014 WL 4793023 (S.D. Cal. Sep. 25, 2014) 24

Twomey v. Maria Regina Residence LTF,
15-CV-3781, 2016 WL 1056570 (E.D.N.Y. Mar. 16, 2016) 21

United States v. Great Am. Ins. Co.,
738 F.3d 1320 (Fed. Cir. 2013)..... 6

Woodrow Woods & Marine Exhaust Sys., Inc. v. Deangelo Marine Exhaust, Inc.,
692 F.3d 1272 (Fed. Cir. 2012)..... 21

Zobmondo Entertainment LLC v. Imagination Int’l Corp.,
No. 09-cv-02235, 2009 WL 8714439 (C.D. Cal. June 23, 2009) 5

Zokari v. Gates,
561 F.3d 1076 (10th Cir. 2009)..... 10, 12

STATUTES AND RULES

15 U.S.C. § 1125 *passim*

Fed. R. Civ. P. 8..... 10

Fed. R. Civ. P. 56..... 9

OTHER AUTHORITIES

5 C. Wright & A. Miller, *Federal Practice & Procedure* (4th ed. 2022) 13

INTRODUCTION

The core legal issue on appeal is not in serious dispute: No case has interpreted the Lanham Act as the district court did below. Nor can *Dastar* and *Baden Sports*—two plagiarism cases—bear the weight that the district court placed on them. And, despite Crocs’ sweeping references to “text,” “history,” “structure,” and “purpose,” Crocs spends not one page parsing any of these things with respect to Section 1125(a)(1)(B). Crocs’ silence speaks volumes because, in truth, the relevant case law hinges Lanham Act liability on what the accused advertising means *to consumers*, not what terms such as “patented” and “proprietary,” mean, in isolation, to a court on summary judgment.

Unsurprisingly, then, Crocs’ brief primarily focuses on two procedural arguments: (1) Dawgs inadequately pled its Lanham Act liability theory and (2) Dawgs did not provide admissible evidence in opposing summary judgment. But Dawgs’ pleadings (and interrogatory responses) plainly alleged that Crocs *linked* false claims about how Croslite is patented, proprietary, and exclusive *with* the impression that its shoes had distinctive characteristics.¹ The district court found that Crocs admitted as much. *See* Appx3. And Dawgs’ opposition to summary

¹ Compare, e.g., ¶ 7 of Dawgs’ Counterclaims at Appx481 (alleging that Crocs falsely advertised that “**Croslite had unique characteristics** that its competitors could not offer” (bold added)) *with* 15 U.S.C. § 1125(a)(1)(B) (making, *inter alia*, false claims about the “characteristics” of a good to actionable).

judgment also cited exemplary Crocs advertisements (some without *any objection* from Crocs), plus Dawgs' counterclaim allegations, supporting exhibits, and interrogatory responses, as evidencing consumer confusion. Dawgs committed no procedural errors.

In any event, if this Court agrees that the district court erred in reading *Dastar/Baden* and finds Dawgs' pleadings proper, it need not delve into the procedural morass raised by Crocs. In the Tenth Circuit the summary judgment burden shifts to Dawgs *only if* Crocs meets its own burden to establish no genuine factual dispute over Crocs' advertisements. But Crocs' motion-to-dismiss style summary judgment brief focused on Dawgs' pleading theory, barely mentioning its advertisements at all. Thus, the burden would not yet shift to Dawgs to present contrary evidence and, for this reason, this Court could not affirm summary judgment on the record below, as Crocs' response brief implies.

Finally, it is telling that so much of Crocs' argument hinges on counseling this Court to ignore contrary evidence from INTA as an amicus, Prof. Rebecca Tushnet as an expert in the field, relevant contrary district court case law, and the panoply of evidence cited by Dawgs. At bottom, Crocs is an admitted false advertiser who misled consumers for years, drove an unjustified price premium, and inflicted substantial harm on Dawgs' business. The weight of authority suggests that the district court erred, making reversal and remand proper.

ARGUMENT

I. The District Court Overextended *Dastar/Baden/Kehoe*

The Lanham Act is concerned with the intended and actual effect of advertising on consumers. *See Hall v. Bed Bath & Beyond, Inc.*, 705 F.3d 1357, 1367 (Fed. Cir. 2013) (“[T]he public interest underlying the Lanham Act’s prohibition of misleading advertisement is that of preventing consumer confusion or deception.”); *see also Autozone, Inc. v. Strick*, 543 F.3d 923, 929 (7th Cir. 2008) (“Whether consumers are likely to be confused . . . [is a] . . . question of fact [that] may be resolved on summary judgment only if the evidence is so one-sided that there can be no doubt about how the question should be answered.”). But the district court’s order effectively granted safe harbor status, as a matter of law, to terms like “patented, proprietary, and exclusive,” regardless of consumer confusion or market harm, and regardless of literal falsity or whether an admitted false advertiser (in this case Crocs), intended to mislead consumers. No legal authority supports such an outcome.

Starting with the case law, *Dastar* was squarely a plagiarism case about § 1125(a)(1)(A). Op. Br. at 28. Similarly, *Baden Sports* was a case where Baden argued that it was the true inventor (not Molten), and there was an actual innovation at issue, so this Court—applying Ninth Circuit law on a full post-trial record—held that Baden’s § 1125(a)(1)(B) claim was not actionable. Op. Br. at 30. And *Kehoe*

involved a dispute over who created an innovation, *see* Op. Br. at 33, not the marketplace confusion over qualities and characteristics of footwear that underpins Dawgs’ § 1125(a)(1)(B) claim.

In brief, these cases are inapposite as Dawgs never accused Crocs of plagiarizing Croslite or claimed itself to be the sole innovator. The falsity of Crocs’ advertising is that Croslite is simply not patented—neither to Crocs nor to anyone else. And the evidence showed that consumers believed that the term “patented”—standing alone and in the context of Crocs’ advertisements—implies superior product qualities. This evidence was before the district court, some without objection, prior to its ruling. *See* Op. Br. at 56 (collecting cites including Appx1481-1484; Appx1429, Appx1449, Appx1457).

The weight of authority—highlighted by both Dawgs and INTA—holds that terms like proprietary, exclusive, and patented must be contextually interpreted to determine if they mislead consumers about a product’s nature or qualities. *See, e.g.*, Op. Br. at 25-26; *see also* INTA Br. 6, 13-15. Yet, Crocs attempts to dismiss all these cases in one fell sweep, hurriedly string citing many of them without due consideration, and without acknowledging the actual evidence, *all* of which shows that consumers understood Crocs’ advertising to be about the qualities and characteristics of Crocs’ footwear.

For example, Crocs tries to distinguish *Proportion–Air, Inc. v. Buzmatics, Inc.*, 57 F.3d 1085 (Fed. Cir. 1995) (discussed by INTA) and several other cases where the term “patented” was found to support Lanham Act liability. Resp. Br. at 67. Crocs states that those cases “involved a claim that a product was covered by a *specific* patent.” But that distinction is immaterial for a variety of reasons. In *Proportion–Air*, the plaintiff falsely marked its products with patent numbers. This Court cited the well-established principle that damages under the Lanham Act “cannot be awarded absent evidence of a likelihood of consumer deception.” 57 F.3d at 1085. That case did not so much as hint at a distinction between specific patent references and general false “patented” claims, let alone advertisements that link false “patented” claims to product qualities and characteristics as Crocs has done.

With respect to the many other court decisions against it, Crocs all but throws in the towel, insisting that those are “all district court cases.” Resp. Br. at 68. But those cases are instructive as to how learned jurists have treated the very argument that Crocs counsels this Court to accept. See INTA Br. at 15-20; see also Op. Br. at 34 (citing, *inter alia*, *Zobmondo Entertainment LLC v. Imagination Int’l Corp.*, No. 09-cv-02235, 2009 WL 8714439, at *3-4 (C.D. Cal. June 23, 2009) (holding *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)).

As for the statutory text, history, and purpose of the Lanham Act, Crocs makes no effort to cite relevant authority or analyze any of these things under 15 U.S.C. § 1125(a)(1)(B). *See United States v. Great Am. Ins. Co.*, 738 F.3d 1320, 1328 (Fed. Cir. 2013) (the court need not consider poorly developed arguments). Nor do its passing references to other cases discussing the text, history, and purpose of the Lanham Act suggest that its reading of § 1125(a)(1)(B) is correct.

Notwithstanding the above law, Crocs defends the district court’s holding that false claims about a product being patented 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. Crocs doubles down on this error by at times arguing that Dawgs’ position “bears no relation to the literal definition of [the] term [patented].” *See* Resp. Br. at 48, 52.² Yet, Crocs does so while simultaneously disputing that it in fact admitted to linking its representations about its footwear material being patented, proprietary, and exclusive to product

² Crocs even admits in a footnote that its brief assumes the correctness of the very legal issue that is before this Court. *See* Resp. Br. at 21 n.6 (“Crocs refers collectively to misrepresentations based on the ‘patented,’ ‘proprietary’ and ‘exclusive’ terms as misrepresentations of ‘inventorship[.]’”).

qualities and characteristics, as the district court found.³ *See* Resp. Br. at 15 n.5, 32. Crocs then concludes that the district court was correct to bucket Crocs’ false advertising with the advertising in *Dastar*, *Baden*, and other plagiarism cases.

The legal error in Crocs’ position is that neither Crocs nor the district court can simply decide what “patented,” “proprietary,” and “exclusive” mean to them, in isolation, as if it was a question of law. *See Clorox Co. Puerto Rico v. Proctor Gamble*, 228 F.3d 24, 37 (1st Cir. 2000) (reversing dismissal of Lanham Act claim because the district court erred in “conduct[ing] its own evaluation of the advertising copy because whether advertising is misleading depends on what message was actually conveyed to the viewing audience.” (cleaned up)). Indeed, Crocs’ summary judgment brief did not so much as cite a dictionary definition concerning the terms at issue, let alone discuss an actual advertisement or the relevant consumers. Nor did the district court rely on any authority interpreting words like patented, proprietary, and exclusive in the context of similar claims to what Dawgs alleged under § 1125(a)(1)(B). This was legal error. *See id*; *see also Johnson & Johnson * Merck Consumer Pharms. Co. v. Smithkline Beecham Corp.*, 960 F.2d 294, 297 (2d Cir. 1992) (“It is not for the judge to determine, based solely upon his or her own

³ The district court correctly found at Appx3 that Crocs admitted linking its advertising to product qualities and characteristics because Crocs did not dispute the relevant material fact in Dawgs’ summary judgment opposition brief. *See infra*, pp. 8-9.

intuitive reaction, whether the advertisement is deceptive.”). Compounding the district court’s error is the fact that Dawgs presented evidence of consumer confusion in its summary judgment opposition brief, *see* Op. Br. at 18, and later, when it was available, submitted survey evidence from both parties. Appx1658-1730; Op. Br. at 10-12. The district court ignored this evidence in favor of its own interpretation.

II. Dawgs Properly Pled Its Counterclaims and Opposed Summary Judgment

A. Dawgs Consistently Pled And Argued That Crocs Misrepresented the Nature, Quality, And Characteristics of Its Footwear

Crocs continues to characterize Dawgs’ position as attempting to present a new “linking theory” in Dawgs’ opposition to summary judgment. Resp. Br. at 24-34. Far from it.

First, the district court found that Crocs admitted the very linkage it now disputes. Second, Dawgs’ counterclaims plainly alleged that Crocs’ advertisements link its false claims about Croslite being patented, proprietary, and exclusive with the impression that Croslite had characteristics that were unique to Crocs. Third, Crocs’ attempt to parse Dawgs’ pleadings as though they are statutes is contrary to the Federal Rules and relevant case law.

Starting with the first issue, Crocs tries to avoid the district court’s finding that Crocs’ advertisements have admittedly “linked” the terms patented, proprietary,

and exclusive to actionable product characteristics under the Lanham Act. Resp. Br. at 32. But the district court's finding is correct. Dawgs summary judgment opposition brief stated (in its material facts section) that "Crocs' advertisements have linked terms such as 'patented,' 'proprietary,' and 'exclusive' to the features, characteristics, and qualities of the product material and leveraged those terms in order to drive a price premium and an image of product superiority." Appx1412. Though Crocs' reply brief disputed the "price premium" and "product superiority" points, *see* Appx1515, Crocs never disputed that its advertisements linked words like patented and proprietary to features, characteristics, and qualities of its shoes. The district court even acknowledged that Crocs *partially* disputed Dawgs' material facts. Appx3, n.4. Thus, under Fed. R. Civ. P. 56(e)(2), the district court permissibly considered the linking "fact undisputed for purposes of the motion."

Second, at least paragraphs 7, 47, and 49 of Dawgs' counterclaims allege that Crocs falsely advertised its footwear as composed of proprietary, patented, and exclusive materials to give consumers the misimpression that its shoes had unique qualities. *See* Appx481, Appx493-494. For example, ¶ 7 of Dawgs' counterclaims alleged that Crocs falsely advertised that "**Croslite had unique characteristics** that its competitors could not offer . . . 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

(bold added). At the pleading stage, this alone sufficed. *See* Fed. R. Civ. P. 8(a)(2); *see also* *Zokari v. Gates*, 561 F.3d 1076, 1084 (10th Cir. 2009) (acknowledging “the general rule that a complaint need not set forth the plaintiff’s legal theories.”).

Dawgs’ pleading went further, replete with specific allegations about Crocs’ misrepresentations about the quality and characteristics of its footwear. *See* Appx493 at ¶47 (“Crocs actively misled its own customers to believe that Croslite was patented and therefore contained some unique or special properties . . .”); *see also* Appx494 at ¶49 (identifying a Crocs advertisement that linked the falsely marketed Croslite material with the qualities of the footwear having a unique “foot bed” and being “lightweight shoes [that] keep up with you,” as well as alleging that Crocs made false representations about the quality and nature of competitor products with Crocs’ statement that “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”); Op. Br. at 47-49.

Further dispelling any doubt about Dawgs’ Lanham Act claim are Dawgs’ interrogatory responses, which Dawgs cited with particularity in its summary judgment briefing. *See* Appx1414, at ¶6 (citing to Berkowitz Decl., Ex. U (Appx1495-1508), which includes specific relevant portions of Dawgs interrogatory responses). For example, in response to Interrogatory No. 16, Dawgs explained that “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 . . .” Appx1499. Dawgs further identified exemplary advertising statements and explained that, “As a result of this false advertising, customers believed that Croslite was a superior material to that of its competitors . . .” Appx1500.⁴

Crocs does not seriously dispute that this interrogatory response sets out a cognizable Lanham Act claim. It instead suggests that the district court rightly ignored it because Dawgs served the supplemental response a day before filing its summary judgment opposition brief. *See* Resp. Br. at 12 n.4, 13, 40. Crocs is wrong.

Crocs filed its summary judgment brief shortly after the case re-opened. *Compare* Order re-opening case in July 2020 (Appx1358-1365) *with* Crocs’ summary judgment brief filed in November 2020 (Appx1393-1399). This was approximately *6 months* before the close of fact discovery (*see* Appx125 at ECF986 (extending certain fact discovery until June 4, 2021)) before most if not all Lanham Act-related depositions were scheduled, and before Crocs had even answered Dawgs’ counterclaim. *See* Appx1537 (Crocs’ Answer filed on April 2, 2021). Crocs’ summary judgment brief was the first time that Crocs presented this interpretation of Dawgs’ Lanham Act claim (Crocs did not, for example, move to

⁴ Crocs ignores this interrogatory response, as well as the others that Dawgs cited in its summary judgment opposition brief.

dismiss on *Dastar* grounds, *see* Appx236, Appx254-255), so Dawgs supplemented its responses to correct Crocs' understanding. Even the Tenth Circuit cases that Crocs cites indicate that this is acceptable and, when coupled with Dawgs' summary judgment opposition brief, should have precluded summary judgment based on a purported pleading misstep. For example, Crocs cites *Evans v. McDonald's Corp.*, 936 F.2d 1087, 1090-91 (10th Cir. 1991), but there the Tenth Circuit held that a Plaintiff could not change their theory *two weeks* before trial and nevertheless reiterated the Circuit's application of the liberal federal pleading rules. And, in *Zokari v. Gates*, the court noted that the plaintiff did not present his wage-law claim "in response to DCAA's motion for summary judgment. He waited until the eve of trial." 561 F.3d at 1087. Yet the court again reinforced the principle that pleadings should be construed liberally "so as to do justice," and should focus on the notice function and prejudice considerations. *See id.* at 1084-1085 (citing Seventh Circuit precedent holding that claims were sufficient so long as a party "brought the legal support for their claim to the district court's attention in their response to the defendant's summary judgment motion.").

Accordingly, even if Dawgs had not pled its Lanham Act theory (it did) or provided explanatory interrogatory responses (it did this too), the district court still was not entitled to disregard Dawgs' arguments in its summary judgment response,

filed before relevant depositions, months before the close of fact discovery, and before Crocs even filed its Answer.

Third, dismissing a claim with prejudice based on a pleading issue that was never raised by Crocs is contrary to the Federal Rules and relevant case law. *See Foman v. Davis*, 371 U.S. 178, 181-82 (1962) (pleadings are not “a game of skill in which one misstep by counsel may be decisive to the outcome”). There are more appropriate procedural tools—like a motion to clarify or motion to dismiss—to test the sufficiency or clarity of allegations in a pleading. *See Lillibridge Health Care Services v. Hunton Brady Arch*, No. 6:08-cv-1028, 2010 WL 1417193, at *5 (M.D. Fla. Apr. 7, 2010) (“Summary judgment is not the appropriate time to raise pleading issues.”).

Finally, it is worth repeating that Dawgs was not required to make “arguments” in pleadings—just legal claims supported by sufficient factual allegations to infer plausibility. *See* 5 C. Wright & A. Miller, *Federal Practice & Procedure* § 1219 (4th ed. 2022) (stating that the federal rules make “it clear that it is unnecessary to set out a legal theory for the plaintiff’s claim for relief”); *see also Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 12 (2014) (having informed defendant of the “factual basis for their complaint, [Petitioners] were required to do no more to stave off threshold dismissal for want of an adequate statement in their claim.”). Only if a legal theory is inconsistent with what is alleged in the complaint

can the theory be disregarded. *Hayes v. Whitman*, 264 F.3d 1017, 1025 (10th Cir. 2001) (“While it might be appropriate for a court to consider additional facts or legal theories asserted in a response brief to a motion to dismiss if they were consistent with the facts and theories advanced in the complaint . . . a court may not consider allegations or theories that are inconsistent with those pleaded in the complaint.”).

Even so, Crocs fails to appreciate that one of several interrogatory responses that Crocs itself cited in its summary judgment brief (Interrogatory No. 18) again informed it of Dawgs’ Lanham Act claim. That interrogatory highlights that consumers have associated Crocs’ false claims about Croslite being patented, proprietary, and exclusive with the unsupported notion that Crocs possess a unique nature or quality unmatched by any other footwear brand. *See* Appx1394-1395 (explaining to Crocs that Dawgs’ customer inquiries “have consistently revealed a concern that Croslite is superior because it is held out as patented, exclusive or proprietary such that in the mind of the customer, Crocs is perceived to have invented a superior EVA material that no other manufacturer can match.”) (emphasis modified).

In short, Crocs’ summary judgment brief spun a narrative that its own false advertising was about authorship, despite Dawgs’ repeated and consistent allegations that Crocs’ advertising misled consumers about the qualities and

characteristics of Crocs' footwear. This was wrong and cannot support summary judgment in favor of Crocs.

B. Dawgs Properly Presented Evidence to Defeat Summary Judgment

Crocs argues that the Order should be affirmed because Dawgs “failed to point the district court to any allegations or admissible evidence that would support a claim against Crocs.” Resp. Br. at 35. Crocs' argument fails for two reasons. First, Crocs' appellate brief ignores that its own summary judgment burden would have been different had the district court correctly apprehended the law, making Dawgs' supposed failure to properly present evidence inconsequential for this appeal. Second, and in any event, Dawgs *did* in fact properly present evidence to oppose summary judgment.

1. The Court Need Not Address Crocs' Procedural Arguments

Crocs writes its brief as if this Court could simply affirm summary judgment based on the procedural issues identified by Crocs. *See* Resp. Br. at 35-51. Not so. In the Tenth Circuit, the burden would shift to Dawgs to present evidence *only after* Crocs meets *its own* burden of establishing no material dispute of fact. *See Reed v. Bennett*, 312 F.3d 1190, 1195 (10th Cir. 2002) (“As explained by the Supreme Court in *Adickes v. S.H. Kress Co.* . . . the burden on the nonmovant to respond arises only if the summary judgment motion is properly ‘supported’ as required by Rule 56(c) . . . If the evidence produced in support of the summary judgment motion does not

meet this burden, ‘summary judgment must be denied *even if no opposing evidentiary matter is presented.*’” (emphasis in original)).

This means that a) if Dawgs properly pled the link between Crocs’ advertising and claims about the shoes’ characteristics and qualities (as Dawgs explains in Section II.A.) and b) if the district court erred in not analyzing how consumers understood Appellee’s advertising regarding the terms patented, proprietary, or exclusive (as Dawgs explains in Section I), then Crocs’ burden on summary judgment would be materially different as a matter of law. This is because Crocs would need to establish, for example, that no material factual dispute exists over (a) whether Crocs’ advertisements were false or misleading or (b) whether customers were mistaken or misled as to the nature, characteristics, or qualities of Crocs’ footwear under § 1125(a)(1)(B) to negate an element of Dawgs’ claim. *See Romans v. Michigan Dep’t of Human Servs.*, 668 F.3d 826, 835 (6th Cir. 2012) (“Defendant bears the burden of showing the absence of a genuine dispute of material fact as to at least one essential element of Plaintiff’s claims.”). But Crocs’ summary judgment brief includes no evidence (or even argument)—via affidavit or otherwise—that Crocs’ advertisements have been truthful or that consumers have not been misled and confused. *See* Appx1394-1395. Nor did Crocs present any evidence (undisputed or otherwise) about how consumers understand the terms “patented,” “proprietary” and “exclusive” in the context of the relevant advertising.

To the contrary, its summary judgment brief was a motion-to-dismiss-style argument that summary judgment should be granted *in spite* of the falsity of its advertisements and customer confusion, which Crocs supported with citations to *Dastar* and *Baden* and by mischaracterizing Dawgs' pleadings. Crocs' mere three "Undisputed Material Facts" are reproduced below:

1. In its Lanham Act counterclaim against Crocs (Count Fifteen), Dawgs alleges that Crocs falsely marketed its shoes in violation of 15 U.S.C. § 1125(a) by advertising its Croslite material as "patented," "proprietary," and "exclusive." ECF 487 (3/10/2017 Second Am. Answer and Counterclaim) ¶¶ 7, 46, 47, 49, 50, 283(d), 301(d), 341-47; ECF 899 (11/9/2020 Dawgs's Reply in Support of Mot. to Amend Discovery Limits), at 1.

2. In its Lanham Act claim against the Individual Defendants (Count Seven), Dawgs asserts that Defendants are liable for causing Crocs to make statements that Croslite was "patented," "proprietary," and "exclusive." ECF 273-1 (8/29/2016 Compl., Case No. 16-cv- 02004) ¶¶ 22, 198(c), 216(d), 255-62.

3. In response to Crocs's Interrogatory No. 18, which sought the basis for Dawgs's assertion that it had lost sales as a result of Crocs' advertising of Croslite, Dawgs stated: "Dawgs has received numerous inquiries from its customers and potential customers regarding Dawgs' foam material in comparison with Croslite. These communications . . . have consistently revealed a concern that Croslite is superior *because it is held out as patented, exclusive or proprietary* such that in the mind of the customer, Crocs is *perceived to have invented* a superior EVA material that no other manufacturer can match." See Declaration of Michael Berta In Support of Mot. for Partial Summary Judgment ¶ 2, Ex. 1, No. 18 (emphasis added).

See Appx1394-1395.

Plainly, on the current record, Crocs cannot meet its burden because it failed to even argue—let alone demonstrate—no genuine issue of material fact as to any essential element of Dawgs' claim, and the burden would not shift to Dawgs to

present evidence rebutting Crocs' claims. And any supposed violation of the district court's local rules would be a moot issue. *See Reed*, 312 F.3d at 1194-95 (reversing the district court's finding that summary judgment was proper because appellant violated local rules by failing to file an opposition to summary judgment brief because "district courts must construe and apply local rules in a manner consistent with Fed. R. Civ. P. 56."); *see also Big O Tire Dealers, Inc. v. Big O Warehouse*, 741 F.2d 160, 163 (7th Cir. 1984) ("Where the moving party fails to meet its strict burden of proof, summary judgment cannot be entered *even if the opposing party fails to respond to the motion.*" (emphasis added)). Because Crocs cannot meet its summary judgment burden on the present record, the Court should not affirm the judgment below.

2. Dawgs Properly Presented Its Evidence

Crocs' argument fails because Dawgs *did* properly present evidence to defeat summary judgment.

First, Dawgs pointed to sufficient evidence in the record through exhibits attached to its opposition brief. *See Op. Br.* at 37-38. Those exhibits included evidence of customer confusion, which is why the district court acknowledged that "the parties dispute whether consumers have been misled into believing that Crocs' shoe material, Croslite, is better than competitors' material." *See Appx13; see also Appx3* at n.4 ("The parties dispute the effect of these advertising terms. Dawgs

states that the terms were ‘leveraged . . . in order to drive a price premium and an image of product superiority.’ [] Crocs disagrees with the implication[.]”).

Crocs’ response brief tacitly acknowledges this. For example, Crocs states that “*nearly all* of the evidence in Appellants’ brief that Appellants insist shows their claims were actually characteristics and qualities claims [] was not properly before the district court.” Resp. Br. at 41 (emphasis added). But if Dawgs presented *any* probative evidence that there was a material factual dispute over how consumers understood Crocs’ advertisements then Dawgs’ § 1125(a)(1)(B) claim was viable, and the district court erred. *See Eisenhour v. Weber Cnty.*, 744 F.3d 1220, 1226 (10th Cir. 2014) (evidence must be construed in the light most favorable to the nonmovant). District courts have been reversed for failing to credit much weaker evidence than what Dawgs presented below. *See Ironhawk Tech. v. Dropbox, Inc.*, 994 F.3d 1107, 1123 (9th Cir. 2021) (reversing and remanding because “Ironhawk offered evidence of actual confusion among actual or potential customers. *While we have some doubt that the jury will find this factor to be in Ironhawk’s favor, it is evidence a reasonable jury could rely on to support a finding of actual confusion or when assessing a likelihood of confusion under the totality of the circumstances.*” (emphasis added)).

Second, to the extent that Dawgs did not present other sources of evidence, that was because Crocs’ terse 7-page summary judgment brief merely argued that

under *Dastar* and *Baden* words like patented and proprietary were necessarily nonactionable representations about inventorship or authorship. See Appx1395-1399. In short, Crocs' motion-to-dismiss-style argument merely tested the legal viability of Dawgs' theory, and Dawgs responded accordingly. Appx1415-1420. Only on reply did Crocs add additional arguments that Dawgs was "recast[ing]" its claims. Appx1520.

Third, the district court's order explicitly found that "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. No additional evidence from Dawgs was required in light of this finding.

Fourth, Dawgs neither violated the local summary judgment rules nor would dismissal be proper for that reason. Crocs cited paragraphs 46, 47, 49, and 50 of Dawgs' counterclaims in its statement of undisputed material facts. No local rule requires Dawgs to re-cite those same allegations, particularly since Dawgs *admitted* these allegations as cited by Crocs. See Op. Br. at 52. What's more, Dawgs' specifically pointed the district court to Paragraph 7 of its counterclaims, which, by itself, gives notice of Dawgs' Lanham Act theory. See Appx1411-1412 (citing Paragraph for the material dispute of fact over whether Crocs' advertisements

suggest that “Croslite had unique characteristics.”). Indeed, Crocs *admits* that Dawgs properly cited Paragraph 7, which, even standing alone, supports Dawgs’ Lanham Act claim. Resp. Br. at 51, n.8.

Crocs points to no authority requiring Dawgs to do more than summarize the false claims at issue and cite just enough evidence to show that, after making all reasonable inferences in Dawgs’ favor, summary judgment should be denied. *See Ortiz v. Norton*, 254 F.3d 889, 893 (10th Cir. 2001) (“This court draws all reasonable inferences in favor of the nonmoving party.”). Beyond this, Dawgs specifically cited its interrogatory responses setting out additional facts supporting its Lanham Act theory well before the fact discovery cut-off and before Crocs even filed an Answer. *See Op. Br.* at 20-21 (highlighting Dawgs’ evidence opposing summary judgment).

In fact, the very purpose of serving interrogatories is to give parties like Crocs a procedural mechanism to gather additional facts to better understand the pleaded allegations against them. *See Woodrow Woods & Marine Exhaust Sys., Inc. v. Deangelo Marine Exhaust, Inc.*, 692 F.3d 1272, 1280 (Fed. Cir. 2012) (“Contention interrogatories . . . serve an important purpose in helping to discover *facts supporting the theories* of the parties.” (emphasis added)); *see also Twomey v. Maria Regina Residence LTF*, 15-CV-3781, 2016 WL 1056570, at *2 (E.D.N.Y. Mar. 16, 2016) (“If defendants have notice of the general nature of the claims against them, ‘the preferred course is to encourage the use of discovery procedures to apprise the

parties of the factual basis of the claims made in the pleadings.” (citation omitted)).

The district court erred in not crediting Dawgs’ interrogatory responses.

Finally, as discussed at length in Dawgs’ opening brief, the district court erred in summarily rejecting some of Dawgs’ cited evidence based on admissibility issues and ignoring other non-objected-to evidence. *See* Op. Br. at 54-56. For one thing, only *some* of Dawg’s cited exhibits were alleged to not be admissible. *Id.* As explained above, Crocs acknowledges this by confirming that at most only “*nearly all*” of the evidence was not properly before the district court. Resp. Br. at 21(emphasis modified); *see also* Appx1516, ¶ 3 (only objecting to some, but not all, evidence). The non-objectionable exhibits independently provided evidence more than sufficient to defeat summary judgment. Op. Br. at 56. For example, Dawgs cited a direct message from one of Crocs’ founders to a customer stating, “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. Dawgs further cited Crocs’ own website, which stated that “The special Patented Closed Cell Resin (PCCR) warms and softens with your body heat and molds to your feet,” and a Crocs blog stating that “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.”

Appx1449, Appx1451. Crocs did *not* object to these documents on evidentiary grounds (*see* Appx1516, ¶3) and the district court did *not* exclude them. The district court simply ignored them, in view of its erroneous interpretation of Dawgs’ pleadings and the relevant caselaw.

Additionally, as for the subset of exhibits that were the subject of Crocs’ objections, though Crocs at times cites the correct law, Crocs’ argument conflates the issues of *the form* of evidence and the *substance* of evidence. Resp. Br. at 42-43. Again, there is no reason to believe that Dawgs could not produce the cited evidence in its summary judgment brief in an admissible form at trial—*i.e.*, addressing issues of hearsay and reliability—and no reason to conclude that the substance of the evidence is unreliable. *See Thomas v. Int’l Bus. Machs.*, 48 F.3d 478, 485 (10th Cir. 1995) (“[Only] the content or substance of the evidence must be admissible.”). And, as Dawgs explains, the documents are not hearsay given that, as in any false advertising case, Dawgs was not offering them for the truth of the matter. *See* Op. Br. at 54-56. Indeed, Crocs only raised “hearsay” in its reply, and the district court never even gave Dawgs the chance to respond or explain why the exhibits would have been admissible.

In any event, Dawgs’ attorney attested to the truthfulness of the content of the cited exhibits under penalty of perjury. *See* Appx1422-1427. The very purpose of such a declaration is to avoid disputes over the reliability of evidence. *See Martz v. Union Labor Life Ins. Co.*, 757 F.2d 135, 138 (7th Cir. 1985) (“The facts must be

established through one of the vehicles designed to ensure reliability and veracity—depositions, answers to interrogatories, admissions and affidavits. When a party seeks to offer evidence through other exhibits, they must be identified by affidavit or otherwise made admissible in evidence.” (citation omitted)); *see also Tobar v. United States*, 07-cv-817, 2014 WL 4793023, at *2 n.3 (S.D. Cal. Sep. 25, 2014) (“The court does not consider website screenshots, *unaccompanied by a declaration explaining and authenticating the documentation, to be evidence.*” (emphasis added)).

The district court erred in summarily disregarding Dawgs’ exhibits.

III. Crocs’ Remaining Arguments Fail

Crocs argues that the district court should be affirmed because its advertising is nonactionable puffery. But the district court made no finding as to whether a claim that a product is “patented” is puffery. Nor did the district court even consider any particular advertisements that Dawgs presented. So, puffery would be no basis to affirm the district court.

Additionally, the district court’s puffery finding as to “proprietary” and “exclusive” is erroneous because Crocs’ claims were not “vague generalities that no reasonable person would rely on as assertions of particular facts.”⁵ *See*

⁵ Crocs did not even raise “puffery” in its opening summary judgment brief. *See generally* Appx1393-1399. As with the “hearsay” issue, the district court never gave Dawgs a chance to address it.

Intermountain Stroke Ctr., Inc. v. Intermountain Health Care, Inc., 638 Fed. App'x 778, 786-87 (10th Cir. 2016) (unpublished). There can be no puffery where, as here, there are specific and credible reasons to believe that consumers were in fact misled by Crocs. *See Newcal Industries, Inc. v. IKON Office Solution*, 513 F.3d 1038, 1053 (9th Cir. 2008) (“A statement is considered puffery if the claim is extremely unlikely to induce consumer reliance.”). In any event, Crocs offered no evidence or argument on how consumers understood its advertisements and, again, the district court never even mentioned a particular advertisement. Summary judgment should have been denied for this reason.

Crocs also argues that INTA’s brief should not be considered and that Prof. Tushnet’s view “merits no consideration.” Resp. Br. at 63, 33. But courts routinely rely on amicus briefs when the amicus is credible and the brief provides useful illustrations of the law. And Prof. Tushnet is an independent expert on the very subject of this appeal and has publicly opined that the district court erred. *See Op. Br. at 40-42.*

In many ways, Crocs’ arguments highlight a telling through line with respect to its position: namely, that contrary case law from district courts deserves no weight, amicus briefs from independent organizations with legal and industry expertise should be ignored, publications by disinterested professors “merit[] no consideration” at all, and the portions of the district court opinion finding that Crocs

admitted to linking its false advertising to product qualities are somehow erroneous. Crocs instead focuses on purported procedural missteps and a narrow and partial parsing of Dawgs' Lanham Act counterclaim. Those positions are incorrect and cannot free Crocs of its decades of wrongdoing.

CONCLUSION

The district court's summary judgment Order should be reversed and this case should be remanded for further proceedings.

Dated: June 28, 2023

/s/ Matthew G. Berkowitz
Matthew G. Berkowitz
Reichman Jorgensen Lehman &
Feldberg LLP
100 Marine Parkway, Suite 300
Redwood Shores, CA 94065
Tel.: (650) 623-1401
mberkowitz@reichmanjorgensen.com

*Attorneys for Appellant U.S.A.
Dawgs, Inc., Double Diamond
Distribution Ltd, and Mojave Desert
Holdings, LLC*

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

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 2022-2160

Short Case Caption: Crocs, Inc. v. Effervescent, Inc.

Instructions: When computing a word, line, or page count, you may exclude any items listed as exempted under Fed. R. App. P. 5(c), Fed. R. App. P. 21(d), Fed. R. App. P. 27(d)(2), Fed. R. App. P. 32(f), or Fed. Cir. R. 32(b)(2).

The foregoing filing complies with the relevant type-volume limitation of the Federal Rules of Appellate Procedure and Federal Circuit Rules because it meets one of the following:

- the filing has been prepared using a proportionally-spaced typeface and includes 6,093 words.
- the filing has been prepared using a monospaced typeface and includes _____ lines of text.
- the filing contains _____ pages / _____ words / _____ lines of text, which does not exceed the maximum authorized by this court's order (ECF No. _____).

Date: 06/28/2023

Signature: /s/ Matthew G. Berkowitz

Name: Matthew G. Berkowitz