

No. 2022-2160

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**In the United States Court of Appeals  
for the Federal Circuit**

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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.*

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Appeal from the United States District Court for the  
District of Colorado, Case No. 06-cv-00605-PAB-MDB  
Hon. Chief Judge Philip A. Brimmer.

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**BRIEF FOR THE APPELLEE**

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## CERTIFICATE OF INTEREST

Counsel for Appellees certifies the following:

1. The full names of every party or amicus represented by me are:  
  
Crocs, Inc.
2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:  
  
N/A
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the parties or amicus curiae represented by me are:  
  
BlackRock, Inc. and FMR LLC
4. The names of all law firms and the partners or associates that appeared for the parties or amicus now represented by me in the trial court or agency and have not or will not appear in this court are:
  - Matt Stump (Faegre & Benson LLP)
  - Natalie Hanlon-Leh (Faegre & Benson LLP)
  - Jared Barrett Briant (Faegre & Benson LLP)
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  - George Langendorf (Arnold & Porter Kaye Scholer LLP)
  - Suneeta Hazra (Arnold & Porter Kaye Scholer LLP)

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal are:

None.

DATED: May 24, 2023

/s/ Michael A. Berta  
Michael A. Berta

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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); *Double Diamond Distribution, Ltd. v. Int’l Trade Comm’n*, No. 18-01219, ECF No. 27 (Fed. Cir. Apr. 10, 2018); *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).<sup>1</sup> Final judgment in this case was entered on July 12, 2022. Appx23-24. On November 29, 2022, this Court dismissed Appellants’ appeal in the -02004 case. *Crocs, Inc. v. Effervescent, Inc.*, No. 22-02160, ECF No. 19 (Fed. Cir. Nov. 29, 2022). The appeal from the district court’s decision in the -00605 case remains.

There are no other appeals pending in this action. Appellee is not aware of any other cases pending in any court or agency that will directly

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<sup>1</sup> All “ECF” cites refer to the -00605 docket unless otherwise indicated.

affect or be affected by the Federal Circuit's decision in the appeal being briefed.

## INTRODUCTION

As Appellants state, this case presents just one issue: Whether the district court erred in granting summary judgment in favor of Crocs on Appellants' false advertising counterclaim under Section 43(a)(1)(B) of the Lanham Act. *See* Appellants' Brief (Br.) 6. It did not.

This case begins and ends with a familiar principle: at summary judgment litigants are bound by the theories that they allege and pursue in their complaints and during discovery, not the theories they belatedly decide they *should* have pursued once it becomes clear that they cannot prevail. At summary judgment, the Tenth Circuit (where this case was litigated) requires parties to stick with the theory of the case they pleaded. It is fundamentally unfair to a party's opponents, who conduct discovery and present defenses in response to a claim as pleaded, to permit a party to switch up the whole theory of their case in response to a motion for summary judgment. That is why the Tenth Circuit does not allow it.

Yet that is what Appellants tried to do below, and now try to do again before this Court. Up until Crocs filed its motion for summary judgment in this case, Appellants' only Lanham Act theory was that Crocs violated the Act by falsely claiming to have *invented* the Croslite shoe material in Crocs footwear by describing it as "patented," "exclusive" and "proprietary." Appellants' theory of the case was that Crocs violated the Lanham Act by making an alleged misrepresentation of inventorship. Appx12; Appx1978. That is how Appellants pleaded their claims and that is how they described their claims during discovery. But belatedly realizing, after reading Crocs's motion, that the Supreme Court's holding in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 27-28 (2003), barred Appellants' claim, Appellants tried to reframe their whole case around a new legal theory. Namely, Appellants tried to argue that *actually* their claim is that Crocs violated the Lanham Act because the words "patented," "exclusive" and "proprietary" no longer referred to who created and owned Croslite, but now instead were really code words about the nature or characteristics of Croslite shoe material being soft, comfortable, or odor-resistant.

The district court saw through Appellants’ attempt to constructively amend their counterclaim to circumvent the Supreme Court’s holding in *Dastar*, Appx1-15; Appx1972-1978, and so should this Court. Up until they opposed Crocs’s summary judgment motion, Appellants’ counterclaim had “never mentioned” the terms “patented,” “proprietary,” and “exclusive” as somehow referring to other product qualities or characteristics, such as Crocs’s footwear “being soft, comfortable, lightweight, odor-resistant, or non-marking.” Appx12. On that basis, consistent with the reasoning in *Dastar* and its progeny, the district court correctly held that Appellants’ counterclaim—premised on a theory of false inventorship—was non-actionable. Appx1-15.

The district court’s decision also rested on Appellants’ failure to comply with basic evidentiary and procedural rules. For instance, the district court correctly rejected Appellants’ consumer confusion evidence. Much of the “evidence” consisted of unauthenticated webpage screenshots from third-party websites. The district court recognized that these materials were inadmissible hearsay and properly refused to consider them. Appx13 n.8. The district court also properly held that Appellants could not later supplement the already-submitted motion for summary



judgment record with new survey evidence because Appellants had not complied with Rule 56(d), a failure that Appellants' opening brief does not even mention. Appx16-17. Appellants complain about the district court's rulings on some of these issues, but do not actually challenge any of them in this appeal. *See* Br. 6.

The district court also correctly rejected Appellants' efforts to circumvent the Court's practice standards by making legal arguments in their statement of disputed facts, and by incorporating *en masse* hundreds of pages of materials instead of making, as the rules require, specific references to record materials. Appx3 n.5; *see also* Appx1973. Holding Appellants to the district court's procedural rules was especially proper given the "unreasonable and vexatious" manner in which Appellants litigated their Lanham Act counterclaim, which ultimately resulted in an award of fees. ECF No. 1191 at 14-17.

Putting aside Appellants' failure to plead a cognizable claim or follow the procedural requirements for opposing summary judgment, Appellants also, critically, never actually presented any evidence at summary judgment showing or suggesting that the words "patented," "exclusive," or "proprietary" did, in fact, secretly convey any other meaning

such as “soft,” “comfortable” or “odor resistant.” This is also fatal. There is simply no support for a conclusion that these terms of inventorship, which describe non-physical attributes, somehow refer to a separate list of physical and functional product qualities as would be required to plead a valid claim under Section 43(a)(1)(B) of the Lanham Act. Said differently, even if it was possible in some case somewhere that a company could use the term “patented” or “exclusive” or “proprietary” in such a way as to tacitly signify some specific product quality or characteristic such that a Lanham Act claim could be appropriate, this is not that case, because Appellants did not provide any evidence to support such a claim in response to summary judgment. By contrast, there is ample support for rejection of Appellants’ counterclaim, found in the statute’s history and purpose, its text and structure, and a body of decisional law from other appellate courts. Moreover, to the extent that Appellants persist in arguing that the usage of the terms “patented,” “exclusive,” or “proprietary” drove a message of product superiority, such generalized claims of superiority are non-actionable as puffery. *EP Henry Corp. v. Cambridge Pavers, Inc.*, 383 F. Supp. 3d 343, 349-50 (D.N.J. 2019).

Finally, it bears noting that even if this Court were to reverse the grant of summary judgment below, it would win Appellants little. Crocs has several additional defenses to Appellants' claim that the district court did not need to resolve below. Reversal here would merely result in a remand for further proceedings, including an opportunity for Crocs to re-urge its separate motion for summary judgment outlining each of the other claim-ending defenses.

### **STATEMENT OF THE ISSUES**

Whether the district court erred in granting summary judgment in favor of Crocs on Appellants' false advertising counterclaims under Section 43(a)(1)(B) of the Lanham Act. *See* Br. 6.

### **STATEMENT OF THE CASE**

This appeal marks the latest chapter in a long-running series of actions by Crocs, one of America's most iconic brands, to counteract unlawful infringement of Crocs's intellectual property.

#### **I. Crocs files successful patent infringement claims against appellants**

On April 3, 2006, Crocs initiated this lawsuit as part of its effort to stop a wave of knockoffs of Crocs's designs pouring into the United States. By April 2006 the Crocs Classic Clog shoe was already a global

phenomenon, and imitators were moving in quickly to capitalize on Crocs's success. One such imitator was Dawgs, a brand launched by Appellant Double Diamond, a newly founded footwear company from Saskatchewan, Canada. Crocs named Double Diamond as a defendant in this lawsuit, and as a respondent in a contemporaneously-filed Section 337 action before the International Trade Commission ("ITC"). This lawsuit was stayed as the ITC action proceeded. During the pendency of the stay, the principal of Double Diamond formed Appellant USA Dawgs to take over the Dawgs shoe business in the United States while Double Diamond continued to sell in Canada. *See* ECF No. 113 at 2-3.

This lawsuit was stayed for five years as the parties litigated the ITC proceeding, which included an appeal to this Court. *See Crocs, Inc. v. Int'l Trade Comm'n*, 598 F.3d 1294 (Fed. Cir. 2010). Finally, on remand, the ITC issued its final determination finding that Appellants' accused footwear infringed Crocs's design and utility patents, and ordering that the footwear be prohibited from importation. *See In the Matter of Certain Foam Footwear*, USITC Inv. No. 337-TA-567, 2011 WL 5997932, at \*4-6, \*55 (Oct. 1, 2011). In 2012, litigation in this action resumed (ECF No. 75) and USA Dawgs was added as a defendant. ECF No. 103.

The lawsuit was stayed twice more, first from 2012 to 2016 pending unsuccessful challenges by Appellants to the validity of Crocs's patents (ECF No. 118 at 1-2; ECF No. 136), and then from 2018 to 2020 on account of USA Dawgs's bankruptcy (ECF No. 821; Appx1358). On June 26, 2022, unable to dispute their infringement after more than sixteen years of litigation, Appellants submitted offers of judgment that resolved Crocs's patent claims on the eve of trial, and judgment was entered against them in an amount surpassing \$6 million in the aggregate. Appx23-24.

## **II. Appellants file meritless counterclaims**

### **A. More than ten years into the lawsuit, Appellants assert a Lanham Act counterclaim**

The dispute between Crocs and Appellants morphed over the many years that this litigation was pending. On May 31, 2016—ten years into the lawsuit—Appellants filed joint amended counterclaims and, for the first time, asserted a Lanham Act counterclaim against Crocs. *See*

Appx230-31, ¶¶ 255-62.<sup>2,3</sup> On March 10, 2017, Appellants filed their operative pleading in this case, their Second Amended Answer and Counterclaims, asserting fifteen counterclaims in total. *See* Appx469.

Appellants' pleading totaled 112 pages, *id.*, with several dozen attached exhibits adding another 552 pages, for a total of 664 pages of materials. ECF No. 487-1 to 487-52; *see also* Appx469-981. As to the Lanham Act claim, Appellants alleged that Crocs falsely marketed its shoes by advertising Croslite, the foam material that Crocs shoes are made from, as “patented,” “proprietary,” and “exclusive.” Appx1394, ¶ 1 (citing Appx575-76, ¶¶ 341-47). Appellants further argued that Croslite was merely a variation of the same ethyl vinyl acetate (EVA) used by many footwear companies around the world and that, by Crocs claiming to have

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<sup>2</sup> Appellants' various other antitrust and tort claims were generally predicated on a series of claims that Crocs was making false claims of inventorship as to its intellectual property. All such claims were dismissed with prejudice. *See* ECF No. 504; Appx982-1013.

<sup>3</sup> After filing amended counterclaims against Crocs, Appellants sued 18 current and former Crocs officers and directors, alleging the same claims against them as they did Crocs. *U.S.A. Dawgs, Inc. et al. v. Snyder et al.*, No. 1:16-cv-02004-PAB-MDB (D. Colo.) (Aug. 5, 2016). The two separate lawsuits were consolidated (Appx413), and the individual defendants have all since been dismissed from this action. *Effervescent, Inc. et al. v. U.S.A. Dawgs et al.*, No. 2022-2160 (Fed. Cir.) ECF No. 19 (Nov. 29, 2022) at 2-7.

invented Croslite, Crocs had implied (though never expressly stated) that Appellants' EVA footwear was inferior. *See* Appx575-76, ¶¶ 341, 345 (claim against individual defendants); Appx407-09, ¶¶ 256, 260 (counter-claim against Crocs). Appellants did not mention anything about Croslite being falsely marketed in a way that related to the material being soft, comfortable, lightweight, odor-resistant, slip-resistant, or non-marking.

As for the 552 pages of exhibits attached to the complaint, some were merely unauthenticated screenshots of the Crocs website retrieved from the Internet Archive's "Wayback Machine." *See, e.g.*, Appx494 ¶ 49 (citing exhibits). By way of example, Appellants cited a webpage that stated "All Crocs™ shoes feature Croslite™ material, a proprietary, revolutionary technology." *Id.* (citing Exhibit 23). Appellants argued that such statements were "false or misleading, as Crocs **did not own** any exclusive, proprietary, or patent rights to the materials from which its footwear are made," *id.*, ¶ 50 (emphasis added), which without more, alleged only a misrepresentation of ownership. *See id.* (alleging "Croslite was neither unique to Crocs nor Crocs' property."). Tellingly, Appellants highlighted the "patented," "proprietary" and "exclusive" terms where they appeared in such exhibits, but did not call attention to any of the

surrounding text they insist is now relevant to their claim. *See, e.g.*, Appx601 (Ex. 20); Appx603 (Ex. 21); Appx608 (Ex. 23).

**B. In response to a contention interrogatory, Appellants clarify that their Lanham Act counterclaim is a “False Inventorship” claim**

In discovery, when served an interrogatory asking the basis for Appellants’ assertion that they had lost sales as a result of the alleged misrepresentations about Croslite, Appellants stated on June 16, 2017 that customer inquiries comparing the Dawgs brand shoe material to Croslite had “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.” Appx1405-06 (emphasis added).<sup>4</sup>

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<sup>4</sup> In opposing summary judgment, Appellants falsely claimed that this quote appeared “in a prior version of its (now supplemented) interrogatory response . . . .” Appx1412 ¶ 3. But Appellants never supplemented this response (*see* Appx1504), even after Appellants’ new and current counsel entered the lawsuit in 2019. ECF No. 831. Indeed, Appellants stuck to their theory of inventorship throughout discovery, and did not supplement *any* interrogatory responses until December 15, 2020, just one day prior to submitting their opposition to summary judgment. *See* Appx1495.



### **III. The District Court grants summary judgment on Appellants' Lanham Act counterclaim in favor of Crocs**

Crocs moved for summary judgment of Appellants' Lanham Act counterclaim based on *Dastar*, which held that statements about the authorship or inventorship of a product are not actionable under the Lanham Act. Appx1393.

In response, Appellants asserted broadly that their “false advertising theory and supporting evidence” could be found in the entirety of their 112-page Second Amended Answer and Counterclaims plus 552 pages of exhibits, as well as a 14-page supplemental interrogatory response served the day before Appellants filed their opposition brief. *See* Appx3 n.5 (citing Appx1414 ¶ 5). Here, for the first time, Appellants argued without any case or evidentiary support that Crocs linked the challenged statements to product characteristics. Appx1409-12. And, without invoking Rule 56(d) or attempting to satisfy its requirements, Appellants asserted that discovery was ongoing and more evidence of the allegedly false statements was likely to be produced in discovery. Appx1414-15 ¶ 6; Appx1420.

Prior to the district court's grant of summary judgment, and over seven months after Appellants filed their opposition to summary

judgment, Appellants also moved for leave to file a supplemental response to Crocs's motion based on survey evidence produced in expert discovery. Appx1658.

On September 14, 2021, the district court granted summary judgment to Crocs on Appellants' Lanham Act counterclaim.

*First*, the district court easily disposed of any claim that Crocs had violated Section 1125(a)(1)(A) of the Lanham Act (relating to the origin of goods) because Appellants conceded that *Dastar* foreclosed any claim under Section 1125(a)(1)(A). Appx7-9.

*Second*, the district court also rejected Appellants' claim that Crocs violated Section 1125(a)(1)(B) of the Lanham Act (relating to product characteristics) because Appellants' theory of the case until summary judgment was that Crocs's use of the words "patented", "proprietary" and "exclusive" were false claims of authorship or inventorship, not false claims about the "characteristics, qualities, or geographic origin" of Crocs's products. Appx9-15.

In reaching that holding, the district court emphasized that Appellants had never previously argued that the "patented," "proprietary" and "exclusive" statements signified, or were "linked" to, other shoe material

qualities such as softness, comfort, or odor resistance, and Appellants could not change their theory of false advertising at summary judgment to avoid termination of their counterclaim. Appx10-11. The district court wrote: “while this may be Dawgs’s argument today, Dawgs did not make these arguments in its claim or counterclaim.” Appx12. Rather, “[i]n 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’s footwear is inferior.” *Id.* Further, from the time the Lanham Act claim was filed in May 2016 to when Crocs moved for summary judgment in November 2020, “Dawgs did not mention anything about Croslite being soft, comfortable, lightweight, odor-resistant, or non-marking.” *Id.*<sup>5</sup>

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<sup>5</sup> Nor had *Crocs* mentioned or admitted anything about the terms “patented,” “proprietary” or “exclusive” signifying a separate set of product qualities. On appeal, Appellants suggest the opposite by pointing repeatedly to a prefatory statement found in the background section of the order granting summary judgment. There, the district court posited that Crocs had admitted to having “linked” the terms “patented,” “proprietary,” and “exclusive” to separate qualities of Croslite. Appx3 (citing Appx1412-13 (Dawgs’s Opposition to Crocs’s Motion for Summary Judgment), ¶¶ 1-2)). However, the district court did not cite to any of Crocs’s briefing or discovery materials to support this point or rely on this finding in its analysis. Nor did the Court explain what it meant by this point, or suggest that the terms “patented,” “proprietary” or “exclusive” were in fact equated

In its order granting summary judgment, the district court also denied Appellants' motion for leave to supplement their summary judgment response. Appx15-17. Applying clearly established Tenth Circuit precedent, the district court held that “[b]ecause Dawgs responded to Crocs’s motion for summary judgment ... it waived its ability to retroactively seek relief under Rule 56(d).” *Id.* at 17 (citing *Pasternak v. Lear Petroleum Expl., Inc.*, 790 F.2d 828, 833 (10th Cir. 1986)). It further held that, even had Appellants not waived their right to invoke Rule 56(d), they still failed to satisfy Rule 56(d)’s requirements, including because they had not shown how new information obtained in discovery would be sufficient to create a genuine issue of material fact. *Id.*

#### **IV. The District Court denies Appellants’ motion for reconsideration**

After the district court granted summary judgment, Appellants filed a motion for reconsideration or, in the alternative, Rule 54(b) certification. Appx1966.

Appellants argued that the district court had “overlooked” allegations in Appellants’ counterclaim. *Id.* at 3-9. In particular, Appellants

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with any specific characteristics of Croslite by Crocs or by consumers, as opposed to just contained in a few of the same documents.

called attention, for the first time, to a single allegation in their Second Amended Answer and Counterclaims alleging 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.” Appx1872 (citing Appx493 ¶ 47 (emphasis added by Appellants)). Yet in the relied-on paragraph, Appellants failed to say what these “unique or special properties” were, let alone why they would be inferred from the term “patented.” Appx493 ¶ 47. Indeed, the very next sentence reiterated that Appellants’ theory was about inventorship: “In fact, Crocs never sought a patent for Croslite.” *Id.*

According to Appellants, the district court should have sifted through their 100+ page pleading to find this single insufficient allegation. Then, Appellants would have required the court to connect that allegation to statements in the 500+ pages of attached exhibits. Appellants contend that the court *then* should have concluded that Crocs had falsely advertised “the benefits of its product features,” because according to Appellants, “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.” Appx1872-73.

Appellants also used their reconsideration motion to advance another new argument: that the meaning of the terms “patented,” “proprietary” and “exclusive” was a question of fact that was not for the district court to resolve at summary judgment. Appx1877-89. Although Appellants had not heretofore raised this argument, they now argued that the survey evidence demonstrated that there was a *factual* dispute about whether Crocs’s use of the “patented,” “proprietary” and “exclusive” terms referred to product qualities or not. Appx1970 at 10.

The district court denied reconsideration. Appx1966. The court “agreed with Crocs that [Appellants’] claims concerned Crocs’s alleged misrepresentation of inventorship, ... which are not actionable under the Lanham Act, rather than the origin, nature, characteristics, or qualities of Crocs’s shoes, which are actionable.” *Id.* (citing Appx10). The court reaffirmed that the allegations in Appellants’ complaint “show that [Appellants’] Lanham Act claims were not that Crocs used the terms ‘patented,’ ‘proprietary,’ and ‘exclusive’ to ‘impl[y] that [Crocs’s] product features — its odor and bacteria-free properties — are better than those in competitor shoes’ ... but rather that [Appellants] targeted Crocs’s claims of inventorship.” Appx1977. The court explained in light of this that it did not

“ignore” or “overlook” Appellants’ arguments at summary judgment. Appx1978.

The district court explained that Appellants’ motion for reconsideration cited allegations and exhibits that Appellants had never identified in their response to Crocs’s summary judgment motion, and had not timely connected to any Lanham Act argument. Appx1973-74. Thus, in their motion, Appellants could not, and did not, “contend that [they] identified those on summary judgment.” Appx1974. That could have been the end of the inquiry. Even so, the district court carefully examined each of the allegations Appellants claimed were overlooked, and explained why these statements would not have changed the outcome, even had Appellants properly identified them. Appx1974-77.

Lastly, the district court rejected Appellants’ new argument that the court had improperly “resolved factual disputes about what consumers understood ‘patented,’ ‘proprietary,’ and ‘exclusive’ meant in Crocs’s advertising.” Appx1978. To the contrary, the district court resolved the motion on undisputed facts alone, without reaching Appellants’ consumer confusion evidence. *Id.* (citing Appx15 n.10)). Accordingly, the district court denied Appellants’ motion for reconsideration.

Similar to the denial of their motion for leave to supplement, Appellants do not appeal the denial of their motion for reconsideration.

### **SUMMARY OF THE ARGUMENT**

The Court should affirm the judgment below.

A. The district court correctly granted summary judgment to Crocs on Appellants' Lanham Act claim. From the filing of counterclaims in May 2016, until their opposition to Crocs's motion for summary judgment on December 16, 2020, Appellants' claim was that Crocs had violated the Lanham Act because Crocs used the words "patented," "exclusive," and "proprietary" to falsely imply that Crocs had invented its shoe material. Holding Appellants to the theory they pleaded and maintained during discovery, as required by binding Tenth Circuit precedent, the district court correctly concluded that *Dastar*, 539 U.S. 23, and *Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d 1300 (Fed. Cir. 2009), barred Appellants' claim. Appellants' after-the-fact "linking" theory was completely new—positing for the first time at summary judgment that Crocs had misrepresented the "nature, characteristics, qualities, or geographic origin" of its footwear by "linking" the "patented," "exclusive," and "proprietary" inventorship terms to a set of separate, physical product



qualities, like the footwear being “soft,” “comfortable,” “lightweight,” “odor-resistant,” or “nonmarking.” The new theory was also unsupported. Nearly *all* of the evidence that Appellants claim was unfairly “ignored” or “overlooked” was, in fact, never properly before the district court. *See infra*, pp. 24-51.

**B.** Appellants’ additional new theory—that words of inventorship like “patented,” “exclusive,” and “proprietary” can impliedly constitute misrepresentations about physical product qualities and characteristics—was likewise never presented to the district court and lacks any record support. At summary judgment, Appellants offered no evidence that these terms should be given (or that consumers give them) any meaning other than their ordinary, non-physical meanings connoting authorship, inventorship, ownership, and the like.<sup>6</sup> Terms with such meanings are non-actionable under Section 43(a)(1)(B) of the Lanham Act. This is consistent with the Act’s purpose and history, its text and structure, and other appellate court decisions. Any overextension of the Act to

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<sup>6</sup> Crocs refers collectively to misrepresentations based on the “patented,” “proprietary” and “exclusive” terms as misrepresentations of “inventorship,” except where distinctions such as authorship or ownership are necessary or reflected in the case law.

allow artful allegations unsupported by record evidence to reach claims of false inventorship would threaten to encroach on the remedial schemes established by other federal and state statutes, such as the Patent Act or state unfair competition acts. Additionally, to the extent Appellants still allege that the use of the words “patented,” “exclusive,” and “proprietary” drove a message of product superiority, generalized claims of superiority are non-actionable as puffery. *See infra*, pp. 52-63.

C. The *amicus curiae* brief of the International Trademark Association (INTA) does not counsel in favor of a contrary result in this case. INTA’s brief encourages the Court to proceed carefully in deciding Lanham Act claims under Section 43(a)(1)(B). But INTA’s concerns with an overly-narrow reading of Section 43(a)(1)(B) are not implicated in this appeal given the facts and procedural history of this case. *See infra*, pp. 63-70.

### STANDARD OF REVIEW

The Federal Circuit applies its own law for issues of substantive patent law and certain procedural issues pertaining to patent law, and the law of the regional circuit on non-patent issues. *Rsch. Corp. Techs. v. Microsoft Corp.*, 536 F.3d 1247, 1255 (Fed. Cir. 2008).

The district court's grant of Crocs's Motion for Summary Judgment is reviewed under Tenth Circuit law de novo, applying the same standards as the district court. *Morris v. City of Colorado Springs*, 666 F.3d 654, 660 (10th Cir. 2012). "Summary judgment is appropriate when 'the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Dullmaier v. Xanterra Parks & Resorts*, 883 F.3d 1278, 1283 (10th Cir. 2018) (quoting Fed. R. Civ. P. 56(a)). "No genuine issue of material fact exists 'unless the evidence, construed in the light most favorable to the non-moving party, is such that a reasonable jury could return a verdict for the non-moving party.'" *Hasan v. AIG Prop. Cas. Co.*, 935 F.3d 1092, 1098 (10th Cir. 2019) (quoting *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004)).

While parties may submit evidence in affidavits that may not be admissible at trial, "the content or substance of the evidence must be admissible." *Thomas v. Int'l Bus. Machs.*, 48 F.3d 478, 485 (10th Cir. 1995). "Like other evidentiary rulings, [the Tenth Circuit] review[s] a district court's decision to exclude evidence at the summary judgment stage for abuse of discretion." *Sports Racing Servs., Inc. v. Sports Car Club of*

*America, Inc.*, 131 F.3d 874, 894 (10th Cir. 1997); *see also Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1199 (10th Cir. 2006).

A grant of summary judgment can be affirmed on any ground supported by the record, given that the appellant had a fair opportunity to address that ground. *Alpine Bank v. Hubbell*, 555 F.3d 1097, 1108 (10th Cir. 2009); *see also Hasan v. AIG Prop. Cas. Co.*, 935 F.3d 1092, 1099 (10th Cir. 2019).

## ARGUMENT

### **I. The District Court correctly granted summary judgment to Crocs on Appellants' Lanham Act claim**

#### **A. The District Court correctly held that Appellants' false advertising claims were barred by *Baden Sports* and *Dastar***

##### **1. Appellants specifically argued that their claims were based on false claims of inventorship**

The district court correctly held that Appellants' false advertising counterclaim was non-actionable under the Lanham Act because Appellants had expressly premised the theory of their case on a false claim of inventorship. Appx14. In reaching this conclusion, the district court applied the decisions in *Dastar* and *Baden Sports*, which bar any claim that Crocs violated the Lanham Act by claiming to have invented Croslite. *See* Br. 23-25; *see* Appx13-14.

First, as the district court observed, the Supreme Court in *Dastar* held that “the Lanham Act does not provide a cause of action for claims concerning authorship.” Appx9 (citing *Dastar*, 539 U.S. at 37). In that case, the defendant Dastar had manufactured and sold a set of videos as its own product, representing itself to be the producer and distributor of that video set, when in fact the video content was merely an edited television series that Dastar had failed to attribute. *Dastar*, 539 U.S. at 27. The plaintiff argued that by holding itself out as the “producer” of the video, Dastar had violated Section 1125(a)(1)(A) by making a “false designation of origin, false or misleading description of fact, or false or misleading representation of fact,” thereby creating a likelihood of “confusion as to the origin of its goods.” *Id.* at 31 (cleaned up) (quoting Section 1125(a)(1)(A)). The Supreme Court held that plaintiff’s claim was barred under the Lanham Act, however, because the phrase “origin of goods” was “incapable of connoting the person or entity that originated the ideas or communications” (*i.e.*, the plaintiff, who had created the original video content that Dastar later edited and sold as its own). *Id.* at 31-32. Instead, the phrase “origin of goods” referred to “the producer of the tangible product sold in the marketplace” (*i.e.*, Dastar, who had produced the

video sets of edited content). *Id.* at 31. It was therefore not a false statement for Dastar to claim it was the “origin” of the videotapes.

The Supreme Court explained that its holding in *Dastar* was consistent with the Lanham Act’s history and purpose. 539 U.S. at 31-32. Namely, the Lanham Act was not created “to protect originality or creativity,” which is the purpose of federal patent and copyright laws. *Id.* at 37. The Lanham Act thus could not be understood “as creating a cause of action for, in effect plagiarism.” *Id.* at 36. The *Dastar* court also found this conclusion consistent with its precedent interpreting the Lanham Act. *Id.* at 36-37 (discussing cases).

Applying similar reasoning, in *Baden Sports*, the Federal Circuit held that such inventorship claims were also barred under Section 1125(a)(1)(B) of the Lanham Act. 556 F.3d at 1305-07. There, the plaintiff Baden had alleged that the defendant Molten falsely advertised the “dual-cushion technology” in its basketballs as “innovative,” “proprietary” and “exclusive.” *Id.* at 1303. The district court found that “proprietary” and “exclusive” “conveyed the idea that ‘Molten invented and owns the basketball technology.’” *Id.* While Molten was thus not liable for its use of these two terms under the Lanham Act based on *Dastar*, the

district court left open the possibility that “innovative” might refer to product characteristics. *Id.* The Federal Circuit confirmed it did not. *Id.* at 1308. Baden’s “innovative” claim was premised on a theory that Molten had falsely represented itself as the *creator* of the dual-cushion technology, an innovation. *Id.* The claim did not “go to the ‘nature, characteristics, [or] qualities’ of the goods,” and was therefore non-actionable under Section 1125(a)(1)(B). *Id.* Any other holding would also have risked creating tension between the Lanham and Patent Acts. *Id.* at 1307.

Appellants do not dispute that *Dastar* and *Baden Sports* bar Section 1125(a)(1)(B) claims premised on theories of false inventorship. *See* Br. 23-25. Indeed, Appellants state that *Baden Sports* was “no different than *Dastar*,” *id.* at 24, because it too was “fundamentally about the origin of an idea.” *Id.* (quoting *Baden Sports*, 556 F.3d at 1308).

Unable to dispute the import of these decisions, Appellants contend that the *facts in this case* are distinguishable because the term “patented” was allegedly “linked” to a host of unrelated product characteristics and qualities, and there was consumer survey evidence (albeit, never properly submitted to the district court) that consumers understood “patented” to imply superiority. *Id.* at 24-25. Appellants thus conclude that “this is not

a question of *who owns* a patent,” but “there simply is *no patent at all* . . . and there never was.” *Id.* at 24 (emphasis in original). Yet this was not Appellants’ claim. Appellants pursued a claim precisely about whether *Crocs owned* a patent on its Croslite shoe material, or whether Crocs could truthfully call its shoe material exclusive and proprietary if its claimed invention was a run-of-the-mill shoe material. Appx12-13. Appellants’ claim was thus an inventorship claim, which as Appellants concede, the Lanham Act does not permit. *See* Br. 23-25.

Under Tenth Circuit law, that is the end of this case. Appellants were not permitted in the district court to change their theory in opposition to Crocs’s motion for summary judgment and, *a fortiori*, they cannot now change it on appeal, either. As the Tenth Circuit has held, plaintiffs are not permitted “to wait until the last minute to ascertain and refine the theories on which they intend to build their case.” *Evans v. McDonald’s Corp.*, 936 F.2d 1087, 1091 (10th Cir. 1991); *see Zokari v. Gates*, 561 F.3d 1076, 1085 (10th Cir. 2009) (similar); *Green Country Food Mkt. Inc. v. Bottling Grp. LLC*, 371 F.3d 1275, 1279-80 (10th Cir. 2004) (similar). That practice, if tolerated, “would waste the parties’ resources, as well as judicial resources, on discovery aimed at ultimately unavailing legal



theories and would unfairly surprise defendants, requiring the court to grant further time for discovery or continuances.” *Evans*, 936 F.2d at 1091.

Consistent with Tenth Circuit law, the district court merely held Appellants to the claim they had actually pursued in the case. The district court made clear that it was granting summary judgment because Appellants had pursued *only* a false inventorship claim; their claim was that Crocs had misrepresented its authorship of Croslite. The court explained: “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 (quoting Appx408 ¶ 256).

In response to Appellants’ efforts to switch up their claim, to argue their claim was really a characteristics or qualities claim, the court wrote: “[W]hile this may be Dawgs’s argument today, Dawgs did not make these arguments in its claim or counterclaim.” Appx12. And again in denying reconsideration: “As to Dawgs’s false advertising claim, the Court agreed with Crocs that Dawgs’s claims concerned Crocs’s alleged misrepresentation of inventorship through Crocs’s use of the terms ‘patented,’

‘proprietary,’ and ‘exclusive,’ which are not actionable under the Lanham Act, rather than the origin, nature, characteristics, or qualities of Crocs’s shoes, which are actionable.” Appx1970. Moreover, despite Appellants failing at summary judgment to point the district court to where in their pleading their alternative argument supposedly was to be found, upon motion for reconsideration, the court carefully considered each cited paragraph and exhibit that Appellants belatedly referenced, again concluding that Appellants’ claim, as pleaded, was a non-actionable false inventorship claim. Appx1975-77.

Thus, the district court’s holding that Appellants’ claim was a non-actionable false inventorship claim under *Dastar* and *Baden Sports* was based on Appellants’ *own* arguments, discovery responses, and pleadings. For over four-and-a-half years, Appellants argued that Crocs’s use of the terms “patented,” “proprietary” or “exclusive” had misled the public into believing that Croslite was Crocs’s unique invention when, in fact, Croslite “was merely a run-of-the-mill common rubber-like copolymer EVA used by many footwear companies, including [Appellants].” Appx493 ¶ 46; *see also* Appx324-26 ¶ 22. According to Appellants, Croslite was a “knock-off material” and Crocs had “just copied it.” Appx481 ¶ 7; *see also*

Appx493 ¶ 46 (“Crocs named its knock-off material ‘Croslite’ and outrageously began touting that Croslite was ‘patented,’ ‘exclusive’ and/or ‘proprietary,’ when it was none of those things.”). Throughout this time, Appellants did not allege a harm caused by misrepresentations of inventorship somehow being “linked” to an entirely separate set of physical product qualities or characteristics of the kind that its new and current counsel would assert, for the first time, in December 2020.

In discovery, Appellants confirmed that their claim was based on misrepresentations of inventorship. When Crocs asked Appellants to specify the basis for their assertion they had lost sales as a result of Crocs’s misrepresentations about Croslite, Appellants responded on June 16, 2017, that the misrepresentations had resulted in “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.” Appx1405-06 (emphasis added). Appellants also compared Croslite to a generic pharmaceutical drug, alleging that Crocs’s use of the term “patented” allowed Crocs to “command price premiums and large

market shares,” similar to the way branded drugs such as Advil do, “even after they go off-patent.” ECF No. 899 at 1.

Recognizing this too late, Appellants attempted to reframe their claim at summary judgment to avoid the termination of their case. They asserted for the first time that statements by Crocs had “linked” the “patented,” “proprietary,” and “exclusive” terms to completely separate product characteristics or qualities like softness, comfort, and odor resistance. Appx1411-12 ¶ 1. This theory was brand new at the time Appellants filed their summary judgment opposition, yet it is peppered throughout their opening brief on appeal. Appellants claim that Crocs *admitted* to “linking” the terms connoting inventorship with separate physical product qualities, whatever that might mean. Br. 24. But this is untrue. Appellants cannot point to anywhere in the record where Crocs made such an admission. Although the district court stated Crocs had admitted that its advertisements “linked” the inventorship terms to various characteristics, Appx3, Appx1968, Crocs disagreed below and disputes here that it ever “linked” the allegedly false terms of inventorship to *any* set of product qualities if “linked” means anything like equating the inventorship terms to any separate, physical product qualities. Appx1515 ¶ 1

(responding to Appellants’ new “linking” allegations). Because that never happened and Appellants submitted no evidence that it did. Crocs also responded that the “linking” described by Appellants was immaterial. *Id.* Thus, the record is clear, and the alleged admission should not factor into the Court’s review of the correctness of the ultimate decision reached. *Helvering v. Gowran*, 302 U.S. 238, 245 (1937) (holding that “if the decision below is correct, it must be affirmed” even where court might otherwise have erred).

Tellingly, Appellants also make much ado about a single blog post by Professor Tushnet to echo their claim that “the patented/proprietary/exclusive language here [was] not the same as claiming authorship[.]” Br. at 41 (quoting 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-exclusive-material-isnt-actionable-under-dastar/> (“Tushnet Blog”). A blog post offering one observer’s off-the-cuff reaction to a newly released decision with apparently no perusal of the underlying record is not persuasive authority, and it merits no consideration here. Indeed, in her post, Professor

Tushnet acknowledged that her view of the correctness of the decision was premised on accepting Appellants' never-pleaded argument that "patented" *actually implied* other qualities like "soft, comfortable, lightweight, odor-resistant, and non-marking." See Tushnet Blog. Appellants fail to mention this conditional aspect of Professor Tushnet's view. Br. 41-42, 57. Or that they never submitted evidence supporting this claim in response to summary judgment.

In sum, Appellants brought a Lanham Act claim against Crocs that was based on a theory of false inventorship, and by the time Appellants realized their mistake, it was too late to switch theories. And there is no dispute in this case that the district court correctly held that false claims of inventorship are not actionable under the Lanham Act under Section 1125(a)(1)(A) or Section 1125(a)(1)(B). Because the entire theory of Appellants' Lanham Act counterclaim was that Crocs violated the Lanham Act by falsely claiming to have invented Croslite, the district court correctly granted summary judgment to Crocs on this claim. Accordingly, the Court may affirm the decision below on this ground alone.

**2. Appellants failed to point the district court to any allegations or admissible evidence that would support a claim against Crocs under section 43(a)(1)(B) of the Lanham Act**

The decision below should also be affirmed because Appellants failed to set forth an alternative characteristics or qualities claim. Namely, Appellants failed to properly put before the district court the allegations, arguments and evidence that they now claim supports their theory that calling Croslite “patented,” “exclusive” or “proprietary” constitutes implied misrepresentations about a separate set of physical product characteristics or qualities. Appx12. Virtually all of the evidence Appellants now point this Court to, and claim the district court “overlooked,” Br. 20-21, 47, or “ignored,” Br. 3, 26 n.4, 27, was in fact not properly presented to the district court and thus not part of the record on appeal. *See Utah v. U.S. Dep’t of Interior*, 535 F.3d 1184, 1197 n.9 (10th Cir. 2008). Appellants violated the district court’s procedural rules for briefing motions for summary judgment, and completely ignored Rule 56(d) of the Federal Rules of Civil Procedure, as well as the Federal Rules of Evidence. *See* Appx1973-1978 (denying reconsideration because the court “did not overlook” or “ignore[]” Appellants’ evidence or allegations).

**a. Appellants failed to point the district court to allegedly relevant allegations or evidence at summary judgment**

As explained above, in opposing summary judgment, Appellants tried to switch their theory of the case. Appx1409-10. But in support of that new theory, Appellants failed to point the court to specific references in the record supporting their contention that this had been their claim all along. Rather, Appellants pointed to a scattered collection of “incorporated by reference” exhibits that they had failed previously to mention were part of their claim. *See* Br. 47-49; Appx1410-11. That furnishes an entirely independent basis to affirm the judgment below.

As the district court held, Appellants did not connect specific “incorporated by reference” exhibits, or related allegations, “to any Lanham Act argument on summary judgment.” Appx1973; *see also* Appx1415-20. Their new “linking” theory was never explained. Rather, Appellants simply cited their 112-page pleading, which contained 552 pages of exhibits, and a 14-page supplemental interrogatory response, and insisted that their false-advertising theory could be found somewhere therein. Appx3 n.5; Appx1973. Incorporating *en masse* 678 pages of materials with no direction to specific passages therein is plainly insufficient to



survive summary judgment. *See* Appx1974 (citing *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (“Judges are not like pigs, hunting for truffles buried in briefs.”)); *see also* Practice Standards (Civil cases), Chief Judge Philip A. Brimmer § III.F.3.b.ii (“[g]eneral references to pleadings, depositions, or documents are insufficient if the document is over one page in length.”); *Bruner-McMahon v. Hinshaw*, 846 F. Supp. 2d 1177, 1186 (D. Kan. 2012) (“The Court has no desire to make ‘technical minefields’ of summary judgment proceedings, but neither can it countenance laxness in the proper and timely presentation of proof” (quotation omitted)).

A look at the evidence Appellants cite for the proposition that they alleged a consistent theory is illustrative. For instance, in the first paragraph of their opposition to summary judgment, Appellants cite to Exhibit 21 of their counterclaims, which is a Crocs press release. Appx1410. Highlighted in the exhibit is the phrase “The Crocs @ Work collection is built with the patented Croslite material[.]” Appx603. Separately, and *not* highlighted, the document explains that the material is used “to provide all-day, on-the-job comfort,” and in a completely different sentence, that “[t]hese work shoes are also odor-resistant and easy to clean with

soap and water...” *Id.* The highlighted material in this exhibit does not point to or remotely suggest that Appellants’ claim is about a statement of inventorship—“patented”—actually standing in as “linked” to, or a signifier for, a separate set of physical and functional characteristics. Rather, it shows that Appellants faulted Crocs for calling Croslite “patented” at all. In other words, the only reasonable conclusion that could be drawn from Appellants’ highlighting of the document is that their claim was premised on a misstatement of inventorship—precisely what *Dastar* bars.

Other materials attached to Appellants’ counterclaims similarly highlighted “patented” verbiage, while neglecting to call attention to any of the separate product qualities that Appellants would later claim were “linked” to statements of inventorship. *See, e.g.*, Appx599-601; Appx608. As such, the district court correctly found that “[t]he highlighted text in these materials show that Dawgs’s claim was that Crocs falsely claims that it invented Croslite and that Croslite was not common EVA, which does not support a Lanham Act claim.” Appx1976. The correctness of that conclusion is especially clear because the district court’s rules required that a party opposing summary judgment provide specific references to

relevant record material, which “may be made by highlighting.” *See* Practice Standards (Civil cases), Chief Judge Philip A. Brimmer § III.F.3.b.ii. Appellants consistently highlighted a different theory, premised on misrepresentations of inventorship. *See supra*, at pp. 24-34. None of the highlighting in question illustrates any “link” between statements of inventorship and entirely separate descriptions of physical properties of Crocs’s shoe materials.

Appellants minimize their failure to point the court to any supportive allegations, calling it merely a violation of the Local Rules. Br. 50-52. In fact, the failure represents something much more fundamental: for multiple years, the district court and Crocs were not given fair notice of what Appellants now claim their central theory is. The district court was well within its discretion to hold Appellants to their allegations that they had consistently been making since filing their Lanham Act counterclaims in 2016, and decline to allow the Appellants to constructively amend their theory. *See Zokari*, 561 F.3d at 1087 (finding that “the district court properly refused to construe the amended complaint so broadly” as to a new theory only presented in opposition to summary judgment, as the plaintiff “acted too late to burden the court and the

defendant with a new theory for relief.”). Thus, Appellants were bound by their pleadings and interrogatory responses, which properly guided the district court to its conclusion that the case was solely about Crocs allegedly falsely claiming inventorship of the Croslite material, and not about any implied linkage to physical or functional characteristics of the shoes themselves.

Further, Appellants mischaracterize the district court’s decision to grant summary judgment as an unfair penalty for failing to follow local rules. Appellants’ case support, *Cooper v. Saffle*, 30 F. App’x 865 (10th Cir. 2002), is inapposite. *See* Br. 52 n.10. In *Cooper*, the district court improperly dismissed the pro se prisoner’s complaint as a sanction for failing to comply with the local rules, *without considering the merits of the case. Id.* at 866-67. This is not that case. Here, the district court declined to sift through Appellants’ citation to their “entire 112-page second amended complaint and counterclaim and [a] fourteen-page supplemental interrogatory response” where Appellants claimed their false advertising theory could be found. Appx3. Even had Appellants wanted to, however, they could not have provided specific references that complied with the local rules, because the false advertising theory Appellants

asserted in those materials was one premised on misrepresentations of inventorship, not product qualities. The district court's rejection of Appellants' newly asserted allegations was not a sanction for violating rules, but rather was because Appellants did not make those allegations in their claim or counterclaim. Appx12.

**b. Appellants' new arguments about how consumers understand "patented" were not before the district court**

In an effort to attack the judgment below, Appellants' brief is packed with evidence that Appellants either (1) did not direct the district court to in their briefing below as required; or (2) did not make part of the summary judgment record. Appellants failed to comply with the requirements of Rule 56(d) and—recognizing their inability to show an abuse of discretion—do not appeal the district court's evidentiary rulings. Despite this, Appellants repeatedly base their argument on new evidence that was not submitted at the time and should not be considered, or even mentioned. Indeed, nearly all of the evidence in Appellants' brief that Appellants insist shows their claims were actually characteristics and qualities claims, *see* Br.36-40, was not properly before the district court.

For one, as discussed already, the uncited allegations in Appellants' counterclaims, and the 552 pages of exhibits attached thereto, were not properly before the district court. *Supra*, pp. 36-41; *see also* Appx3 n.5; Appx1973. Thus, Appellants' claim that these exhibits were "presented to the district court in summary judgment briefing," Br. 37, is simply incorrect.

Nor did Appellants properly provide the district court with any indication as to which of the exhibits submitted with their summary judgment opposition had also actually been included as exhibits to their counterclaims. Appx1974. ("Dawgs did not identify those exhibits as having been the ones that it attached to its second amended complaint and counterclaim."). "Thus, even if the Court had sifted through the hundreds of pages of Dawgs's pleadings and exhibits to locate Dawgs's Lanham Act theory, as Dawgs asked the Court to do ... Dawgs does not suggest that the Court would have been directed to any other facts or evidence than what Dawgs presented in its summary judgment response." *Id.*

In particular, the unauthenticated screenshots from online reviews of Crocs shoes upon which Appellants now seek to rely, *see* Br. 9, 38; *see also id.* at 53-56, were properly rejected by the district court. For

instance, Exhibit B to Appellants’ summary judgment opposition was a screenshot not reflecting a URL or date of capture, purporting to be a review from a buyer identified only as “Confused buyer” that appears to be taken from Amazon.com but contains no authenticating information whatsoever. Appx1430-31. The screenshot shown in Exhibit K—purportedly an unknown Amazon.com user’s question, which appears to have been posted on Sept. 29, 2020 and asked about why “patented Croslite” does not appear in the description of a Crocs product listing—was similarly devoid of any authenticating information. Appx1458-59. As the district court recognized, such screenshots lacked the most basic indicia of reliability and thus were “inadmissible double hearsay.” Appx13 n.8.

Other materials were similarly properly rejected. Exhibit T to Appellants’ summary judgment opposition, for example, was an online news article published by Outlook Business, a business magazine in India. Appx1488-93. Appellants quoted this article in their opposition for a statement about Croslite (Appx1413) made by a self-described “brand manager[] in India” that does not contain any of the allegedly false “patented,” “proprietary” or “exclusive” terms. Appx1489-91. Yet Appellants rely on this article as somehow relevant to Crocs’s marketing to U.S.

consumers, without explaining why. Appx1413. Appellants instead take the statement out of context by attributing it to a “Crocs executive,” implying that the statement was made by a U.S. executive speaking to U.S. media. *Id.* But a statement made to Indian media by an individual in India while discussing consumers in India does not show relevant conduct because it does not concern marketing or consumers in the United States, and Appellants never tried to show otherwise. *See Gordon and Breach Science Publishers S.A. v. American Institute of Physics*, 905 F.Supp. 169, 182 (S.D.N.Y.1995) (recognizing that in a Lanham Act claim for false advertising, “the primary focus is the degree to which the representations in question explicitly target relevant consumers”).

The rest of the proffered evidence is no different. It consists primarily of anonymous online reviews, or internal Crocs emails or documents that cannot constitute evidence of either public-facing advertisements or consumer perception in response thereto. Appx1422-1507. The materials are also dated, such as the early to mid-2000’s archived webpage captures and emails. Appx1448-52. Most importantly, however, none of these materials presents admissible evidence that consumers equated terms of inventorship (“patented,” “proprietary” and “exclusive”) with a *separate* set



of product qualities or characteristics (soft, non-marking, odor-resistant, *etc.*). Appx1409-21. This is, of course, a key issue because, with no actual evidence submitted to the district court showing that consumers were equating the inventorship terms with any specific product qualities, Appellants submitted no evidence in response to summary judgment establishing a genuine issue of material fact supporting Appellants' new arguments about product qualities or characteristics.

Appellants claim the district court erred because Appellants *might* have been able to present their unauthenticated hearsay materials in admissible form at a hypothetical trial, Br. 54, but Appellants are wrong. In the Tenth Circuit “[i]t is well settled ... that we can consider only admissible evidence in reviewing ... summary judgment.” *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1541 (10th Cir. 1995) (citations omitted). And it was incumbent on Appellants to “show that it will be possible to put the information, the substance or content of the evidence, into an admissible form,” something they failed to do below or in their briefing here. 11 James Wm. Moore et al., *Moore’s Federal Practice—Civil* § 56.91 (3d ed. 2015); Fed. R. Civ. P. 56(c)(2) adv. comm. cmt. (“The burden is on the proponent to show that the material is admissible as presented *or to*

*explain the admissible form that is anticipated.*”) (emphasis added). As Appellants did not show how they would have been able to submit these screenshots in an admissible form, they have not shown how the district court abused its discretion. Evidentiary rulings are reviewed under an abuse of discretion standard. *Duffee By & Through Thornton v. Murray Ohio Mfg. Co.*, 91 F.3d 1410, 1411 (10th Cir. 1996) (citation omitted). “Under the abuse of discretion standard, a trial court’s decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.” *United States v. Ortiz*, 804 F. 2d 1161, 1164 n.2 (10th Cir. 1986). Appellants clearly cannot establish that the district court abused its discretion in refusing to consider the screenshots, and indeed, have not even tried to meet that standard here.

The survey evidence that Appellants now claim supports their new theory was also never properly before the district court. *See* Br. 39-40 (relying on rejected survey evidence), 50 n.9 (seeming to admit that Appellants relied on new evidence in moving for reconsideration). Appellants submitted the survey evidence for the first time in connection with

their *motion for leave to supplement* and, later, their *motion for reconsideration*, both of which were denied. Appx16-17 (denying motion to supplement); Appx1972-78 (denying motion for reconsideration). Thus, the claimed survey evidence is entirely irrelevant to this appeal, and Appellants' citation of this "evidence" should not be countenanced. *See Tarpley v. Greene*, 684 F.2d 1, 7 (D.C. Cir. 1982) (holding that, "having never brought the [evidence] to the attention of the District Court in opposing appellees' motions for summary judgment, appellant [could not] rely on [it] on appeal to obtain a reversal"). Moreover, Appellants nowhere challenge the correctness of those decisions, thereby waiving their ability to rely on the arguments and evidence raised in both of the denied motions. *United States v. Yelloweagle*, 643 F.3d 1275, 1280 (10th Cir. 2011) ("[W]here [an appellant] raises an issue before the district court but does not pursue it on appeal, we ordinarily consider the issue waived.").

The consumer survey data relied on by Appellants (at 39-40) is thus not entitled to any weight, let alone the enormous weight that Appellants argue it must be given as "direct evidence of consumer understanding." Br. 45. Appellants claim that this survey data conclusively shows that consumers understood the term "patented" to impliedly mean something

different than what they pleaded it meant, with a new meaning that bears no relation to the literal definition of that term. *Id.* However, this argument relies on the untested say-so of Appellants' expert and their counsel, and Appellants never argued that such data was needed to defend against Crocs's summary judgment motion. Appx16-17.<sup>7</sup> By responding to Crocs's motion for summary judgment in December 2020, Appellants waived any right to supplement under Rule 56(d) by the time they finally tried to do so in June 2021. *Id.* Even then, Appellants failed to submit a proper Rule 56(d) affidavit with their request. *Id.* (citing *Cerveny v. Aventis, Inc.*, 855 F.3d 1091, 1110 (10th Cir. 2017)). Had Appellants appealed the denial of their motion for leave to supplement, that denial would be subject to abuse of discretion, rather than the same *de novo* standard of review as the grant of summary judgment. *Ellis v. J.R.'s Country Stores, Inc.*, 779 F.3d 1184, 1205-06 (10th Cir. 2015). Thus, under well-established Tenth Circuit law, this evidence was properly rejected below, that rejection was not appealed, and this evidence thus

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<sup>7</sup> On appeal, Appellants complain that the "surveys were all conducted after summary judgment briefing was complete" and they "could not have predicted any of the results." Br. 51. This fails to take into account that Appellants declined to properly take advantage of Rule 56(d) to allow for them to commission and complete their own survey.

should not be cited—let alone considered—here for whatever dubious weight it may or may not have. *See Tarpley*, 684 F.2d at 7; *see also In re Pressman-Gutman Co., Inc.*, 459 F.3d 383, 387 n.2 (3d Cir. 2006) (“[I]mproperly citing material outside the record” “contraven[es]” “the black letter law that a United States court of appeals may not consider material or purported evidence which was not brought upon the record in the trial court.”).

Relatedly, the Court need not consider Appellants’ argument that it was improper to resolve the meaning of the terms “patented,” “proprietary” and “exclusive” at summary judgment because “the question of the meaning of advertising is one of fact.” Br. 42-45. Appellants did not raise this argument in opposing summary judgment. Rather, they raised the argument for the first time in their motion for reconsideration, ten months after opposing the motion, and thus ten months too late. *See Appx1877-79*. The argument can be rejected on that basis alone, especially where the reconsideration decision was not appealed. *See Zokari*, 561 F.3d at 1085. It can also be rejected because the district court did not resolve any factual disputes about the meaning of these terms; its ruling

was “based on the undisputed facts without reaching consumer confusion.” Appx1978 (citing Appx15 n.10).

In sum, even if Appellants had not litigated a Lanham Act counterclaim based on a false inventorship theory, *supra*, pp. 23-32, Appellants’ opposition to Crocs’s motion for summary judgment failed to present an alternative based on characteristics and qualities. Under these circumstances, the district court properly held that Appellants’ counterclaim was non-actionable under the Lanham Act.

**3. Appellants cannot prevail on their argument based on the record they made at summary judgment**

At bottom, as a result of Appellants’ own legal theory, own pleading, own litigation decisions, and own failures to comply with the most basic requirements of the rules for briefing summary judgment, the record before the district court consisted of bare allegations that Crocs violated the Lanham Act by falsely claiming to have invented Croslite. That was the district court’s holding at summary judgment, a holding reaffirmed on reconsideration. Despite this, Appellants repeatedly cite to Appendix materials to give the impression that Appellants are relying on materials

that were appropriately placed in the summary judgment record.<sup>8</sup> Appellants fault the district court for declining to consider the evidence that they failed to properly place before the court at summary judgment, and for declining to consider their additional untimely and inadmissible evidence. But Appellants do not actually appeal any of the district court's individual decisions to decline to consider their evidence and new arguments. *See* Br. 6. That is because the court's decisions were the direct result of Appellants' own failures to comply with basic procedural rules. Once all the extraneous evidence and arguments are stripped away, the complaint Appellants filed, and the record Appellants made, simply cannot support their new Lanham Act theory.

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<sup>8</sup> Almost invariably, none of the Appendix materials were specifically identified by Appellants in their summary judgment opposition. *See, e.g.*, Appx469-580 (Appellants' amended pleading, from which they cited only Paragraph 7 in their opposition); Appx581-981 (exhibits to Appellants' amended pleading, from which they cited only Exhibit 21); Appx1658-1730 (Appellants' motion for leave to file supplemental opposition and survey evidence).

**B. Appellants' claims against Crocs under section 43(a)(1)(B) of the Lanham Act fail for additional reasons**

**1. Claims that a product is “patented” “exclusive” or “proprietary” fall outside the Lanham Act**

Even if the Court entertains Appellants' belated argument that “patented,” “exclusive,” and “proprietary” are not mere false claims of inventorship, Appellants' argument still fails because, in opposing summary judgment, Appellants never presented *any* evidence that these terms translate to, or have definitions relating to, actual product qualities. Nor is there any evidence to believe that describing a product as “patented,” “exclusive,” and “proprietary” misrepresents “the nature, characteristics, qualities, or geographic origin” of entirely separate physical attributes of the good itself.

Appellants appear to acknowledge this deficiency in their theory by repeatedly claiming that Crocs itself admitted that it “linked” these terms connoting inventorship to a completely unrelated set of product characteristics or qualities. Br. 2, 6, 7, 15, 23, 25, 36, 42. As already discussed, Crocs never “linked” the allegedly false terms by equating them with product qualities, and there is certainly no such admission in the record. *Supra*, pp. 32-33. Even if the Court were to consider this “linking”



theory, the theory makes no sense, has zero evidentiary support, and is flatly inconsistent with the text, purpose and history of the Lanham Act. Appellants' theory posits that the presence of terms of inventorship ("patented," "proprietary" and "exclusive") anywhere in the same document as descriptions of unrelated product characteristics (*e.g.*, odor resistance or comfort) "linked" these disparate terms and characteristics in a way that somehow equates them, bringing the alleged misstatements within reach of Lanham Act liability. Not so. Appellants' "linking" theory fails for the obvious reason that the alleged misrepresentations *still do not* concern, much less misrepresent, product qualities.

If Appellants believed that there was evidence the terms "patented," "proprietary," or "exclusive" conveyed a specific meaning other than inventorship, they should have said what that evidence was at summary judgment. They did not. Thus, it was entirely correct for the district court to find that these terms reflected no more than "the source of the ideas embodied in a tangible object." Appx14-15 (quoting *Kehoe Component Sales Inc. v. Best Lighting Prods., Inc.*, 796 F.3d 576, 590 (6th Cir. 2015)). And, the court's holding that such terms were non-actionable was

consistent with the Lanham Act’s history and purpose, its text and structure, and a consensus of persuasive precedent interpreting its scope.

The Lanham Act was never intended to be a catch-all unfair competition statute. The Supreme Court has recognized that its “history and purpose” counsel for a narrower, rather than broader, interpretation of its scope. *Dastar*, 539 U.S. at 31-32. As the Court explained, “[b]ecause of its inherently limited wording, § 43(a) can never be a federal ‘codification’ of the overall law of ‘unfair competition’” *Id.* at 29 (quoting 4 J. McCarthy, *Trademarks and Unfair Competition* § 27:7, p. 27–14 (4th ed. 2002)) (cleaned up). For instance, Appellants could have pursued the same false inventorship claim under the Patent Act, which specifically prohibits using “in advertising in connection with any unpatented article, the word ‘patent.’” 35 U.S.C. § 292(a)-(b). In 2017, Appellants tried just that, and belatedly sought to add a claim for false marking under 35 U.S.C. § 292. ECF No. 723 at 2, 6-8. But Appellants withdrew that request in 2020 (ECF No. 844 at 14), and instead focused on adding a different claim “directed to the same core misconduct” under the Colorado Consumer Protection Act (ECF No. 849 at 1-2). However, recognizing that Appellants had attempted to assert new and revised counterclaims repeatedly

throughout the litigation, the district court found that Appellants were simply “seeking ‘another bite at this withering apple,’” Appx1529 (quoting Appx1389), and thus denied the untimely requested amendment. Appx1533. Appellants’ erstwhile attempts to bring additional claims under the Patent Act and state law based on the same allegedly false “patented,” “proprietary” and “exclusive” terms confirm that Appellants had other avenues to seek relief for the alleged wrongdoing.

The text and structure of the Lanham Act also support the conclusion that the “nature, characteristics, [or] qualities” that might be actionable under Section 43(a)(1)(B) do not rope in non-physical attributes like “patented,” “proprietary” and “exclusive.” The words “nature,” “characteristics” and “qualities” all are naturally read to refer to physical or functional attributes. The inclusion of the words “geographic origin” in Section 43(a)(1)(B) reinforces this interpretation because if the “nature, characteristics, [or] qualities” of a good included non-physical traits or characteristics, there would have been no need for Congress to include “geographic origin” in the list. *See Bd. of Trs. of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 563 U.S. 776, 788 (2011) (noting

judicial “reluctance to treat statutory terms as surplusage” (cleaned up) (citation omitted)).

This understanding is consistent with the statutory interpretation by numerous appellate courts that have held non-physical attributes, such as inventorship or status of intellectual property protection, non-actionable under Section 43(a)(1)(B). In *Sybersound Recs., Inc. v. UAV Corp.*, 517 F.3d 1137 (9th Cir. 2008), the Ninth Circuit rejected an attempt to use Section 43(a)(1)(B) for an alleged misrepresentation about the copyrighted status of a work. The court explained that “the nature, characteristics, and qualities of karaoke recordings under the Lanham Act are more properly construed to mean characteristics of the good itself, such as the original song and artist of the karaoke recording, and the quality of its audio and visual effects.” 517 F.3d at 1144. “Construing the Lanham Act to cover misrepresentations about copyright licensing status as Sybersound urges would [impermissibly] allow competitors engaged in the distribution of copyrightable materials to litigate the underlying copyright infringement” via the Lanham Act. *Id.* The *Sybersound* court recognized that “the nature, characteristics, and qualities” properly refer to

“characteristics of the good itself” and not to “misrepresentations about copyright licensing status.” *Id.*

Other courts of appeal have found similarly. In *Kehoe*, the Sixth Circuit held that under Section 43(a)(1)(B), a misrepresentation is only actionable if it is a misrepresentation of the “characteristics of the good itself such as its properties or capabilities.” 796 F.3d at 590 (quoting *Sybersound*, 517 F.3d at 1144) (cleaned up). Similarly, in *Baden Sports*, relied on heavily by the court below, this Court found non-actionable under section 43(a)(1)(B) of the Lanham Act representations that basketballs were “innovative.” 556 F.3d at 1307. The Court reasoned that in advertising that the basketballs were innovative, no “physical or functional attributes of the basketballs” were implied, and thus the misrepresentation was not of the nature, characteristics, or qualities of the basketballs. *Id.* The district court below applied both of these cases in concluding that Section 43(a)(1)(B) claims do not reach misrepresentations of inventorship. Appx14.

Two district court cases are also instructive. In *Bob Mills Furniture Co., L.L.C. v. Ashley HomeStores, Ltd.*, the court held that “misuse of the ® designation alleged here does not state a claim under Section 43(a),” as

a misstatement about the trademark registration does not involved an “inherent or material quality of the product.” No. CIV-17-0059-HE, 2017 WL 11144629, at \*2 (W.D. Okla. July 25, 2017) (unpublished) (quoting *Apotex Inc. v. Acorda Therapeutics, Inc.*, 823 F.3d 51, 62-63 (2d Cir. 2016)). In doing so, the court reasoned that “[a] focus on the inherent nature of the product or service is also suggested by the pertinent language of the Act,” which only targets misrepresentations of the “origin, sponsorship or approval” or the “nature, characteristics, qualities, or geographic origin” of the goods or services *Id.* (quoting 15 U.S.C. § 1125(a)(1)(A), (B)). Similarly, the court in *Classic Liquor Imps., Ltd. v. Spirits Int’l B.V.*, found that for a misrepresentation to be actionable under the Lanham Act, a false advertising plaintiff must not only show falsity, but that the misrepresentation relates to “an inherent quality or characteristic of the product” as well. 201 F. Supp. 3d 428, 451 (S.D.N.Y. 2016) (quoting *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 855 (2d. Cir. 1997)). The court found the misuse of the registered trademark symbol “in no way relates to an inherent quality or characteristic of” the product and so was not actionable under Section 43(a). *Id.* at 452 (internal quotation marks omitted).

Moreover, if Appellants are correct that the terms “patented,” “proprietary,” and “exclusive” can, through creative pleading, be given an implied meaning at odds with their literal meanings, then any plaintiff could easily evade *Dastar* simply by artfully pleading that a misstatement of inventorship *actually* constitutes a misstatement about entirely separate qualities of the tangible product itself. This is precisely what the plaintiff in *Baden Sports* attempted with the term “innovative.” 556 F.3d at 1307. While the “innovative” term may have indicated that Molten’s basketballs were a new product, or that Molten had created something new, the term by definition did not imply “physical or functional attributes” of the product. *Id.* It was instead “fundamentally about the origin of an idea.” *Id.* at 1308. Baden’s argument to the contrary was merely an “attempt to avoid the holding in *Dastar* by framing a claim based on false attribution of authorship as a misrepresentation of the nature, characteristics, and qualities of a good.” *Id.* at 1307. That is the same thing that Appellants tried to do here and failed. Appx14 (citing *Baden Sports*, 556 F.3d at 1307). But if Appellants are correct, it means that a plaintiff like Baden could survive summary judgment simply by alleging that consumers could have ascribed any other meaning to “innovative” if Molten ever

made any other statement about the product qualities of its basketballs. In other words, if Appellants are correct, *Dastar* and *Baden Sports* are dead letters.

**2. Appellants’ theory that using the terms “patented,” “exclusive,” and “proprietary” projected brand superiority is non-actionable under the puffery doctrine**

Even if the Court were inclined to reject all of the above, under Appellants’ claim as pleaded, Crocs’s statements that Croslite was “patented,” “exclusive,” and “proprietary” would still be non-actionable puffery, as the district court correctly held. *See* Appx15. Appellants fault Crocs for statements they that say are “designed to create a false impression of superiority.” Br. 45; *see also id.* at 18, 19, 24, 28, 38. But generalized statements of superiority are classic non-actionable puffery.

A claim of product superiority is a classic example of non-actionable puffery. The goal of *all* advertisements is to create or imply some general sense of superiority. Extolling a product as better than all others “is not deceptive [because] no one would rely on its exaggerated claims.” *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 922 (3d Cir. 1990) (quoting *Toro Co. v. Textron, Inc.*, 499 F. Supp. 241, 253 n. 23 (D. Del. 1980)); *see also Intermountain Stroke Ctr., Inc. v.*



*Intermountain Health Care, Inc.*, 638 F. App'x 778, 788-89 (10th Cir. 2016) (unpublished). It bears emphasizing that here, Appellants have never asserted that Crocs made claims that Appellants' shoe material was inferior. Thus, this is not a case in which one competitor has allegedly made a disparaging or false statement directly targeting another competitor's product. Rather, Appellants' theory as pleaded relied on the following series of assumptions: that a false statement of inventorship equated to a statement of generalized superiority of Crocs's shoe material, and thereby further equated to a statement of generalized inferiority of any other material, and further equated to a specific impression in consumers' minds that Appellants' material was inferior. Appx576 ¶ 345. Appellants have never cited a shred of evidence to support even one link of this far-fetched chain of inferences.

Vague assertions of innovativeness of the kind underlying Appellants' theory have repeatedly been held to amount to non-actionable puffery. Puffery is "is exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely and is not actionable under § 43(a)." *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1145 (9th Cir. 1997) (quoting 3 J. Thomas McCarthy, McCarthy on

Trademarks and Unfair Competition § 27.04(4)(d) at 27–52 (3d ed.1994)). Statements of “innovation” and “breakthroughs” are classic puffery—they are “precisely the type of generalized boasting upon which no reasonable buyer would rely.” *OptoLum, Inc. v. Cree, Inc.*, 244 F. Supp. 3d 1005, 1011 (D. Ariz. 2017) (quoting *Southland Sod Farms*, 108 F.3d at 1145).

Claims that something is “proprietary” also have been held to constitute mere puffery. A claim that “[t]he secret is a proprietary formula used in the manufacturing process that intensifies the beauty of our pavers” was held to be mere puffery because it “represents the type of exaggerated statement regularly made by companies.” *EP Henry*, 383 F. Supp. 3d at 350. “Such statements are the type of generalized and vague claims that constitute puffery.” *Id.*

As the district court found, Appellants cannot maintain an action against Crocs’s use of “proprietary” and “exclusive” when their theory merely faulted Crocs for trying to drive a generalized theme of brand superiority, as this brand superiority is “precisely the type of generalized boasting upon which no reasonable buyer would rely.” *Southland Sod*

*Farms*, 108 F.3d at 1145; *see also Alpine Bank v. Hubbell*, 555 F.3d at 1106. Crocs’s use of the word “patented” is no different.

Appellants counter that because “proprietary,” “exclusive,” and “patented” can be “verifiably false,” they cannot be puffery. Br. 44 & n.8. But that is not the test for puffery because essentially all vague claims of product superiority can be “verifiably false.” Claims that a product is “one of a kind” or “best in class” can be falsified but are nonetheless puffery. The measure of puffery is whether the statement is merely a “a claim of superiority,” Appx15, which Appellants themselves agree “proprietary,” “exclusive,” and “patented” all are. Br. 45.

**C. The concerns raised in the INTA amicus brief are not implicated in this case**

The INTA *amicus* brief is directed to a different case that is not before this Court on appeal. As the brief itself acknowledges, “INTA takes no position on ... whether the District Court properly characterized Appellants’ pleadings in evaluating how Appellants presented their false advertising theory.” INTA Br. 4. Indeed, INTA agrees its brief does not take any position on the merits of Appellants’ position. INTA Br. 4. In light of these admissions, the court need not, and should not, consider this brief which, while potentially suitable for a law review article, is not

relevant to the case at hand. *Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 133 (3d Cir. 2002) (if a filed amicus brief is unhelpful, the reviewing court “can then simply disregard the amicus brief”); *see also Medina v. Cath. Health Initiatives*, No. 113CV01249REBKLM, 2015 WL 13683647, at \*1 (D. Colo. Oct. 7, 2015) (when considering discretion in allowing amicus, the most important factor is the “usefulness of information and argument presented by the potential amicus curiae to the court.” (internal quotation marks and citation omitted)). The INTA brief primarily contends that the words “proprietary,” “exclusive,” and “patented” must be read in “context” to determine whether they are being used to make a misrepresentation about a product’s nature, characteristics, or qualities. INTA Br. 6, 13-15. The INTA brief also claims that it is “well-established” that claiming that a product is “patented” may give rise to Lanham Act liability. INTA Br. 15-19. Finally, the INTA brief argues that “proprietary,” “exclusive,” and “patented” should not be treated as puffery *per se* because sometimes consumers will take these claims seriously and not treat them as mere claims of superiority. INTA Br. 20-25.

As an initial matter, despite calling for a context-specific reading of claims, the INTA Brief essentially assumes that the record before the district court, and before this Court, consists of the extraneous allegations and evidence that Appellants now seek to litigate in this Court. But as explained earlier, that is not the record that was, in fact, properly before the district court. Indeed, INTA does not reference Appellants' claims or counterclaims that were actually before the district court a single time throughout its entire brief. INTA's professed confusion regarding "the full scope and nature of the District Court's reasoning" and concern over whether the court "creates a *categorical* bar" against all Lanham Act claims (*see* INTA Br. 3 (emphasis in original)) can be cleared up by looking at the order on summary judgment and the order denying reconsideration, which do not create any such sweeping categorical rules for Lanham Act claims. Appx12; Appx1977.

Even if the Court were to accept everything that the INTA Brief says about how "proprietary," "exclusive," and "patented" can hypothetically be used to violate the Lanham Act, here the only relevant claim is that the terms were used to misrepresent inventorship—and INTA does not dispute that false claims of inventorship are not actionable. Similarly,

INTA's characterization of the district court's holding that certain words "necessarily equate[]" to puffery also misses the mark, as the district court merely held that to the extent that Appellants' own claim, as pleaded, was that Crocs statements are false in that they connote superiority, that is non-actionable puffery. Appx15. The INTA Brief makes one other claim that warrants response: that it is "well-established" that the Lanham Act extends to false claims that a product is "patented." INTA Br. 15. That is incorrect. The cases INTA cites are inapposite. *See id.* at 15-19 (citing *inter alia*, *Zenith Elecs. Corp. v. Exzec, Inc.*, 182 F.3d 1340, 1354 (Fed. Cir. 1999), *Hall v. Bed Bath & Beyond Inc.*, 705 F.3d 1357, 1372 (Fed. Cir. 2013), *Proportion-Air, Inc. v. Buzmatics, Inc.*, 57 F.3d 1085, 1995 WL 360549 (Fed. Cir. 1995) (unpublished), and several district court cases). Counsel is also not aware of any case supporting an argument that Lanham Act liability for "patented" misrepresentations is well-established.

Many of the cited cases are inapposite because they involved direct misrepresentations about the nature, characteristics, and qualities of

products. In *Proportion-Air*, 1995 WL 360549, at \*3 (unpublished),<sup>9</sup> the defendant had falsely marked its product as being protected by the specific patent at issue. But such a mismarking falsely represents the product to actually *have* the characteristics and functionality of the very invention embodied in the actual real-life patent. It is not akin to generically claiming a product is “patented.” Other cases INTA cites are similar. See *Azimuth Unlimited, LLC v. Sea Tel, Inc.*, No. 10-60253, 2011 WL 13173548, at \*1 (S.D. Fla. Apr. 14, 2011) (products claimed to be covered by the patent were “unmistakably different” from the patented invention); *DP Wagner Mfg. Inc. v. Pro Patch Sys., Inc.*, 434 F. Supp. 2d 445, 450 (S.D. Tex. 2006) (similar). All of the above cases involve a misrepresentation about the product’s nature, characteristics, or qualities, as they each involved a claim that a product was covered by a *specific* patent. That is far different from merely generically claiming something is “patented.”

In *BPI Sports, LLC v. ThermoLife Int’l LLC*, No. 19-60505-CIV, 2020 WL 10180910, at \*5 (S.D. Fla. Jan. 9, 2020), decided on a motion to

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<sup>9</sup> It bears noting that this pre-*Dastar* opinion is not eligible for citation under Federal Rule of Appellate Procedure 32.1(a).

dismiss, the Lanham Act claim included direct allegations that the defendant had falsely advertised and misrepresented the nature of its goods and services. *Id.* at \*5-6. Nothing in the opinion suggests that it held that falsely claiming a product is “patented” *per se* violates the Lanham Act. And, when that same case was later heard on summary judgment, the court ruled “that the statements concerning propriety rights to and licensing requirements ... *are not actionable under the Lanham Act for false advertising,*” citing *Dastar* and *Baden Sports*. 2021 WL 4972975, at \*6 (S.D. Fla. July 27, 2021) (emphasis added).

Thus, INTA has only identified four federal cases, all district court cases, spanning four decades, that have held that generically claiming that a product is “patented” may violate the Lanham Act in specific circumstances not found here. *See Roof Maxx Techs., LLC v. Rourk*, No. 2:20-CV-03151, 2021 WL 3617154, at \*10 (S.D. Ohio Aug. 16, 2021); *ERBE USA, Inc. v. Byrne Med., Inc.*, No. 1:11-CV-1480-AT, 2011 WL 13220386, at \*6 (N.D. Ga. July 22, 2011); *Third Party Verification, Inc. v. Signaturelink, Inc.*, 492 F. Supp. 2d 1314, 1324 (M.D. Fla. 2007); *Blank v. Pollack*, 916 F. Supp. 165, 172 (N.D.N.Y. 1996). One district court decision per decade not backed by any circuit court is not enough to “well-



establish” any legal principle, let alone one that overcomes *Dastar* and dictates a newly expanded reach of the Lanham Act. See *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (explaining that “district court decisions” do not typically settle important legal standards). Moreover, only one of these cases, *Roof Maxx Technologies*, even mentioned *Dastar*, which it distinguished on the grounds that in *Roof Maxx Technologies*, the issue “revolve[d] around Roof Maxx’s misrepresentations that its Product was subject to an active, valid patent—not around the person or entity who originated the Product’s formula.” 2021 WL 3617154, at \*9. But that situation is also different than the one here, since the defendant in *Roof Maxx* had entered into a licensing agreement for rights to a specific patent covering the Roof Maxx product, *id.* at \*8-9, and there is no such specific patent identified in this case.

At bottom, INTA asks that the Court “neither overextend *Dastar* nor limit the scope of Section 43(a)(1)(B) false advertising claims where advertising misrepresents the ‘nature, characteristics, [or] qualities’ of goods or service.” INTA Br. 25. The Court can affirm in this case in numerous ways without doing either. The Court need not issue any sweeping pronouncements about the scope of the Lanham Act (or puffery) in

this case. The Court can affirm by simply holding Appellants to the claim they actually pleaded and maintained below, and the record they actually made at summary judgment, and hold that Crocs was entitled to summary judgment on that basis.

## **II. Reversal would require a remand for further proceedings**

Even if the Court reverses the district court's decision, the appropriate resolution of this appeal would be a remand for further proceedings. At the time the district court granted Crocs's motion for summary judgment, Crocs had an additional motion for summary judgment pending. ECF No. 1055. In that motion, Crocs offered several other grounds for summary judgment, and those grounds for relief all remain unresolved.

For one, Appellants' counterclaim was barred by the doctrine of laches because Appellants had waited approximately ten years after learning of the basis for their counterclaim before asserting it. *Id.* at 5-9. Such a delay was unreasonable, and caused Crocs evidentiary prejudice, since there was scant evidence preserved from the beginning of 2005 when (as one recovered email showed) Crocs had instructed its employees to stop using the "patented" verbiage. *Id.* at 9, 15.

Additionally Appellants' counterclaim failed because there was no evidence of injury, since Appellants had never proven a single lost sale or reputational harm. *Id.* at 9-12. There was also no evidence that it was false or misleading to call Croslite "proprietary" or "exclusive," including because the record evidence showed that Crocs had exclusive supply contracts for, and thus a proprietary right to, its materials. *Id.* at 12-13. And, there was no evidence that the "patented" statements had been sufficiently disseminated to the relevant purchasing public, as is required for Lanham Act liability. *Id.* at 13-17.

Thus, there were multiple independent grounds for denying Appellants relief under the Lanham Act, but the district court's grant of summary judgment mooted the pending motion. Appx1867; ECF No. 1085. Any reversal of the district court opinion will need to be remanded back to the district court to consider these other motions.

## CONCLUSION

The judgment of the district court should be affirmed.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 13,992 words, excluding the parts exempted by Fed. R. App. P. 32(f) and Cir. R. 32(e)(1). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Century Schoolbook font using Microsoft Word.

/s/ Michael A. Berta  
Michael A. Berta

## CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(d) and Cir. R. 25, that on May 24, 2023, the foregoing brief was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

/s/ Michael A. Berta  
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