

2024-1300

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

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CROCS, INC.,

*Appellant,*

— v. —

INTERNATIONAL TRADE COMMISSION,

*Appellee.*

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*Appeal from the United States International Trade Commission in  
No. ITC-1: 337-TA-1270*

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**CORRECTED BRIEF OF AMICI CURIAE HOBBY  
LOBBY STORES, INC. AND ORLY SHOE CORP. IN  
SUPPORT OF APPELLEE AND AFFIRMANCE**

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OCTOBER 2, 2024

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FORM 9. Certificate of Interest

Form 9 (p. 1)  
March 2023

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

**CERTIFICATE OF INTEREST**

**Case Number** 24-1300

**Short Case Caption** Crocs, Inc. v. ITC

**Filing Party/Entity** Hobby Lobby Stores, Inc. and Orly Shoe Corp.

**Instructions:**

1. Complete each section of the form and select none or N/A if appropriate.
2. Please enter only one item per box; attach additional pages as needed, and check the box to indicate such pages are attached.
3. In answering Sections 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance.
4. Please do not duplicate entries within Section 5.
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Date: 09/27/2024

Signature: /s/Brian P. Johnson

Name: Brian P. Johnson

## FORM 9. Certificate of Interest

Form 9 (p. 2)  
March 2023

<b>1. Represented Entities.</b> Fed. Cir. R. 47.4(a)(1).	<b>2. Real Party in Interest.</b> Fed. Cir. R. 47.4(a)(2).	<b>3. Parent Corporations and Stockholders.</b> Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.  <input checked="" type="checkbox"/> None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.  <input checked="" type="checkbox"/> None/Not Applicable
Hobby Lobby Stores, Inc.		
Orly Shoe Corp.		

☐ Additional pages attached

FORM 9. Certificate of Interest

Form 9 (p. 3)  
March 2023

**4. Legal Representatives.** List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☐ None/Not Applicable☐ Additional pages attached

Brian P. Johnson

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Thomas K. Hedemann

**5. Related Cases.** Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

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

If yes, concurrently file a separate Notice of Related Case Information that complies with Fed. Cir. R. 47.5(b). **Please do not duplicate information.** This separate Notice must only be filed with the first Certificate of Interest or, subsequently, if information changes during the pendency of the appeal. Fed. Cir. R. 47.5(b).

**6. Organizational Victims and Bankruptcy Cases.** Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☒ None/Not Applicable☐ Additional pages attached

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## **INTEREST OF THE AMICUS CURIAE**

*Amici curiae* Hobby Lobby Stores, Inc. (“Hobby Lobby”) and Orly Shoe Corp. (“Orly”) respectfully submit this brief in support of the Commission Opinion holding that there has been no violation with respect to the trademark asserted by Crocs, Inc. (“Crocs”). All Parties have consented to the filing of this brief. No counsel for any party authored this brief in any part, and no party, counsel, or person other than Hobby Lobby and Orly contributed money to fund the preparation and submission of this brief. Fed. R. App. P. 29(a)(4)(E).

Hobby Lobby and Orly were both Respondents that Crocs accused of infringing its asserted 3D Marks in the ITC proceeding and against whom Crocs sought exclusion orders. Hobby Lobby and Orly submit this brief as *amici curiae* to provide further reasons for why the Commission’s non-infringement decision should be affirmed by this Court.

## **INTRODUCTION**

Crocs’ allegations in this case were never more than a thinly veiled attempt to extend in perpetuity the monopoly it enjoyed for years through its recently-expired utility and design patents. Crocs obtained a general exclusion order after a section 337 investigation based on such patents. *See Certain Foam Footwear, Inv.* No. 337-TA-567, 76 Fed. Reg. 43723-24 (July 21, 2011). With its patents having expired and their subject matter in the public domain, Crocs is for the first time

facing real market competition for its clogs. Rather than face that competition in the market-place, Crocs seeks to prolong its expired monopoly by stretching the reach of its 3D Marks beyond the bounds of trademark law to cover the overall shape or impression of clogs.

Crocs' arguments on appeal amount to a house of cards built on the contention that its 3D Marks somehow cover the "overall impression" of its clogs. As stated in the Initial Determination, and again highlighted by the Commission, "the 3D Marks '*do not* cover the entirety of the shoe or its overall look.'" Appx16. The Commission also correctly recognized that the trademark office rejected Crocs' attempt to register the overall clog shape. Appx17-19.

Understanding that it would be fruitless to attempt to rebut the Commission's finding, Crocs simply pretends as though it doesn't exist and backfills its arguments with references to "overall impression" that it wrongly contends should have been considered. And while Crocs now contends that the arguments presented by the Examiner in prosecution are wrong, it fails to acknowledge that it did not contest those arguments during prosecution but accepted the Examiner's offer to grant its 3D Marks with a scope limited to just five, specific elements. Crocs cannot regain now what it abandoned before the Examiner.



Because virtually all of Crocs' arguments now are premised on the idea that its 3D Marks are somehow broader than the agreed scope to the Examiner, those arguments should be summarily rejected.

### **ARGUMENT**

#### **I. THE COMMISSION'S NON-INFRINGEMENT DETERMINATION IS WELL-SUPPORTED BY SUBSTANTIAL EVIDENCE**

The Commission appropriately considered the evidence relating to each of the *DuPont* factors and correctly determined that the factors collectively do not support a finding of infringement. On appeal, Crocs offers a hodgepodge of arguments that either ignore that evidence, are contrary to its own and its expert's positions below, or that were excluded by order of the ALJ. None suffice to overturn the Commission's determination, which this Court should affirm.

##### **A. Factors 1-3: Crocs' Contention That These Factors Are Controlling Is Contrary to Its Own Position Below and Contrary to the Evidence.**

On appeal, Crocs asserts that the first three *DuPont* factors are the "controlling troika" and dispositive here. C.Br. at 26. Even if Crocs could demonstrate that the first three factors *can* be dispositive, Crocs does not and cannot contend that they *must* be so treated as a matter of law. And here, the Commission – like the ID – did not find these factors dispositive but opted to review "all the evidence" as Crocs counselled below and found that it collectively

does not show likelihood of confusion. That finding is well-supported by substantial evidence and should be affirmed.

Further, the basis for Crocs' contention that the similarity between the 3D Marks and the Gator (and the Redesign) is dispositive of confusion is based on a mischaracterization of the 3D Marks as covering the overall look and feel of the shoe. *See* C.Br. at 30-31 (contending that "the Gator is nearly indistinguishable from the 3D Marks"). *See also id.* at 3 (referencing "an overall impression confusingly similar to the 3D Marks"); *id.* at 9 (contending that the 3D Marks "create a boxy profile" and "predominate the overall design of the shoe"). As already discussed, the Examiner rejected Crocs' attempt to obtain marks that cover "generic elements commonly present in waterproof strap clogs" such as "the overall clog shape of the proposed configuration mark and the presence of a defined midsole and a topline collar." Appx17-18. Indeed, Crocs' own expert, Dr. Pittaoulis, confirmed that "[t]he overall shape of the entire shoe is not part of the 3D marks...." Appx22253 (Trial Tr. 355:13-15). She similarly agreed that "the overall silhouette is not something that's claimed by the Crocs 3D marks. . . ," Appx22266 (Trial Tr. 368:1-4), and testified that holes in the upper of the shoe "in general" are also not a part of the 3D Marks. Appx22255-22256 (Trial Tr. 357:23-358:10). Thus, neither the law nor the facts support Crocs' incorrect appellate argument that the first *DuPont* factors are dispositive of a likelihood of confusion.

**B. Factor 4: Crocs Improperly Ignores the Factual Findings Regarding Pricing.**

The Commission appropriately affirmed the ID’s finding that the different price points between Crocs’ Classic Clogs and Orly’s Gators weighs against likelihood of confusion. Appx31. As the Commission stated, Crocs itself acknowledged that the Classic Clogs “typically retail for about \$45.32, or sometimes as low as \$35 (but not less than that), whereas Hobby Lobby typically sells the Orly Gators for \$10 or less.” *Id.* In its appellate brief, Crocs simply ignores these findings and asserts that the Classic Clogs sell for “between \$18-\$45” and that the Gator “has a suggested retail price of \$38 and sell on average for \$10.” C.Br. at 54-55. To the extent Crocs disagrees with the ID and the Commission about the relevant factual findings it must offer sufficient evidence to show that those findings were error. Crocs has not done so, and the Commission’s conclusion that *DuPont* factor 4 weighs against a likelihood of confusion is supported by substantial evidence.

**C. Factors 7, 8, and 12: Crocs Relies on Precluded and Incorrect Arguments for Its Contention that the Actual Confusion Factors Weigh in Favor of Likelihood of Confusion.**

**1. Crocs is precluded from asserting that the Wallace survey was flawed based on the inclusion of a “u-shaped line” on the controls.**

Crocs’ main contention on appeal is that the Wallace survey was flawed because the survey’s control included a “distinct u-shaped line” that is part of the

3D Marks. C.Br. at 37-45. Crocs audaciously criticizes the Commission for “ignoring” this issue, *id.* at 39, but conveniently omits that the ALJ *precluded* Crocs from making this precise argument – first on a motion in limine and then again upon Crocs’ request that the ALJ reconsider. Crocs cannot simply pretend that the ALJ’s order doesn’t exist on appeal. Rather, to the extent Crocs believed the preclusion order was erroneous it was incumbent on Crocs to raise that as an issue on appeal and then demonstrate that an error occurred. Crocs has done neither and thus cannot now resurrect this already-precluded argument. *See Zircon Corp. v. Int’l Trade Comm’n*, 101 F.4th 817, 827 (Fed. Cir. 2024) (holding that argument based on declaration that was excluded by the ALJ on a motion *in limine* could not be raised on appeal when the appellant had not appealed the exclusion order).

The record leaves no room for any dispute that Crocs has been precluded from making this argument. Prior to trial, Respondents moved *in limine* to preclude Crocs “from offering untimely evidence and arguments that the scope of its 3D Marks includes ‘a u-shaped line around the toe box denoted in a solid line.’” Appx15640. The basis for Respondents’ motion was Crocs’ belated inclusion of arguments based on this u-shaped line in its Pre-Hearing Brief despite having failed to make any reference to it in interrogatory responses, infringement contentions, and expert reports. *Id.* On September 7, 2022, with Staff’s support,

the ALJ granted the motion based on the prejudice to Respondents and Staff from Crocs' untimely disclosure. Appx21100-21101.

On September 12, 2022, the ALJ conducted a prehearing conference during which counsel for Crocs inquired whether the preclusion order prohibits it from arguing that the survey controls include "things that are within the mark itself," i.e., the u-shaped line. Appx21170-21173 (Hearing Tr. 17:14-20:16). The ALJ affirmed the *in limine* order but left a response to Crocs' question for later. Appx21195 (Hearing Tr. 42:2-8). The next hearing day, counsel for Crocs reiterated the issue:

The issue is that their experts, I think all of their survey experts, included within their controls the U-shaped line. And the request for -- the question from Complainants is whether we can question them about the solid lines from the marks that they included in their controls, including the U-shaped line. The fact that they kept them in their controls, and the reason we would do that is because it bears on whether the controls are proper or not.

Appx21734 (Hearing Tr. 164:7-15). In response, the ALJ reiterated that the order was based on the untimely notice of the u-shaped line. Appx21734-21735 (Hearing Tr. 164:16-165:1). "And so consistent with that order, *the arguments just mentioned by Complainant and questions just mentioned by Complainant will be excluded pursuant to that order regarding the motion in limine.*" Appx21735 (Hearing Tr. 165:2-5) (emphasis added). It thus could not be more clear that Crocs

was precluded from arguing that the controls in the Wallace survey were flawed because of their inclusion of the u-shaped line.

Furthermore, while the ALJ's preclusion order was based on Crocs' failure to disclose the alleged u-shaped line, Crocs would not have been able to assert this as an element of the 3D Marks if it had tried. When Crocs applied for what became the '328 Mark, it included the following "description of the mark":

The mark consists of a three dimensional configuration of the outside design of an upper for a shoe, the upper having a gentle curving outline, a ridge along the upper opening perimeter, a pattern of 13 round holes on the horizontal portion of the upper of the shoe, a first strip along the vertical portion of the upper having a pattern of 7 trapezoidal openings, and second strip paralleling the first strip and separated from it by a divider and ridge, the second strip circumnavigating the shoe and gently rising toward the heel, and the relative position of these elements to each other. The broken lines show the position of the mark and are not claimed as part of the mark.

Appx067413 (underline added). The application resulting in the '875 Mark included the same "the upper having a gentle curving outline" language.

Appx068819.

As the Commission notes, the Examiner rejected the applications because they sought to cover generic elements such as "the overall clog shape" and "the presence of a defined midsole and top line collar." Appx17-19 (citing file histories). The Examiner further found that the potentially distinguishing elements were "the specific shape and placement of ventilation/drainage holes, a pattern of

texturing on the front and heel area of the shoe, and the placement of a decorative band on the strap feature.” Appx17-18. In response, Crocs amended its applications and expressly struck the element “the upper having a gentle curving outline” from the claimed “description of the mark” in both applications. Appx17; Appx19. Thus, the “distinct u-shaped line” to which Crocs appeals is not, in fact, an element of the 3D Marks, which explains why it did not assert this as an element in its contentions or expert reports.

**2. Crocs’ contention that improper control can be inferred from the high gross level of confusion shown by the Wallace survey is unsupported and contradicted by Crocs’ own expert.**

Crocs argues incorrectly that the high level of confusion reported in the Wallace survey control group “directly confirm(s)” that the control retained elements of the 3D Marks. C.Br. at 40. Crocs’ own expert Dr. Pittaoulis confirmed that no such inference can be drawn, testifying that simply because a control stimuli produced high levels of confusion does not mean that it is per se inappropriate. Appx22030-22031 (Tr. 391:22-392:12).

The district court opinion Crocs cites does not support Crocs’ proposed inference. In that case, the court found the controls improper because “they included the very elements being assessed.” *U.S. Polo Ass’n, Inc. v. PRL USA Holdings, Inc.*, 800 F. Supp. 2d 515, 534 (S.D.N.Y. 2011), *aff’d*, 511 F. App’x 81 (2d Cir. 2013). That holding comes before any discussion of the level of confusion

and not the other way around as Crocs would have it. *Id.* The article Crocs cites is also unsupportive. As an initial matter, the article notes that “the expert should select a stimulus for the control group that shares as many characteristics with the control group as possible” so long as it itself is not actionable. Jacob Jacoby, “Experimental Design and the Selection of Controls in Trademark and Deceptive Advertising Surveys,” 92 Trademark Rep. 890, 931 (quoting Shari Seidman Diamond, *Reference Guide on Survey Research*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 229, 256-60 (Federal Judicial Center ed., 2d ed. 2000)). The Wallace control group is in line with this guidance. And while the Jacoby article opines that a low level of confusion is desirable “in the best of all possible worlds,” it makes clear that controls will yield higher levels of confusion and therefore that “the more important consideration is whether, when the control estimate is subtracted from the test estimate, the ‘net’ exceeds 15 percent (or whatever value the court believes is appropriate).” *Id.* at 932 n.76.

**3. Crocs fails to show that the Commission’s finding regarding direct evidence of confusion is unsupported by substantial evidence.**

Crocs contends that the Commission erred in finding that two Facebook posts referencing the purchasing of “crocs” at Hobby Lobby was likely using the term generically. C.Br. at 52. But Crocs fails to offer anything more than simple disagreement with the finding. For example, Crocs’ musings about the absence of



“rigorously formal writing” in social media posts is not evidence supporting reversal. Furthermore, actual evidence in the form of the deposition testimony of Crocs’ own founder, Scott Seamans, fully supports the Commission’s finding. When asked whether consumers perceive Crocs as a category of shoe, Mr. Seamans referred to the Facebook posting, testifying that “I believe they do, certainly based on the Hobby Lobby example that we saw earlier, they referred to them as Crocs, whether or not they were really Crocs or an imitation product. So I believe, just like some people call Curad strips Band-Aids, I believe Crocs has become a -- I don’t want to say -- I believe they’re -- it’s its own category, and it’s unique, and it’s recognizable.” Appx75919 (Dep. Tr. 180:24-181:7).

Crocs is similarly wrong when it contends that a former Orly executive’s momentary mistake at a deposition is “unrebutted evidence of post-sale confusion.” C.Br. at 53. As an initial matter, the Commission correctly noted that the former executive corrected himself after he had a chance to view the images more closely, and that the artificial, virtual deposition setting could not take into account real-life difference like prices, tags, and other factors. Appx33. Crocs’ attempt to dismiss the Commission’s reasoning as “*post hac* explanations” (C.Br. at 53) is unpersuasive because the Commission is simply offering true observations about the conditions under which the mistake occurred. Furthermore, it is plain

from the transcript that the image that was presented did not show all the features relevant to the 3D Marks. Appx29689 (Dep. Tr. 51:6-22).

**D. Factor 13: Crocs Offers Nothing That Justifies Disturbing the Unanimous Determination That There Is No Evidence of Intent to Deceive.**

The Commission, the dissent, and the ID all agree that Crocs failed to demonstrate any intent to deceive. *See* Appx43; Appx86 (“I agree that there is no evidence of an intent to confuse.”); Appx264-65. Crocs now contends that this unanimous determination was error because, allegedly, Orly did not offer “*any* explanation” that the Gator bears resemblance to the Classic Clog. C.Br. at 67. Crocs is wrong.

The ID found the evidence to show that Orly’s original design came from a pre-existing mold from a contract manufacturer – a mold that that Orly neither designed nor have any exclusive rights to. Appx264. Indeed, testimony established that Orly never used Crocs as a reference precisely because it simply used the pre-existing mold. *Id.* (citing deposition testimony). Crocs does not dispute this evidence, which is plainly an explanation for the asserted resemblance. Crocs also ignores the finding that “Orly prominently brands its products with its own licensed trademarks, such as coXist, or will use the private label of its retailer.” Appx265.

Crocs similarly ignores the finding that internal emails and documents that reference “Crocs” or include images of the Classic Clog do not demonstrate any intent because, for example, when read in full context the image of the Clog was there simply to confirm “the color of glitter.” *Id.* And the use of the terms “croc” or “crocs” was to “describe a category of shoes.” *Id.* Finally, with respect to Hobby Lobby, Crocs misleading blows up the back of a tag displaying the term “croc” but ignored the ID’s finding that the term “is descriptive in nature,” appears only “in fine print, ” and “is not used in any consumer-facing capacity.” Appx346 n.70. Conversely, “front of the tag . . . prominently features its own in-house private label.” *Id.* The full label in context is as follows:



See Appx277.

In sum, the evidence fully supports the finding that Crocs failed to show any evidence of intent to deceive.

## **CONCLUSION**

For the reasons stated herein and in the Commission's brief, the Court should affirm the Commission's non-infringement determination.

Dated: October 2, 2024

Respectfully submitted,

/s/Brian P. Johnson

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FORM 19. Certificate of Compliance with Type-Volume Limitations

Form 19  
July 2020

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

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS**

**Case Number:** 24-1300

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