No. 24-1300

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CROCS, INC.,

Appellant,

v.

INTERNATIONAL TRADE COMMISSION,

Appellee.

Appeal from the United States International Trade Commission in Investigation No. 337-TA-1270

RESPONSE BRIEF OF APPELLEE INTERNATIONAL TRADE COMMISSION

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STATEMENT OF RELATED CASES

The Commission has no information regarding any related cases, other than the information provided by Appellant Crocs, Inc. ("Crocs").

JURISDICTIONAL STATEMENT

Crocs's Jurisdictional Statement is incorrect, for its appeal is untimely under section 337(c). 19 U.S.C. § 1337(c). The Commission's final negative determinations finding no violation by certain participating respondents and denying a request for a general exclusion order ("GEO") were final on the date they issued, September 14, 2023. Appx10-12; Appx101-102. Under section 337(c), Crocs had 60 days thereafter, until November 13, 2023, to file its notice of appeal. 19 U.S.C. § 1337(c). Yet Crocs did not file its notice of appeal until December 22, 2023—more than five weeks *after* the expiration of the 60-day statutory deadline for filing a notice of appeal. ECF 1 (filed Dec. 22, 2023). Crocs's appeal is thus untimely under section 337(c) and should be dismissed.

This result follows the same clear, consistent, mandatory framework created by section 337 and followed by this Court for nearly four decades. A final determination that does not result in an exclusion order is final when it is issued because it is not subject to any further administrative or Presidential review. *Allied Corp. v. ITC*, 782 F.2d 982, 983-84 (Fed. Cir. 1986). Thus, a complainant seeking to appeal a final determination of no violation or the denial of a particular remedy (*i.e.,* a negative determination) must file its notice of appeal within 60 days from issuance, per section 337(c). *Id.*; *Broadcom Corp. v. ITC*, 542 F.3d 894, 896-97 (Fed. Cir. 2008); *Excel Dryer, Inc. v. ITC*, No. 18-1622, Order at 2-3 (Fed. Cir.

May 22, 2018) (unpublished) (citing *Allied*, *supra*) (available at ECF 11, Ex. 1). Crocs has not cited a single contrary case in which a complainant was allowed to file a notice of appeal from a negative determination after the close of the Presidential review period. Appellant's Br. at 82-83 (ECF 21) ("C.Br."); Opp'n to Mot. to Dismiss for Lack of Jurisdiction at 15 (Mar. 18, 2024) (ECF 13) ("C.Opp.").[1] Crocs's theory that no-violation and violation determinations must be treated as a "single entity" for purposes of appeal has already been rejected as "without merit." *Allied*, 782 F.2d at 984.

The U.S. Supreme Court's recent decision in *Harrow v. Department of Defense*, 601 U.S. 480 (2024) (cited at C.Br. at 82), has no effect on the finality of Commission determinations or the timing of appeals from no-violation and violation determinations. The Supreme Court did not set forth a blanket rule for identifying jurisdictional versus procedural deadlines; rather, it held that this question must be decided on a case-by-case basis. *Id.* at 484-85. Section 337(c) is a jurisdictional and mandatory deadline, as discussed below.

Even if section 337(c) is found to be procedural, despite decades of precedent treating the statute as jurisdictional, Crocs has provided no explanation

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[1] The Commission has already addressed the case law cited in Crocs's opposition. *See* Commission's Reply in Support of Mot. to Dismiss (Mar. 25, 2024) (ECF 14).

as to why a company with experienced counsel and prior section 337 and Federal Circuit experience should be entitled to equitably toll the statutory 60-day deadline for five weeks, without notice, motion, or even excuse. *Id.* at 489. Crocs's appeal should be dismissed entirely, even under *Harrow.*

STATEMENT OF THE ISSUES

(1) Whether Crocs's appeal should be dismissed, where Crocs did not file its notice of appeal from the Commission's final negative determinations (*i.e.*, no violation by participating respondents and no GEO issued) until five weeks after the 60-day statutory deadline of 19 U.S.C. § 1337(c) had expired.

(2) Whether substantial evidence supports the Commission's determination that Crocs failed to carry its burden to prove that certain participating respondents are infringing or diluting the 3D Marks, where Crocs failed to focus on the narrow design of the 3D Marks and relied instead on the broader overall design of the Classic Clog, including its well-known, eye-catching design elements that were once protected by a design patent but are not protected by the 3D Marks.

(3) Whether the Commission acted reasonably, and not arbitrarily or capriciously, in denying Crocs's request for a GEO, where issuing a GEO is discretionary and where a GEO was not warranted under 19 U.S.C. § 1337(d), because Crocs did not prove a violation by any respondent "as a result of an investigation," based on reliable, probative, and substantial evidence.

STATEMENT OF THE CASE

I. INTRODUCTION

Crocs failed to carry its burden to establish infringement or dilution based on the narrow scope of its asserted 3D Marks. Instead, Crocs attempted to rely on the recognition that the Classic Clog derived from other, broader overall design elements, including the clog itself, that are not protected by the 3D Marks.

In essence, Crocs is admittedly, but improperly, trying to use its narrow 3D Marks to recreate the broader protections once provided by its now-expired U.S. Patent No. D517,789 ("the '789 design patent") and original GEO, which was issued in 2011 but expired in 2020.[2] Appx95736-95737. This Court described the once-patented clog as having multiple "overall effects," including a "visual theme of rounded curves and ellipses throughout the design," "a visually continuous ring encircling the entire shoe," and "[m]ultiple major design lines and curves" that converged at the "focal point" where the strap attaches to the base.[3] *Crocs, Inc. v.*

[2] *Certain Foam Footwear*, Inv. No. 337-TA-567, Comm'n Notice, 2011 WL 5997932 (July 15, 2011) (on remand from *Crocs I*, 598 F.3d 1294).

[3] The '789 design patent was represented by the following drawings:

ITC, 598 F.3d 1294, 1304-06 (Fed. Cir. 2010) ("*Crocs I*"). The Court found infringement of the now-expired '789 design patent because the accused shoes were nearly identical to the patented design and would deceive an ordinary observer into believing they were the same as the patented design. *Id.* at 1306.

Crocs, however, can no longer rely on the broader overall look of the shoe, whether generic or not, to establish likelihood of confusion with the 3D Marks in either point-of-sale or post-sale contexts. By the time the 3D Marks were prosecuted in 2016-17, some 14-15 years after the Classic Clog was introduced in 2002, the molded foam clog design and lines, curves, and design elements that have made the Classic Clog "iconic" were regarded as non-distinctive, common, and even "generic." Appx17-18; Appx222-223; Appx67418-67419; Appx68519-68520. While Crocs may dispute whether its design is "generic" going forward, it cannot deny that the overall look and recognition of the clog are due to more than

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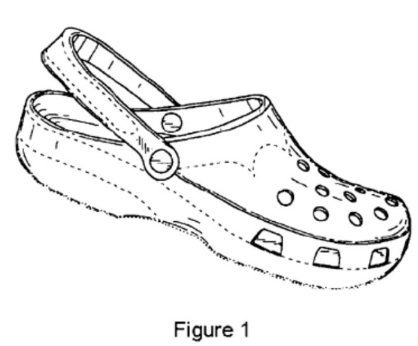

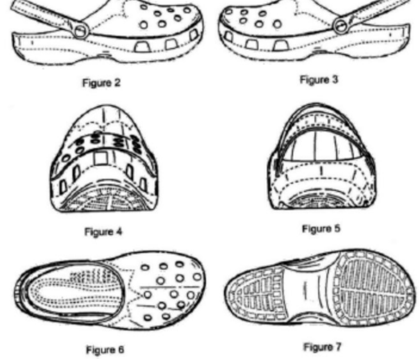

Crocs I, 598 F.3d at 1299-1300.

the 3D Marks, as evidenced by the consumer surveys and verbatim responses from those surveys, discussed later. Appx34-42; Appx95770-95771.

II. THE 3D MARKS AT ISSUE

Crocs filed the applications that issued as the 3D Marks in 2016, some 14 years after it introduced the Classic Clog. During prosecution of the 3D Marks, Crocs could not obtain coverage of the overall clog shape or its upper, and even had to withdraw certain proposed ribs, lines, and other design features from its applications, because they were considered "generic," "commonly present in waterproof strap clogs," and "non-distinctive."[4] Appx17-18; Appx222-223;

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[4] During prosecution of the '328 Mark, the examiner explained:

> In the present case, the overall clog shape of the proposed configuration mark and the presence of a defined midsole and topline collar appear to represent generic elements commonly present in waterproof strap clogs. These features are nondistinctive and do not function as a mark because such elements are so common in the industry for such products and are the same or substantially similar to the designs of competitors' products such that consumers are accustomed to seeing such elements on similar products. As such, *[Crocs's] request to exclude other shoe manufacturers from employing such ubiquitous design elements cannot be granted*. The examining attorney attaches for reference numerous examples of competing but distinguishable waterproof clog configurations illustrating the generic nature of the referenced shape/elements.

Appx67418-67419 (emphasis added) (discussed in Appx17; Appx222).

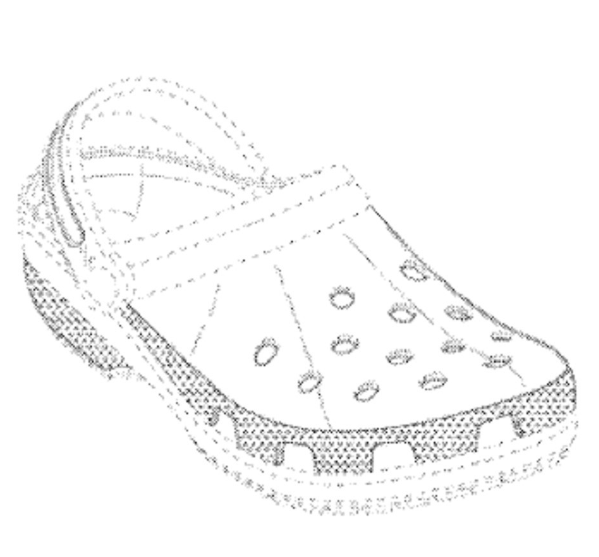
Appx67418-67419; Appx68519-68520; *see also* Appx67460; Appx68819 (from Crocs's original applications).

The only design elements in the Classic Clog that are protected by the 3D Marks are a specific pattern of 13 circular holes on the horizontal portion of the upper, a second pattern of 7 trapezoidal drainage holes around the vertical portion of the upper (above the sole), and a textured strip around the toes, as shown below:

'328 Mark (Registration No. 5,149,328)	
	The mark consists of a three dimensional configuration of the outside design of an upper for a shoe comprising *a pattern of 13 round holes on the horizontal portion of the upper* of the shoe and *a textured strip along the vertical portion of the upper having a pattern of 7 trapezoidal openings*. The broken lines show the position of the mark and are not claimed as part of the mark.

Appx17; Appx223; Appx67391. The covered design elements are outlined by the solid lines. Notably, the dotted lines, which outline the overall clog shape, sole, strap, collar and heel portions, are all unprotected.

The '875 Mark covers the same patterns of holes plus a textured strip on the heel and a decorative band on the strap, as shown below:

<table>
<tr><th colspan="2">’875 Mark (Registration No. 5,273,875)</th></tr>
<tr><td></td><td>The mark consists of a three dimensional configuration of the outside design of an upper for a shoe comprising a pattern of 13 round holes on the horizontal portion of the upper of the shoe, a textured strip along the vertical portion of the upper having a pattern of 7 trapezoidal openings, a textured strip on the heel of the shoe and a decorative band along the length of the heel strap. The broken lines show the position of the mark and are not claimed as part of the mark.</td></tr>
</table>

Appx18-19; Appx224; Appx68500 (emphasis added).

III. PROCEEDINGS BEFORE THE COMMISSION

On July 9, 2021, the Commission instituted this investigation based on a complaint filed by Crocs accusing multiple respondents, including the Participating Respondents[5] and the Defaulting Respondents,[6] of violating section 337 of the Tariff Act, 19 U.S.C. § 1337 (“section 337”), by importing, selling for importation,

[5] The Participating Respondents are Orly Shoe Corp. (“Orly”), Hobby Lobby Stores, Inc. (“Hobby Lobby”), and Quanzhou ZhengDe Network Corp. d/b/a Amoji (“Amoji”). Other respondents participated in the underlying investigation but settled with Crocs and were terminated from the investigation before or during the hearing. Appx3-4.

[6] The Defaulting Respondents are La Modish Boutique, Star Bay Group, Inc., Huizhou Xinshunzu Shoes Co., Ltd., and JinJiang Anao Footwear Co., Ltd. Appx2.

or selling in the United States after importation certain casual footwear that infringes or dilutes its 3D Marks, among other things. Appx2372-2373.

On January 9, 2023, the presiding Administrative Law Judge ("ALJ") issued a final initial determination ("ID"), finding, *inter alia,* that the Participating Respondents did not violate section 337 because the accused products (*i.e.*, the Orly Gator, Orly Redesign, and Amoji Garden Clog) did not infringe or dilute the 3D Marks. Appx365-366.[7] The ALJ also found the 3D Marks to be invalid because they had not acquired secondary meaning prior to Orly's first sale of the accused products. Appx366.

On September 14, 2023, the Commission issued a final determination affirming with modifications the ALJ's findings that Crocs failed to prove that any of the Participating Respondents infringed or diluted the 3D Marks or otherwise violated section 337. Appx2; Appx5; Appx10-12; Appx30-47. The Commission took no position on the domestic industry requirement or secondary meaning. Appx5; Appx54 (citing *Beloit Corp. v. Valmet Oy*, 742 F.2d 1421, 1423 (Fed. Cir.

[7] The Commission affirmed the ALJ's findings that are not inconsistent with its opinion. Appx27. Such findings have thus become those of the Commission and are discussed herein as the Commission's own findings. 19 C.F.R. §§ 210.42(h), 210.45(c).

1984)). Commissioner Kearns dissented, arguing in favor of finding infringement and remanding the investigation to the ALJ for further proceedings. Appx55-100.

Consistent with this Court's precedent, the Commission weighed the *DuPont* factors for likelihood of confusion and concluded that, on balance, they do not support infringement. Appx25 (citing *Swagway, LLC v. ITC,* 934 F.3d 1332, 1338 (Fed. Cir. 2019); *In re DuPont DeNemours & Co.*, 476 F.2d 1357 (CCPA 1973)); Appx30-43. Specifically, the Commission found little or no evidence of actual or potential confusion (factors 7, 8, 12) and no intent to confuse (factor 13) by any of the Participating Respondents. Appx33-34; Appx251-253; Appx264-265; Appx268-269; Appx274-275. The Commission also found that price differentials, sophisticated shoppers, and branding dispelled confusion as to the source of the products (factor 4). Appx245-249; Appx267; Appx274.

The Commission found that the similarity factors (factors 2-3) (similarities of the goods and trade channels) weighed in favor of likelihood of confusion. Although *DuPont* factor 1 (similarity to the marks) weighed in favor of likelihood of confusion for the Orly Gator, it weighed only weakly so for the Amoji Garden Clog and against likelihood of confusion for the substantially dissimilar Orly Redesign. Appx30-31; Appx236-244; Appx269-273. On balance, the Commission found the similarity factors were outweighed by other *DuPont* factors. Appx43; Appx265-266; Appx269; Appx276.

The Commission also carefully considered the consumer surveys submitted by the parties, which, when proper controls are used, are supposed to discriminate between confusion caused by the 3D Marks and confusion due to other, unprotected features. The Wallace survey, submitted by the Participating Respondents, used a proper control and showed that the "net" association rate for the accused products (*i.e.*, their individual "gross" association rate minus the "gross" association rate for the control) was very low, thereby evidencing little likelihood of confusion with the 3D Marks. Appx39-42; App261; Appx80154-80155 (Q/As 73-77) (Wallace); Appx80175-80180 (Q/As 116-22, 128-32) (Wallace). In contrast, the Commission found the Pittaoulis survey, submitted by Crocs, to be unreliable because its control shoe was not proper and artificially inflated the "net" association rates for the accused shoes. Appx34-39; Appx254-259; Appx67282 (Q/A 43) (Pittaoulis); Appx67291-67292 (Q/As 66, 69, 71-72, 74, 75) (Pittaoulis); Appx80146-80147 (Q/As 40-42); Appx80154 (Q/A 71) (Wallace). Even so, the Pittaoulis survey showed that the net association rates for the Orly Redesign and Amoji Garden Clog were only about 10% or below, respectively, and only about 21% or less for the Orly Gator. Appx256.

Having found no violation by the Participating Respondents, the Commission properly denied Crocs's request for a GEO under section 337(d)(2). Appx49-50. Crocs waived establishing a violation against the Defaulting

Respondents under the "reliable, probative, and substantial evidence" standard and thus could not obtain a GEO under section 337(d)(2), based on those respondents. Appx43-45. The Commission found no such waiver under section 337(g)(1) and thus issued a limited exclusion order ("LEO") and two cease and desist orders ("CDO") (collectively, "the remedial orders") against the Defaulting Respondents under that subsection. Appx49-51.

IV. NOTICE OF APPEAL

The Commission issued and served its final determinations finding no violation by the Participating Respondents and denying Crocs's request for a GEO on September 14, 2023. Appx5-8; Appx101-102. Crocs had 60 days, or until November 13, 2023, to file its notice of appeal from the final negative determinations, pursuant to section 337(c). In contrast, the remedial orders issued against the Defaulting Respondents did not become final until after the close of the Presidential review period, pursuant to 19 U.S.C. § 1337(j).

Crocs, however, did not file its appeal from the Commission's negative determinations until December 22, 2023, more than five weeks after the November 13, 2023, deadline had expired. ECF 1 (filed Dec. 22, 2023).

On March 6, 2024, the Commission filed a motion to dismiss Crocs's appeal as untimely under 19 U.S.C. § 1337(c) (ECF 11). Crocs filed its opposition to the

motion on March 18, 2024 (ECF 13). The Commission filed its reply on March 25, 2024 (ECF 14).

On April 9, 2024, the Court denied the motion to dismiss and directed the parties to include their arguments in their briefs. ECF 15.

SUMMARY OF THE ARGUMENT

Crocs's appeal is untimely under section 337(c) and should be dismissed. Under nearly forty years of precedent, the Commission's negative determinations finding no violation by the Participating Respondents and denying Crocs's request for a GEO were final on the date they issued, September 14, 2023, because they were not subject to any further administrative proceedings or Presidential review. 19 U.S.C. §§ 1337(c), (j); *Broadcom*, 542 F.3d at 896-97; *Allied*, 782 F.2d at 984. Thus, Crocs had 60 days, or until November 13, 2023, to file its appeal. 19 U.S.C. § 1337(c). Crocs, however, waited until December 22, 2023—*over five weeks after the statutory deadline had expired*—to file its notice. Crocs's appeal was out of time and should be dismissed.

The untimeliness of Crocs's appeal is not affected by the U.S. Supreme Court's recent opinion in *Harrow*. *Harrow* does not alter or delay the finality of Commission determinations, which is the true question presented in this case. *See* 601 U.S. at 484-89. The question presented in *Harrow*—whether a statutory deadline is jurisdictional—is also unavailing, as Crocs offers no argument as to

why section 337(c) is supposedly non-jurisdictional, non-mandatory, or otherwise subject to equitable tolling. *See id.* at 484-85, 489. Even if equitable tolling applied (which it does not), Crocs offers no explanation as to why a large company, with prior section 337 experience and experienced litigation counsel, should be entitled to equitably toll the statutory 60-day deadline for five weeks.

Should Crocs's untimely appeal be allowed to proceed, this Court should affirm the Commission's no violation determination on the merits. The narrow scope of the 3D Marks should be considered in the context of the many other eye-catching but unprotected features that made the Classic Clog and Crocs successful. Appx95736; *see Crocs I*, 598 F.3d at 1304-06 (finding infringement of Crocs's '789 design patent). Indeed, by the time Crocs prosecuted the 3D Marks, some 14-15 years after the Classic Clog's introduction, it could no longer protect the clog design or its overall features. Appx67418-67419; Appx68519-68520. Instead, the 3D Marks are limited to two specific patterns of holes on the shoe's upper and certain textured strips, but they do not protect the overall design. Appx17-18; Appx222-223; Appx67391; Appx68500.

Given that Crocs cannot use the 3D Marks to exclude its competitors from selling a molded clog design or using other unprotected design elements, the Commission carefully considered the *DuPont* factors, and found that on balance, they do not support likelihood of confusion. As discussed below, the Commission

found little or no evidence of actual or potential confusion (factors 7, 8, and 12) and no intent to confuse (factor 13), while the conditions of sale (factor 4), including significant price differentials, sophisticated shoppers, and the presence of branding, dispelled potential confusion as to the source of the accused products. The Commission also found the Classic Clog's fame (factor 5) was due largely to its clog style, colors, and other features displayed in its advertising, rather than the 3D Marks.

The Commission further found that any similarities (factors 1-3) were outweighed by the other factors. With respect to visual similarities (factor 1), the Commission found only the Orly Gator to be similar to the 3D Marks, the Amoji Garden Clog was only weakly similar, and the Orly Redesign had a substantially different overall appearance than the 3D Marks, such that confusion with the 3D Marks was unlikely. The Commission also found factors 2 and 3 to weigh in favor of likelihood of confusion. The similarities factors (1-3), however, were outweighed by other factors, including the conditions of sale and actual or potential confusion (as evidenced by the consumer surveys conducted by the parties' experts). Substantial evidence thus supports the Commission's final determination that the Participating Participants did not infringe or dilute the 3D Marks.

Having found that the Participating Respondents did not violate section 337, the Commission acted reasonably, and not arbitrarily, in denying Crocs's request

for a GEO. Although the Defaulting Respondents were found in default, and the Commission issued an LEO and CDOs against them as required under section 337(g)(1) (which requires the Commission to presume the allegations of the complaint to be true), Crocs did not establish a violation under section 337(d) against the Defaulting Respondents. Appx43-45. Thus, the Commission could not issue a GEO under section 337(d)(2) because it did not find a violation by the Participating Respondents or Defaulting Respondents "as a result of an investigation" under section 337(d), pursuant to the "reliable, probative, and substantial evidence" standard. *See* 19 U.S.C. § 1337(d)(2); 5 U.S.C. § 556; *Certain Pocket Lighters*, Inv. No. 337-TA-1142, Comm'n Op., 2020 WL 4049935, at *7 & n.10 (July 13, 2020) (citations omitted). Crocs, then, is not entitled to a GEO based on the Defaulting Respondents, regardless of the outcome of the jurisdictional and violation issues.

ARGUMENT

I. STANDARD OF REVIEW

Pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, this Court reviews the Commission's factual findings for substantial evidence and its legal determinations, including its statutory interpretations, are reviewed *de novo*. *Swagway*, 934 F.3d at 1338 (citing *Converse, Inc. v. ITC*, 909 F.3d 1110, 1115 (Fed. Cir. 2018)).

The Court reviews the Commission's factual findings for substantial evidence, which means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Kinik Co. v. ITC*, 362 F.3d 1359, 1361 (Fed. Cir. 2004) (quotations omitted). Under this standard, "this court 'must affirm a Commission determination if it is reasonable and supported by the record as a whole, even if some evidence detracts from the Commission's conclusion,'" or if there is a "possibility of drawing two inconsistent conclusions from the evidence." *Philip Morris Prods. S.A. v. ITC*, 63 F.4th 1328, 1343 (Fed. Cir. 2023) (quoting *Spansion, Inc. v. ITC*, 629 F.3d 1331, 1344 (Fed. Cir. 2010)). Nonetheless, the Court does not "reweigh" evidence on appeal. *Nutrinova Nutrition Specialties & Food Ingredients GmbH v. ITC*, 224 F.3d 1356, 1359 (Fed. Cir. 2000).

A. Final Commission Determinations and Remedies

"Any person adversely affected by a final determination of the Commission under subsection (d), (e), (f), or (g) may appeal such determination, within 60 days after the determination becomes final" to this Court for review under the APA. 19 U.S.C. § 1337(c). A determination is final when there is "no provision for Presidential review, or for other administrative proceedings following a determination that does not lead to an exclusion order." *Allied*, 782 F.2d at 984; *Broadcom*, 542 F.3d at 896-97 ("final" means there is "no further opportunity for review of that decision other than by way of review in this court").

In the event the Commission finds a respondent has violated section 337 or is in default for failing to respond to the complaint, notice of investigation, and show cause order, the Commission "shall" issue remedial orders limited to the respondent(s) in question, *i.e.*, an LEO and/or CDOs, unless the Commission finds that the public interest precludes issuance of such order. 19 U.S.C. § 1337(d)(1), (g)(1); *Kyocera Wireless Corp. v. ITC*, 545 F.3d 1340, 1356 (Fed. Cir. 2008).

The Commission's authority to issue an exclusion order "shall be limited" to those respondents found to violate section 337 "unless the Commission determines that—(A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or (B) there is a pattern of violation of [section 337] and it is difficult to identify the source of infringing products." 19 U.S.C. § 1337(d)(2); *Kyocera*, 545 F.3d at 1356. Whereas an LEO is mandatory ("shall") if a violation or default is found, a GEO is discretionary, even if its factual predicates are met. 19 U.S.C. § 1337(d) (Commission shall issue an LEO upon finding violation); § 1337(g)(2) (GEO "may be issued" under certain circumstances).

The Commission has broad discretion in selecting the form, scope, and extent of a remedy. *Cisco Sys., Inc. v. ITC*, 873 F.3d 1354, 1363 (Fed. Cir. 2017); *Viscofan, S.A. v. ITC*, 787 F.2d 544, 548 (Fed. Cir. 1986). Judicial review of that choice is limited, so the Court will not interfere in a remedy determination, unless

it is arbitrary, capricious, an abuse of discretion, or not in accord with the law. *Cisco*, 873 F.3d at 1361, 1363; *Viscofan*, 787 F.2d at 548.

B. Trademark Infringement

"The core element of trademark infringement is the likelihood of confusion," *i.e.*, whether a competitor is using a substantially similar trademark that is likely to confuse consumers as to the source of the product. *VersaTop Support Sys., LLC v. Georgia Expo, Inc.*, 921 F.3d 1364, 1371 (Fed. Cir. 2019) (quotations omitted); *see also Converse*, 909 F.3d at 1116. The complainant bears the burden to establish likelihood of confusion. *Swagway*, 934 F.3d at 1338. Likelihood of confusion is a legal question reviewed *de novo*, but it rests on multiple "factual underpinnings." *Id.* More specifically, likelihood of confusion is determined using the "*DuPont* factors." *Id.* at 1338-39 (quoting *In re DuPont*, 476 F.2d 1357 (C.C.P.A. 1973)). The *DuPont* factors may be accorded different weights in different circumstances, but they should never be reduced to a mere tally of factors. *Id.* at 1340. On the other hand, accused designs that are not substantially similar to the asserted mark cannot infringe that mark. *See Converse*, 909 F.3d at 1124.

The Court reviews these factual determinations, including the similarities between the asserted and accused marks and the relatedness of different goods bearing those marks, for substantial evidence. *Swagway*, 934 F.3d at 1338. The

relative weight assigned to each *DuPont* factor and the ultimate determination on likelihood of confusion are legal determinations and reviewed *de novo*. *Id.*

C. Dilution of a Trademark

To prove dilution of a trademark, the complainant must show: (1) it owns a mark that is famous and distinctive; (2) a respondent is using a mark in commerce that dilutes the famous mark; (3) the respondent began using the mark after it became famous; and (4) the respondent's use of its mark is likely to cause dilution of the complainant's mark by blurring or tarnishment. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1372 (Fed. Cir. 2012). Dilution requires a more stringent showing of "fame" than that required to show fame (factor 5) for purposes of a likelihood of confusion. *Id.* at 1373; 15 U.S.C. § 1125(a)(2)(A) (mark must be "widely recognized" as designating the source of the goods or services).

II. CROCS'S APPEAL IS UNTIMELY AND SHOULD BE DISMISSED

For nearly four decades, this Court has clearly and consistently held that a complainant has 60 days from the issuance of a negative determination (*e.g.*, a finding of no violation or the denial of the issuance of a specific remedy, here a GEO) to file a notice of appeal. *See* 19 U.S.C. § 1337(c). The appeal period runs from the date of issuance because a negative determination is not subject to any further administrative proceedings or Presidential review, per sections 337(c) and

(j); thus, it becomes final and appealable upon issuance. *See Broadcom*, 542 F.3d at 896-97; *Allied*, 782 F.2d at 984.

Here, the Commission's negative determinations became final upon issuance, on September 14, 2023; thus, Crocs had 60 days, or until November 13, 2023, to file its notice of appeal. Instead, Crocs waited *an additional five weeks after the deadline expired* before it filed its notice of appeal on December 22, 2023. Crocs's appeal is therefore untimely under section 337(c).

Crocs's reliance on the recent U.S. Supreme Court opinion in *Harrow* is misplaced. *Harrow* does nothing to affect the finality of Commission determinations, which is the true question presented in this case. The question of whether a statutory deadline is jurisdictional is also unavailing, as Crocs offers no argument or explanation as to why section 337(c) is non-jurisdictional, non-mandatory, or otherwise subject to equitable tolling. *See Harrow*, 601 U.S. at 484-85, 489. Crocs's appeal should be dismissed.

A. The Commission's No-Violation Determination and Denial of a General Exclusion Order Were Final Upon Issuance

The Commission's negative determinations for the Participating Respondents were final when they were issued, on September 14, 2023, because they were not subject to any further administrative or Presidential proceedings. *See Broadcom*, 542 F.3d at 896-97 (a no-violation determination based on non-infringement did not become final at the end of the period of Presidential review

but upon issuance because "there was no further opportunity for review of that decision other than by way of review in this court"); *Allied*, 782 F.2d at 984 (a Commission determination of patent invalidity was final upon issuance, "there being no provision for Presidential review, or for other administrative proceedings, following a determination that does not lead to an exclusion order"); *Excel Dryer*, Order at 3 (a Commission determination not to issue a CDO was final upon issuance because "the results of the Presidential review 'could not possibly effect [Excel Dryer's] right to appeal'" that decision) (citing *Allied*, *supra*). Crocs thus had 60 days from issuance, or until November 13, 2023, to appeal the Commission's final negative determination. 19 U.S.C. § 1337(c).

This Court has already rejected Crocs's argument that the Presidential review period applies to negative determinations. *Allied*, 782 F.2d at 983-84 (there is no Presidential review for a determination that does not lead to an exclusion order). Presidential review applies only to an affirmative determination of "*a violation*" of section 337 and its accompanying remedial orders (here, the LEO and CDOs issued against the Defaulting Respondents), even if that violation

determination is combined with a no-violation determination for another respondent.[8] 19 U.S.C. § 1337(j).

This Court has already rejected Crocs's theory that the Commission's September 14, 2023, determination, which contains both negative (no-violation) and affirmative (violation) findings, "constitutes a singular Commission 'determination'" for purposes of appeal. C.Br. at 82-83; *Allied*, 782 F.2d at 984 (rejecting appellant's argument that a section 337 proceeding is a "single entity"). Crocs's theory contradicts this Court's well-established principle that finality is established (*e.g.,* on a claim-by-claim basis) when there are no further administrative or Presidential proceedings on that determination. *See Broadcom*, 542 F.3d at 896-97; *Allied*, 782 F.2d at 984. Crocs's "singular determination" theory is also contradicted by numerous exemplary cases in which a single Commission opinion contained both affirmative and negative determinations, with different dates of finality and different appeal deadlines for the various parties involved. *See, e.g.*, *Sonos, Inc. v. ITC*, 2024 WL 1507605, at *1-2 (Fed. Cir. Apr. 8, 2021); *Bio-Rad Labs., Inc. v. ITC*, 998 F.3d 1320, 1322-23 (Fed. Cir. 2021);

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[8] The Commission's affirmative determination to issue remedial orders against the Defaulting Respondents became final after Presidential review, but that determination was not adverse to, and thus was not appealable by, Crocs. *See Allied*, 782 F.2d at 983 ("Because Allied prevailed in respect of that patent and the exclusion order, it could not appeal from that order.").

Ajinomoto Co. v. ITC, 932 F.3d 1342, 1348 (Fed. Cir. 2019). In each case, complainants had 60 days to file an appeal from issuance of the Commission's no-violation determination (which were not subject to Presidential review), whereas respondents had 60 days from the end of the Presidential review period to appeal the Commission's final determinations of violation and remedy determinations, even if those determinations appeared in a single document.

For the same reasons, the allegedly "inadequate relief" of an LEO and the CDOs does not merge a negative determination into "a single entity" with the affirmative determination, as Crocs erroneously contends. *Allied*, 782 F.2d at 984 (rejecting appellant's argument that a section 337 proceeding is a "single entity"); C.Br. at 4. Rather, the time for appeal is mandated by the finality of each determination, whether negative or affirmative. The President is authorized only to approve or disapprove the remedial orders issued for an affirmative determination of violation for "policy reasons," and not on the merits. 19 U.S.C. § 1337(j); *Young Eng'rs, Inc. v. ITC*, 721 F.2d 1305, 1313 (Fed. Cir. 1983).[9] The President has no authority to reverse, modify, or remand the Commission's remedial orders, issue a remedial order *sua sponte*, or order the Commission to issue a remedial

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[9] *Young Engineers*, cited by Crocs (C.Br. at 82-83), is inapposite because it involved only affirmative determinations of a violation but no negative determinations. *Young Eng'rs*, 721 F.2d at 1308-09.

order. 19 U.S.C. § 1337(j). Thus, Crocs cannot rely on the Presidential review of the Defaulting Respondents' remedial orders to delay the finality of the negative determinations or extend the period for appeal therefrom because the Presidential review has no impact on negative determinations.[10]

Crocs's argument that this longstanding framework could result in piecemeal appeals does not negate that negative determinations are final upon issuance. In any event, Crocs here was required to file only a single notice of appeal for review of "all adverse judgments, decrees, decisions, rulings, findings, orders, instructions, and opinions." Petition for Review, ECF 1-2 at 2 (Dec. 29, 2023). Crocs's failure to do so within the prescribed statutory period dooms its appeal.

B. The Supreme Court's *Harrow* Decision Does Not Extend the 60-Day Statutory Deadline

The *Harrow* decision cited by Crocs has no effect on the finality of Commission determinations or the longstanding framework for filing notices of appeal under section 337(c). *See Allied*, 782 F.2d at 984; *Broadcom*, 542 F.3d at

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[10] Crocs's argument over "mootness" of the GEO (C.Opp. at 25) is also irrelevant because the issue is the untimeliness of Crocs's appeal, not mootness. To the extent the Commission engages in further proceedings after the conclusion of its investigation, as suggested by Crocs, such a proceeding does not affect the finality of its original determination but would result in a new determination and a new right of appeal. *See Allied Corp. v. ITC*, 850 F.2d 1573, 1580 (Fed. Cir. 1988).

896-97; *Excel Dryer*, Order at 3 (citing *Allied*, *supra*). Accordingly, *Harrow* does not impact or salvage the untimeliness of Crocs's appeal based on finality.

Harrow also did not make a blanket ruling that all "notice of appeal deadlines such as the deadlines described in [section 337(j)] are not jurisdictional," as Crocs erroneously contends. C.Br. at 82 (citing *Harrow*, 601 U.S. at 484-85). Instead, the Supreme Court required a clear Congressional statement for a statutory deadline to be jurisdictional, while noting that no "magic words" are required to confer jurisdictional status. *Harrow*, 601 U.S. at 484.

As for the statutory deadline set forth in section 337(c), that deadline is jurisdictional and mandatory, and therefore not subject to equitable tolling. *See id.* at 484 ("When Congress enacts a jurisdictional requirement, it 'mark[s] the bounds' of a court's power … [a]nd a court must adhere to the rule 'even if equitable considerations would support' excusing its violation.") (citations omitted); *Nutraceutical Corp. v. Lambert*, 586 U.S. 188, 192 (2019) (mandatory rules, even if non-jurisdictional, are not subject to equitable tolling). Crocs fails entirely to address the language of section 337(c) or to demonstrate that its statutory deadline is (a) non-jurisdictional, and (b) non-mandatory. Nor does Crocs provide any reason to support equitable tolling in the present appeal.

Harrow, a case involving private claims before the Merit Systems Protection Board, does not explicitly disturb the decades of precedent that have consistently

treated section 337(c), a trade statute, as jurisdictional. *See, e.g.*, *Allied*, 782 F.2d at 984 (finding no jurisdiction over appeal filed more than 60 days after issuance of a Commission determination); *Broadcom*, 542 F.3d at 896-97 (finding jurisdiction to review an appeal from a negative Commission determination filed within 60 days of the issuance of that determination); *Tessera, Inc. v. ITC*, 646 F.3d 1357, 1368 (Fed. Cir. 2011) (finding jurisdiction over appeal filed within 60 days of issuance of the Commission's final determination). This longstanding precedent supports a finding that the statutory deadline of section 337(c) is jurisdictional, or at least is mandatory, and therefore not subject to equitable tolling. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 138 (2008) ("a definitive earlier interpretation of the statute" can rebut the presumption of equitable tolling); *Harrow*, 601 U.S. at 485-86.

The statute at issue in *Harrow* was found non-jurisdictional because it simply recites a time bar without "demarcating a court's power." *Id.* at 484; *see also id.* at 485 (citing 5 U.S.C. § 7703(b)(1) ("[A] petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.")).

Section 337(c), on the other hand, directly implicates the Federal Circuit's power and jurisdiction. Specifically, section 337(c) recites that "[a]ny person adversely affected by a final determination of the Commission *under subsection (d), (e), (f), or (g)* may appeal such determination, within 60 days after the determination becomes final, to the United States Court of Appeals for the Federal Circuit *for review in accordance with chapter 7 of title 5*." 19 U.S.C. § 1337(c) (emphasis added). The 60-day statutory deadline appears in the same sentence as the statutory provision limiting this Court's jurisdiction to only those appeals from final determinations of the Commission under subsections (d), (e), (f), or (g). *See Amarin Pharma, Inc. v. ITC*, 923 F.3d 959, 963-64 (Fed. Cir. 2019).[11]

This provision limits the Court's ability, *i.e.*, its jurisdiction, to review Commission determinations under other subsections of section 337. For instance, this Court has held that it has no jurisdiction to review a Commission's refusal to declassify confidential information subject to section 337(n). *Viscofan*, 787 F.2d at 552. Similarly, Presidential decisions under section 337(j) are not reviewable

[11] In *Amarin,* the Court recognized that section 337(c) "has been interpreted as requiring a 'final determination decision on the merits, excluding or refusing to exclude articles from entry' under section 1337(d), (e), (f) or (g)." The Court nonetheless found it had jurisdiction over a Commission determination not to institute an investigation because the determination was intrinsically a final determination on the merits under section 337(d) and (f). 923 F.3d at 963-64.

because they are not among the categories of determinations listed in section 337(c). *Duracell, Inc. v. ITC*, 778 F.2d 1578 (Fed. Cir. 1985) (dismissing appeal for lack of jurisdiction for appeal from Presidential disapproval under then-section 337(g) (now section 337(j)).

Also, unlike the statute at issue in *Harrow*, section 337(c) explicitly provides that the Commission's determinations are reviewable "in accordance with chapter 7 of title 5," *i.e.*, under the standards of review per the APA. 19 U.S.C. § 1337(c). In particular, the APA demarcates the Court's jurisdictional scope by requiring that "the reviewing court … decide all relevant questions of law" and "hold unlawful and set aside agency action, findings, and conclusions found to be … unsupported by substantial evidence." 5 U.S.C. § 706.

The legislative history of section 337 shows the evolution of this standard of appellate review and further demonstrates Congressional intent to treat the statute as jurisdictional. Indeed, before the Trade Act of 1974, review by this Court's predecessor was limited to "a question or questions of law only." S. Rep. 93-1298, 254-55 (1974). In 1974, Congress amended section 337(c) to provide that this Court's predecessor shall have "jurisdiction to review [the Commission's final] determination in the same manner and subject to the same limitations and conditions as in the case of appeals from decisions of the United States Customs Court" (now, the Court of International Trade). *Id.* at 256. And in 1980, Congress

amended the statute again to provide for judicial review under the APA. H. Rep. 96-1235, 14, 68 (1980). As noted in the legislative history, however, "[t]he net effect of this change was to remove the 60-day time limit for appeal," which was implied when the standard of review followed that of the United States Customs Court. H. Rep. 98-619, 4 (1984).[12] Congress reinstated that statutory deadline when it amended section 337(c) in 1984 to underscore that "an appeal from a final determination of the International Trade Commission *must* be taken within 60 days." *Id.* (emphasis added).[13]

C. Even If *Harrow* Applies to Section 337, This Appeal Is Still Improper

If the Court finds that Harrow does apply, and section 337(c) is not jurisdictional, that does not end the inquiry. As indicated by the Supreme Court in remanding *Harrow,* this Court would still have to determine: (1) whether the statutory deadline in 337(c) is subject to equitable tolling; and (2) if so, whether Crocs is entitled to such relief under the facts here. *Harrow*, 601 U.S. at 489-90.

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[12] Congress emphasized that a "major goal" behind the various 1984 amendments was "to correct or improve certain areas relating to the jurisdiction of the CAFC that were overlooked during the consideration and passage of Public Law 97-164." H. Rep. 98-619 at 3.

[13] The legislative history also notes that under the APA, "the time for taking an appeal is set forth in the governing *jurisdictional* statute." H. Rep. 98-619 at 4 (emphasis added).

As to the first point, "[t]he mere fact that a time limit lacks jurisdictional force … does not render it malleable in every respect." *See Nutraceutical*, 586 U.S. at 192. To the contrary, "some claim-processing rules are 'mandatory'" and not subject to equitable tolling. *Id.* In this case, section 337(c) is mandatory as it provides for filing an appeal within 60 days, without exception. In that regard, section 337 is similar to Federal Rule of Civil Procedure 23(f), at issue in *Nutraceutical*, which "authorized courts of appeals to 'permit an appeal from an order granting or denying class-action certification ... if a petition for permission to appeal is filed ... within 14 days after the order is entered.'" *Id.* at 191 (quoting Fed. R. Civ. P. 23(f)). The Supreme Court held that the 14-day time limit was mandatory and not subject to equitable tolling. The same is true here.

Unlike jurisdiction, arguments as to the mandatory nature of section 337(c) may be forfeited if not timely raised. *See Murphy v. OPM*, No. 23-2019, 2024 WL 3617025, *2 (Aug. 1, 2024) (unpublished). Crocs has certainly forfeited its arguments by failing to raise them in its opening brief; thus, Crocs should not be allowed to raise such arguments in its reply brief. C.Br. at 82-83.

As to the second point, Crocs is not entitled to benefit from equitable tolling under the facts here. Preliminarily, Crocs does not even mention equitable tolling in its opening brief, let alone explain why a large corporation, with experienced counsel and prior appearances before both the Commission and the Federal Circuit,

should be entitled to toll section 337(c)'s unambiguous statutory deadline for five weeks. *See* C.Br. at 11, 63-65, 82-83; *see also K.G. v. Sec'y of Health and Hum. Servs.,* 951 F.3d 1374, 1379 (Fed. Cir. 2020) (requiring diligence and extraordinary circumstances to establish equitable tolling) (citation omitted); *Sneed v. McDonald*, 819 F.3d 1347, 1351 (Fed. Cir. 2016) (same). Moreover, because it has failed to address equitable tolling considerations in its opening brief, even after raising *Harrow*, Crocs should be precluded from raising any arguments in its reply brief or at oral argument regarding equitable tolling or excusing its untimely appeal.

For these reasons, this Court should find that Crocs's notice of appeal was untimely under 19 U.S.C. § 1337(c) and dismiss Crocs's appeal for lack of jurisdiction. Alternatively, if *Harrow* applies, the Court should find that the 60-day time limit in section 337(c) is mandatory and, therefore, not subject to equitable tolling. At a minimum, this Court should find that Crocs failed to present any adequate reason to justify equitable tolling in the present appeal and dismiss the appeal as untimely.

III. THE COMMISSION'S FINAL DETERMINATION THAT THE PARTICIPATING RESPONDENTS DID NOT VIOLATE SECTION 337 IS LEGALLY CORRECT AND SUPPORTED BY SUBSTANTIAL EVIDENCE

Even if Crocs's untimely appeal is allowed to proceed, this Court should affirm the Commission's finding that there is no violation by the Participating

Respondents.[14] The Commission correctly weighed the *DuPont* factors, and its factual findings as to each factor are supported by substantial evidence. The Commission found that similarity of the marks, goods, and trade channels (factors 1-3) weighed in favor of likelihood of confusion only for the original Orly Gator, less so for the Amoji Garden Clog, but not at all for the Orly Redesign. Those factors, however, are not dispositive, for similarity was outweighed by other factors, which either weighed against likelihood of confusion or were neutral. In particular, the Commission found little evidence of actual or potential confusion (factors 7, 8, and 12) and no intent to confuse (factor 13) as to the products of each Participating Respondent. The Commission also found that the conditions of sale demonstrate a significant price difference, sophisticated purchasers, and the presence of branding that dispels any confusion as to the source of the products (factor 4).

Crocs's arguments to the contrary are flawed because they wrongly focus on the overall look of the clog (which includes non-protected and/or generic design

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[14] As discussed *infra*, Part IV, Crocs established a violation against the Defaulting Respondents only under section 337(g)(1), which requires the Commission to "presume the facts alleged in the complaint to be true," but waived any argument against those respondents under section 337(d)(2), which requires the complainant establish a violation by substantial, reliable, and probative evidence. Appx43-45; Appx50-51. Accordingly, the Commission's findings against the defaulting respondents cannot support a GEO under section 337(d)(2).

elements), rather than the actual 3D Marks. Crocs's flawed focus is fatal to its likelihood of confusion position, regardless of whether confusion is considered in point-of-sale or post-sale contexts. Crocs also does not seriously dispute that certain design elements, such as the overall clog shape, have become generic and are no longer protected, while it improperly seeks to rely on those unprotected elements to establish confusion, fame, intent, and other *Dupont* factors.

Accordingly, the Court should affirm the Commission's findings and reject Crocs's invitation to reweigh the evidence.

A. There Is No Actual or Potential Confusion and No Intent to Confuse (Factors 7, 8, 12, and 13)

The Commission correctly credited the survey evidence showing little net confusion with the 3D Marks and correctly found Crocs's "*de minimis*" evidence of actual confusion insufficient in the context of the large number of shoes sold by the Participating Respondents. Appx33-34; Appx251-253. "Consumer surveys, in which a representative sample of the consumers of a product are presented with the parties' products in a controlled setting, are the most direct method of showing the likelihood of confusion" or lack thereof. *Charles Jacquin Et Cie, Inc. v. Destileria Serralles, Inc.*, 921 F.2d 467, 475 (3d Cir. 1990). Crocs itself called consumer surveys "the best evidence" of confusion during the investigation. Appx95761.

The Commission also properly found that the intent factor, even if less relevant, weighs against likelihood of confusion. Appx264-265; Appx268-269;

Appx275-276. In particular, the use of labels by the Participating Respondents, including Amoji's visible brand, eliminates any confusion and any intent to confuse. *Converse*, 909 F.3d at 1124 (finding that "labels may be highly probative evidence" to avoid likelihood of confusion). Orly's active efforts to redesign its product to prevent confusion also negate any intent to confuse. *See QuikTrip West, Inc. v. Weigel Stores, Inc.*, 984 F.3d 1031, 1036 (Fed. Cir. 2021) (finding a party's "willingness to take steps to alter its mark evidenced its lack of bad faith"). This case is thus distinguishable from *Daddy's*, cited by Crocs, which merely concerned lack of intent, not active steps to prevent confusion. *See Daddy's Junky Music Stores, Inc. v. Big Daddy's Family Music Ctr.,* 109 F.3d 275, 287 (6th Cir. 1997); *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 875 (2d Cir. 1986) (crediting junior user's good faith in adopting its mark).

1. The Survey Evidence Weighs Against Likelihood of Confusion

a. The Commission's Survey Findings Are Supported by Substantial Evidence

The Commission correctly determined to credit the Wallace survey evidence, which shows very low net confusion rates with the 3D Marks, while declining to credit the Pittaoulis survey, which used an improper control that failed to preserve the non-protected elements of the Classic Clog, thereby artificially inflating net confusion. Appx38-40; *see also Spangler Candy Co. v. Tootsie Roll*

Indus., LLC, 372 F. Supp. 3d 588, 598 (N.D. Ohio 2019) ("In designing a survey-experiment, the expert should select a stimulus for the control group that shares as many characteristics with the experimental stimulus as possible, with the key exception of the characteristic whose influence is being assessed."); *Cumberland Packing Corp. v. Monsanto Co.*, 32 F. Supp. 2d 561, 574-75 (E.D.N.Y. 1999) (stating that "[p]roper controls will approximate 'background noise,' the amount of confusion existing due to reasons unrelated to similarities in trade dresses," so that "confusion 'caused by' similarities in the trade dresses can be isolated." (quotes in original)).[15]

As the Commission found, Mr. Wallace recorded very low net association rates for the Orly Gator (0.5% and -4.5%) and the Orly Redesign (2%). Appx40; Appx261 (citing Appx80175-80180 (Q/As 116-22, 128-32)). While the Commission declined to credit the Pittaoulis survey evidence due to its improper control, Appx38 (citing Appx80147-80148 (Q/As 42-45) (Wallace), even that survey evidence showed low net confusion rates of only 8.7% for the Amoji Garden Clog, 10.8% for the Orly Redesign, and between 13.6% and 21.4% for the

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[15] While it may be "desirable" for a control to yield confusion estimates of 10 percent or less, it is not a strict rule. *See* Jacoby, Jacob, "*Experimental Design and the Selection of Controls in Trademark and Deceptive Advertising Surveys*," 92 Trademark Rep. 890, 932 & n.76 (July-Aug. 2002). Crocs's own control yielded gross confusion levels above 50%. Appx256.

Orly Gator. Appx38. These confusion rates are insufficient to support likelihood of confusion. *See* J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, § 32:188 (5th ed. 2021) ("[S]urvey confusion numbers that go below 20% need to be carefully viewed against the background of other evidence weighing for and against a conclusion of likely confusion.").

Thus, substantial evidence supports the Commission's determination that the survey evidence weighs against likelihood of confusion. Appx42.

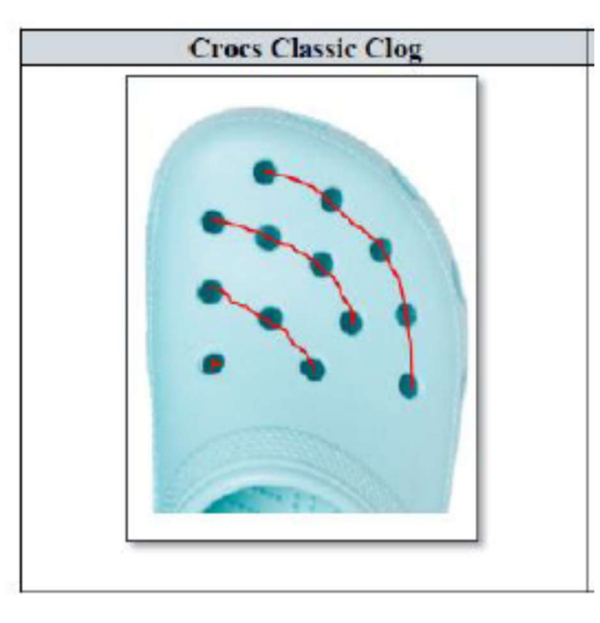
b. Crocs's Criticisms of the Survey Evidence Are Unsupported

Crocs's argument that the Wallace control "incorporated elements of the 3D Marks" (C.Br. at 37) is contradicted by its own expert, Dr. Pittaoulis, who agreed that Mr. Wallace's control (shown below) did not include the elements related to the 3D Marks. Appx262 (citing Appx22029 (Tr. at 390:4-21 (Pittaoulis))).

Appx80154 (Q/As 73-74) (Wallace).

In particular, Mr. Wallace omitted all seven of the drainage holes ("trapezoidal openings") around the toes, as well as any unique texturing in the heel or above the sole. Appx41; Appx259. Mr. Wallace also substantially reduced the number of holes on top, from 13 in the 3D Marks to only 9 in the control, and then completely changed their shape, from uniform circular holes to pill-shaped, arranged in a substantially different pattern. Appx41; Appx80155 (Q/A 77) (Wallace). Thus, the Commission correctly found that the Wallace control was proper because it removed all features relevant to the 3D Marks, while keeping constant the elements that are not part of the 3D Marks. Appx41 (citing Appx80154-80158 (Q/As 71-75, 79-87) (Wallace)); Appx262.

There is also no merit to Crocs's argument that the Wallace control has the same "cascading" effect as the 3D Marks. C.Br. at 37-38, 72. To the contrary, the top holes in the Wallace control form a very different pattern than the 3D Marks, as shown below:



C.Br. at 72

Wallace control

Appx80154 (Q/A 74)

Crocs also waived its argument that the Wallace control allegedly includes a "snout" by failing to raise that argument before the ALJ or the Commission. *See* 19 C.F.R. § 210.43(b)(2); *Philip Morris*, 63 F.4th at 1336-37; *Guangdong Alison Hi-Tech Co. v. ITC*, 936 F.3d 1353, 1362-63 (Fed. Cir. 2019); *see also, e.g.*, Appx95764-95771; Appx96124-96131; Appx96133-96137 (making no mention of a "snout"). Moreover, the 3D Marks do not disclose or protect any specific "snout" or identify the u-shaped line as a separate, articulated design element. Appx16-18; Appx222-24; Appx67391; Appx68500; Appx80144 (Q/A 36) (Wallace) (stating that "if [the u-shaped line] was the intent of the registration, it most certainly would be captured in the description"; rather the u-shaped line "appears to be the beginning and the ending of that textured strip"). Crocs's own tracings of the alleged "u-shaped line," which is the only possible identifier for the

alleged "snout" in the 3D Marks, also fail to demonstrate that the Wallace control includes such a "snout," as shown below:

'328 Mark	**'875 Mark**
Appx94627	Appx94627
Wallace survey control	
Appx94628	

Crocs's arguments about Dr. Pittaoulis's control are even less supportable. The mesh slide control is not even a generic clog-style shoe; it lacks the most basic elements of a clog, including its rigid sides, defined upper, thick sole, pronounced heel, and strap. Appx37 (citing Appx80146-80147 (Q/As 40-42) (Wallace)). Thus, there is no merit to Crocs's argument that Dr. Pittaoulis's control, *i.e.*, the black mesh slide (shown below), is "more, not less, reliable" than Mr. Wallace's control. C.Br. at 47.

Appx80146-080147 (Q/A 41) (Wallace); Appx67289-067290 (Q/A 60) (Pittaoulis); Appx35; Appx256.

As the Commission found, the "substantial differences" between Dr. Pittaoulis's control and elements of the test stimuli unrelated to the 3D Marks "clouded the reliability of the survey, making it difficult, if not impossible, to determine if survey respondents were reacting to the absence of the 3D Marks (the purpose of the control), or to the absence of the many other, unclaimed features in the control." Appx37 (citing Appx80147-80148 (Q/As 42-44) (Wallace)); Appx257-259. Dr. Pittaoulis even admitted that the "control 'does not hold constant all non-infringing elements.'" Appx22000 (Tr. at 361:14-21 (Pittaoulis));

Appx257. Thus, the Commission correctly determined that Dr. Pittaoulis's control was not proper, and that her survey was unreliable.[16] Appx34-39.

c. Crocs's Other Arguments Are Similarly Unavailing

There is no support for Crocs's suggestion that the Commission should have considered gross confusion levels. C.Br. at 47-49. Crocs's own expert, Dr. Pittaoulis contradicted this argument and explained that a control is needed to "measure[] the level of 'confusion' stemming from factors other than the trademark at issue," such as "pre-existing impressions, market dominance, guessing, question wording effects, and *elements of the product other than the trademarks at issue*." Appx67282 (Q/A 43) (Pittaoulis) (emphasis added); Appx35. The confusion stemming from other factors could include, for example, "*even just an association with Crocs for having holes on the upper of the shoe in general*." Appx67292 (Q/A 75) (Pittaoulis) (emphasis added). In arguing that the control data could be ignored, Crocs is improperly asking that all confusion data, no matter the source, be associated with the 3D Marks, despite evidence to the contrary. Appx38-39.

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[16] Crocs's argument that the 3D Marks include a snout while Dr. Pittaoulis's control does not, is untimely and fails for the same reasons discussed in connection with the Wallace control. C.Br. at 45-46.

Dr. Pittaoulis's survey results further expose the flaw in Crocs's "gross" confusion rate argument. Indeed, Dr. Pittaoulis's improper non-clog black mesh slide control yielded about 52% of gross association rates, which shows that many people associate almost any molded foam shoe with Crocs, due to its widespread name recognition and success. Appx38-39; Appx256. The "gross" association rate went up to about 70% with the Wallace control, which properly used a molded foam clog without the 3D Marks. Accordingly, the Court should reject Crocs's invitation to rely on gross association rates because it fails to account for confusion based on the clog design and other features that are not protected by the 3D Marks.

Crocs also argues, incorrectly, that the verbatim responses about the Wallace control confirm that it "improperly retained the overall appearance and elements of the 3D Marks." C.Br. at 40. But as discussed above, the verbatim responses merely reflect the "widespread recognition of the Crocs name," while affirming that the Wallace control is sufficiently reliable. Appx39. For instance, the Wallace control has no drainage holes, substantially different top holes, and no visible texturing or other elements from the 3D Marks; thus, the consumers in their verbatim responses were not relying on the elements of the 3D Marks for brand recognition, but rather on the clog shape or other elements of the Classic Clog that are not protected by the 3D Marks.

Additionally, *none* of the verbatim responses that Crocs cited or quoted identified the holes as the reason for associating the Wallace control with Crocs. *Cf.* Appx96129-96130 *with* C.Br. at 42. To the contrary, some consumers recognized that the Wallace control had different holes; indeed, the 3D Marks recite round holes and those holes were modified in the Wallace control. C.Br. at 43 (citing Appx97304 (Row 536)). Similarly, the verbatim responses identifying the Wallace control as a "knock-off" confirm that the Wallace control is distinct from Crocs's Classic Clog. C.Br. at 42-43; Appx96129-96130; Appx80177-80178 (Q/A 126) (Wallace) (stating that "'Crocs' may be recognized not as a specific source or brand, but rather as a description of both the primary and the control stimuli"). Thus, the verbatim responses do not support likelihood of confusion, contrary to Crocs's contentions, but merely confirm that consumers are recognizing certain design elements of the Classic Clog that are not covered by the 3D Marks. Appx16-19; Appx41-42; Appx222-223.

Lastly, Crocs incorrectly argues that the Hollander survey, which the Participating Respondents submitted on the question of secondary meaning, shows that survey respondents were making associations based on elements of the 3D

Marks.[17] C.Br. at 49; Appx319-327. Even accepting the contention that the Hollander survey shows that consumers associate the 3D Marks with Crocs, it is irrelevant because it does not measure likelihood of confusion with respect to the accused products and does not negate the fact that the Wallace control is required to isolate the effect of the 3D Marks.

Thus, the Commission correctly determined that the survey evidence weighs against likelihood of confusion and Crocs's contrary arguments are unsupported and without merit.

2. Crocs's Evidence of "Actual Confusion" Was Insufficient (Factor 7)

The Commission also correctly found that the few alleged instances of actual confusion do not establish confusion as to source and are insignificant in the context of the large number of shoes sold by the Participating Respondents.

The Commission correctly found that the two social media posts that refer to "hobby lobby crocs" and "cheap white crocs at hobby lobby" (lowercase) are more likely referring to the term "crocs" as a "category of shoe" rather than the "Crocs" branded shoe. Appx252 (citing Appx66355-66358); Appx33 (citing Appx80177-

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[17] The ALJ found that the Hollander surveys show that the 3D Marks lack secondary meaning. Appx319-327. The Commission did not ignore those surveys, as Crocs contends; rather, it took no position on the issue of secondary meaning. Appx12.

80178 (Q/As 126-27) (Wallace) (stating that survey consumers view "Crocs" more as a descriptor than a source)). The Commission's findings are supported by the record and consistent with the Wallace survey evidence, contrary to Crocs's contentions (C.Br. at 52). Crocs's argument that the "CROCS" word mark is not generic (in the legal sense) also fails to refute the finding that at least some customers use that term generically. C.Br. at 52-53; *see also H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 989-90 (Fed. Cir. 1986) ("The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question.").

The Commission also correctly declined to find actual confusion based on the testimony of Orly's Chief Operating Officer, Mr. Shaikh, referring to an Orly Gator image as a Crocs. Appx252 (citing Appx29684-29688 (Dep. Tr. at 46:25-47:21, 48:5-49:1, 50:10-20 (Shaikh))). As the Commission explained, Mr. Shaikh was confused by the logo, not by the shoe, and corrected himself after he had a chance to view the images more closely. Appx33; Appx252. Mr. Shaikh also made no references to the Orly Redesign or Amoji Garden Clog.

Significantly, Crocs fails to address the Commission's finding that these few alleged instances of actual confusion for the Orly Gator shoe (and none for the Amoji Garden Clog) are wholly insufficient in the context of the large number of

shoes sold by Hobby Lobby and Orly. Appx34; Appx252-253 (citing McCarthy § 23:14 ("If there is a very large volume of contacts or transactions which could give rise to confusion and there is only a handful of instances of actual confusion, the evidence of actual confusion may receive relatively little weight."); *Water Pik, Inc. v. Med-Sys., Inc.*, 726 F.3d 1136, 1150 (10th Cir. 2013) ("We have consistently recognized, however, that isolated, anecdotal instances of actual confusion may be *de minimis* and may be disregarded in the confusion analysis."); Appx274-275. Accordingly, the Court should reject Crocs's arguments on actual confusion and affirm the Commission's finding that this factor is neutral with respect to likelihood of confusion.

3. The Intent Factor Weighs Against Likelihood of Confusion (Factor 13)

The Commission[18] correctly found that none of the Participating Respondents had the intent to confuse consumers but actively sought to avoid confusion; thus, intent weighs against likelihood of confusion. Appx264-265; Appx268-269; Appx275-276. The Participating Respondents used branding and private labels to dispel any confusion as to the source of their products. Appx265;

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[18] The Commission adopted the ALJ's findings as to intent. Appx43 ("The Commission adopts the [ALJ's] findings with respect to the other *DuPont* factors and likelihood of confusion, to the extent they are consistent with [its] Opinion.").

Appx268; Appx276. Such branding or labeling is "highly probative evidence" for avoiding likelihood of confusion. *Converse*, 909 F.3d at 1124.

Orly's active efforts to redesign its product to prevent confusion also negate any intent to confuse and weigh against likelihood of confusion. Appx264-265 (citing Appx80204 (Q/A 19) (Shaikh) ("Our goal was to develop a product that Crocs would not even accuse of infringement.")); *see also QuikTrip*, 984 F.3d at 1036 (finding a party's "willingness to take steps to alter its mark evidenced its lack of bad faith"). Thus, this case is unlike *Daddy's*, cited by Crocs, which merely concerned lack of intent, not active steps to prevent confusion. *See Daddy's Junky Music Stores,* 109 F.3d at 287; *Lois Sportswear*, 799 F.2d at 875 (crediting junior user's good faith in adopting its mark).

Contrary to Crocs's contention (C.Br. at 67), the Participating Respondents had a credible explanation for using the original Orly Gator design, which is the only design that is arguably similar (factor 1) to the 3D Marks. As the Commission found, "Orly did not design the mold or have any exclusive rights to it," but was "using a preexisting mold." Appx264 (citing Appx29938 (Tr. at 101:2-6 (Valencia))). Additionally, the Commission correctly found that the use of "croc" or "crocs" to describe a category of shoes does not support intent to confuse. Appx265 (citing Appx27839-27844; Appx27857-27860); Appx269 (citing Appx28803-28804 (Tr. at 147:20-148:8 (Beams))).

As for Amoji, Crocs waived its arguments on appeal by failing to raise them in its petition for Commission review. C.Br. at 74; Appx94636-94638. In any event, offering a lower-priced alternative is not evidence of intent to confuse by Amoji. Appx275; Appx22175-22176 (Tr. at 536:10-537:5 (Rowe)).

Thus, substantial evidence supports the Commission's determination that this factor weighs against likelihood of confusion.

B. The Conditions of Sale Dispel Any Confusion (Factor 4)

The Commission correctly determined that this factor weighs against likelihood of confusion. Appx31; Appx245-249; Appx267; Appx274. Significant price differentials, sophisticated purchasers, and the presence of branding, dispel any confusion as to the source of the products. Appx31.

As the Commission found, 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." Appx31 (citing Appx80185-80186 (Q/As 149-54) (Wallace)); Appx245. The Commission also found that "[t]he Amoji Garden Clogs typically retail for about $26-30, which is about $15-20 less than the typical retail price for the Classic Clog (except when the Classic Clog is on sale)." Appx31; Appx274 (citing Appx31450-31451 (Q/A 217) (Yijia); Appx49479-49482). The Commission further found that "[w]hen purchasing products from a discount retailer, consumers typically pay attention to the price."

Appx245 (citing Appx80185-80186 (Q/As 152-153) (Wallace); *L.A. Gear, Inc. v. Thom McAn Shoe Co.*, 988 F.2d 1117, 1134 (Fed. Cir. 1993) ("Purchasers in discount stores are sufficiently sophisticated … to know whether they are buying the cheaper copies or the expensive originals.")).

Furthermore, the Commission found that the presence of labels dispels any confusion. Appx267 ("The Accused Products and the Classic Clog are both sold with hangtags bearing their brand (e.g., 'Spring ShopTM' for Hobby Lobby and 'Crocs' for the Classic Clog), which would dispel any potential confusion.") (citing Appx80189-80190 (Q/A 158) (Wallace); Appx28720 (Dep. Tr. at 64:10-25 (Beams))); Appx274 ("[T]he Amoji Accused Products are sold using the Amoji private brand label.") (citing Appx31430-31434 (Q/As 163-79) (Yijia)); *see also Converse*, 909 F.3d at 1124 (finding that "labels may be highly probative evidence" to avoid likelihood of confusion).

Crocs fails to establish that the Commission's findings as to the conditions of sale are not supported by substantial evidence. Crocs improperly presents its own pricing evidence against this factor (C.Br. at 54-55), effectively asking the Court to reweigh the evidence of record. Crocs, however, was required (but failed) to explain why the Commission's factual findings were not supported by

substantial evidence.[19] While Crocs suggests that a ten-fold price difference is required before any difference can be deemed significant, none of the cited cases supports such a rule.

There is also no merit to Crocs's argument that conditions of sale should be discounted entirely, because they allegedly have "no relevance to post-sale confusion." C.Br. at 56. *Dupont* factor 4 is explicitly directed to a point-of-sale context, *i.e.*, "[t]he conditions under which and buyers to whom sales are made, *i.e.* 'impulse' vs. careful, sophisticated purchasing." *Swagway*, 934 F.3d at 1338-39. Crocs's argument that this factor should be neutral based on post-sale confusion would effectively eliminate this factor in any likelihood of confusion inquiry. This cannot be correct, given that this factor has long been accepted as one of the *DuPont* factors. It is also incorrect to suggest that the Commission failed to consider post-sale confusion. C.Br. at 56 (citing *Payless Shoesource, Inc. v. Reebok Int'l, Ltd.*, 998 F.2d 985, 989 (Fed. Cir. 1993)).[20] For instance, the Wallace

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[19] Crocs failed to provide, and thus waived, any specific arguments as to the conditions for sale of the Amoji Garden Clog. C.Br. at 70.

[20] In *Payless*, the Court held that post-sale confusion was actionable, but nowhere did it suggest that post-sale confusion should neutralize the conditions-of-sale factor. *See Payless*, 998 F.2d at 989.

and Pittaoulis surveys explicitly considered post-sale confusion, but they failed to detect any such confusion. Appx254; Appx80150 (Q/A 56) (Wallace).

Thus, substantial evidence supports the Commission's finding that this factor weighs against likelihood of confusion.

C. Crocs Failed to Establish Fame for the 3D Marks (Factor 5)

Under *DuPont* factor five, "fame" for confusion purposes may be found if "a significant portion of the relevant consuming public … recognizes the mark as a source indicator." *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 1325 (Fed. Cir. 2017).

Substantial evidence supports the Commission's finding that the fame factor is neutral with respect to likelihood of confusion for the 3D Marks. Appx32. Crocs cannot rely on the entire Classic Clog to establish fame, because that product owes its fame to many potential eye-catching elements that are not covered by the 3D Marks and not entitled to protection. When the evidence is considered in its proper context, the Commission properly found that Crocs's evidence does not support fame for the 3D Marks. Appx32; Appx249-251 (citing Appx293-299); Appx274.

Crocs further errs in asserting that the Commission required Crocs to focus "solely" on the 3D Marks or held Crocs to an impossible standard. C.Br. at 58-59. Rather, the Commission faulted Crocs's reliance on advertising that fails to

"feature the 3D Marks in a prominent manner" and that "feature[s] other products in addition to the Classic Clog." Appx294 (citing Appx31764 (Q/As 55-57) (Sly); Appx77131; Appx77139-77141; Appx77143 (Dep. Tr. at 203:1-17, 211:10-213:1, 213:7-23, 215:14-24 (Sly)); Appx76722 (Tr. at 98:6-16) (Wagner)).[21] Similarly, the Commission correctly declined to credit Crocs's sales because there is no evidence that "the success of the Classic Clog is necessarily tied to the 3D Marks." Appx295 (citing Appx31722 (Q/A 44) (Wagner); Appx21568-21570 (Tr. at 184:18-186:1 (Wagner))); Appx250 ("[T]here is no evidence of extensive recognition or accolades for the 3D Marks, separate and apart from the Classic Clog, among consumers of like products.") (citing *Sally Beauty Co. v. Beautyco, Inc.*, 304 F.3d 964, 974 (10th Cir. 2002)).

Crocs's fame survey fails for the same reasons. As Crocs admits, survey respondents were presented with an unbranded Classic Clog to measure consumer recognition. C.Br. at 62. The Commission properly declined to credit that survey evidence because "it assesses the overall look of the Classic Clog, not the 3D Marks." Appx297 (citing Appx22035-22039 (Tr. at 396:10-398:4, 399:19-400:10

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[21] This is consistent with Commission precedent in which the Commission credited advertising that prominently displayed the asserted trademark *in nearly all the images* of the Converse shoes. *See Certain Footwear Prods.*, Comm'n Op., Inv. No. 337-TA-936, 2020 WL 5942000, at *13-17 (Sept. 24, 2020) (emphasis added).

(Pittaoulis))). Nor did Dr. Pittaoulis use a proper control to isolate the effect of the 3D Marks. Appx297-298 (citing Appx22040 (Tr. at 401:4-9 (Pittaoulis)); Appx74117-74118 (Q/As 37-40) (Hollander)).

Crocs does not dispute that its evidence relates to the Classic Clog generally, rather than the 3D Marks specifically. C.Br. at 61-66. For instance, Crocs made no effort to advertise the 3D Marks independently from the Classic Clog, such as focusing on the specific elements of the 3D Marks. *Cf. First Brands Corp. v. Fred Meyer, Inc.*, 809 F.2d 1378, 1383 (9th Cir. 1987) (finding no secondary meaning where "[appellant] did not attempt to engender consumer identification with the [asserted trade dress]"); *see also Fort James Operating Co. v. Royal Paper Converting, Inc.*, 2007 WL 1676779, at *3 (TTAB 2007) (declining to find design marks famous based on sales and advertising evidence where the majority of references to the design marks were accompanied by references to other marks); *Mattel, Inc. v. MGA Entm't, Inc.*, 782 F. Supp. 2d 911, 1011 (C.D. Cal. 2011) (finding sales and advertising evidence insufficient to establish fame for a registered package design where the evidence was not specific to the package).

While evidence of advertising and sales may indirectly establish fame of a mark, it is not proper for Crocs to rely only on advertising and sales of the Classic Clog to establish fame with respect to the 3D Marks. The *QSC* case, which Crocs cites but inadequately portrays, is illustrative. *See Bose Corp. v. QSC Audio*

Prods., Inc., 293 F.3d 1367 (Fed. Cir. 2002). In that case, the Federal Circuit noted that the Board did not err in requiring "Bose [to] produce evidence that the product marks [(*e.g.*, Wave)] can properly be seen as independent of the famous house mark," *i.e.*, Bose. *Id.* at 1374-75. The Court, however, disagreed with the Board's conclusion that "there is no evidence in the record to show that the Bose product marks stand independently from its famous house mark." *Id.* at 1375. Rather, the Court found "considerable record evidence of advertising and sales literature that [] decouples the product marks from the famous house mark." *Id.* Thus, the Court found "overwhelming evidence of the independent trademark significance of the product marks." *Id.* Crocs made no such showing in the present case.[22]

Thus, the Commission correctly determined that the fame factor is neutral on likelihood of confusion and substantial evidence supports that determination.

D. The Similarity Factors (Factors 1-3) Are Not Dispositive and Were Outweighed by the Other Factors

Likelihood of confusion is the gravamen of trademark infringement. As such, even very similar marks may not infringe if likelihood of confusion is not

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[22] The *QSC* case involved registered marks, which negates Crocs's attempt to distinguish Commission cases because they involved both registered and unregistered marks. C.Br. at 60-61.

established. *Beer Nuts, Inc. v. Clover Club Foods Co.*, 805 F.2d 920, 925 (10th Cir. 1986) ("[V]ery similar marks may not generate confusion as to the source of the products where the products are very different or relatively expensive."). While a tribunal "may focus its analysis on dispositive factors, such as similarity of the marks and relatedness of the goods," this Court requires the tribunal to "consider each factor for which it has evidence." *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1336 (Fed. Cir. 2001).

In this case, factors 1-3 were found to weigh in favor of likelihood of confusion (less so for the Amoji Garden Clog, but not so for the Orly Redesign), but they were outweighed by other factors that weighed against likelihood of confusion. Specifically, the conditions of sale (factor 4), including a significant price difference, sophisticated discount purchasers, and the use of labelling, dispelled any confusion. The survey evidence also showed no confusion with the 3D Marks, while the Participating Respondents engaged in active steps to avoid confusion negating any intent to confuse. These countervailing factors, combined with the scant evidence of actual confusion and the lack of fame of the 3D Marks, support the Commission's finding that Crocs failed to establish likelihood of confusion.

Furthermore, the Commission found that factors 2 and 3 (similarity of the goods and trade channels) weigh in favor of likelihood of confusion. Appx31;

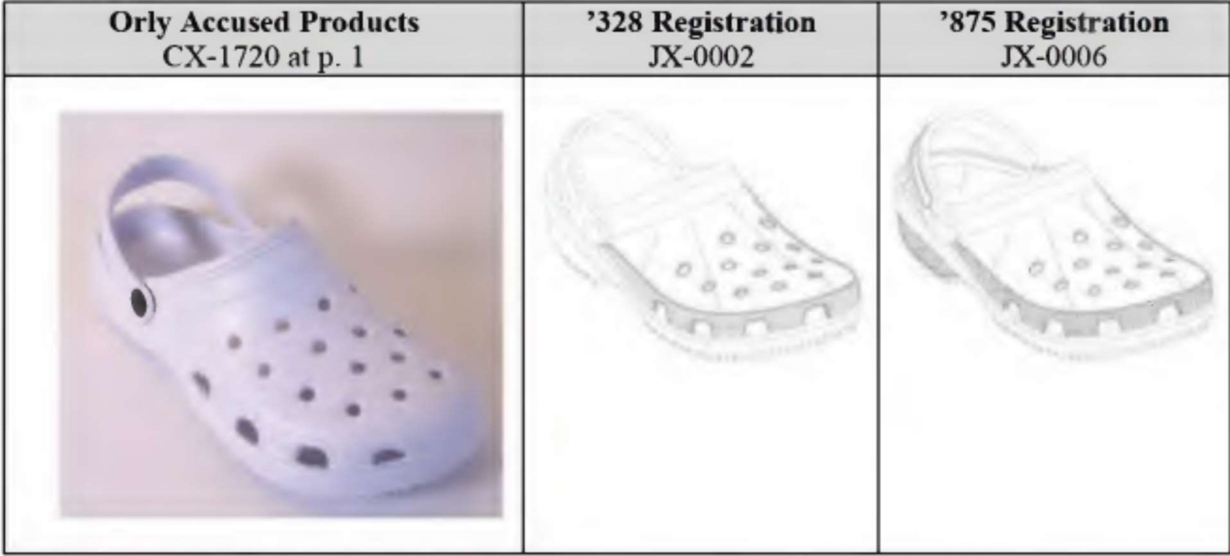
Appx244-245; Appx266-267; Appx273-274. While Crocs correctly notes that the degree of similarity (factor 1) necessary to support likelihood of confusion is less because the marks appear on similar goods, Crocs itself recognizes that substantial similarity is required here because a product design, not a word mark, is involved. C.Br. at 75; *see also Converse*, 909 F.3d at 1124 (citing, *inter alia*, *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 670 (Fed. Cir. 2008) (*en banc*)).

The Commission found that factor 1 (similarity of the marks) weighs in favor of likelihood of confusion for the Orly Gator, but only weakly so for the Amoji Garden Clog. Appx30-31. The Orly Redesign weighs against likelihood of confusion. Appx239-243. The Court should reject Crocs's request that the Court assign more weight to factor 1 so as to outweigh the countervailing factors. C.Br. at 72 (arguing that factor 1 should weigh *heavily* in favor of a likelihood of confusion). The Commission's findings under factor 1 for each accused product, as well as its balancing of the *DuPont* factors, are supported by substantial evidence. Thus, this Court should affirm the Commission's no likelihood-of-confusion determination.

- *Orly Gator*

Crocs does not challenge the Commission's findings as to the Orly Gator, but incorrectly argues that the Gator is "nearly indistinguishable from the 3D Marks." C.Br. at 30. While the Commission found the Orly Gator "very similar"

in overall appearance to the 3D Marks, the Commission also noted some key differences. Appx239. Specifically, the Commission found that the Orly "Gator products have 15 holes on the horizontal portion of the upper in a different pattern" and "semi-circle instead of trapezoidal openings on the vertical portion of the upper in a different pattern." Appx237. Additionally, the Commission found that "the accused white Gator product includes an elevated design on the heel strap without the widening element or any branding," while the "flamingo Gator has a broken line on the heel strap." Appx238.



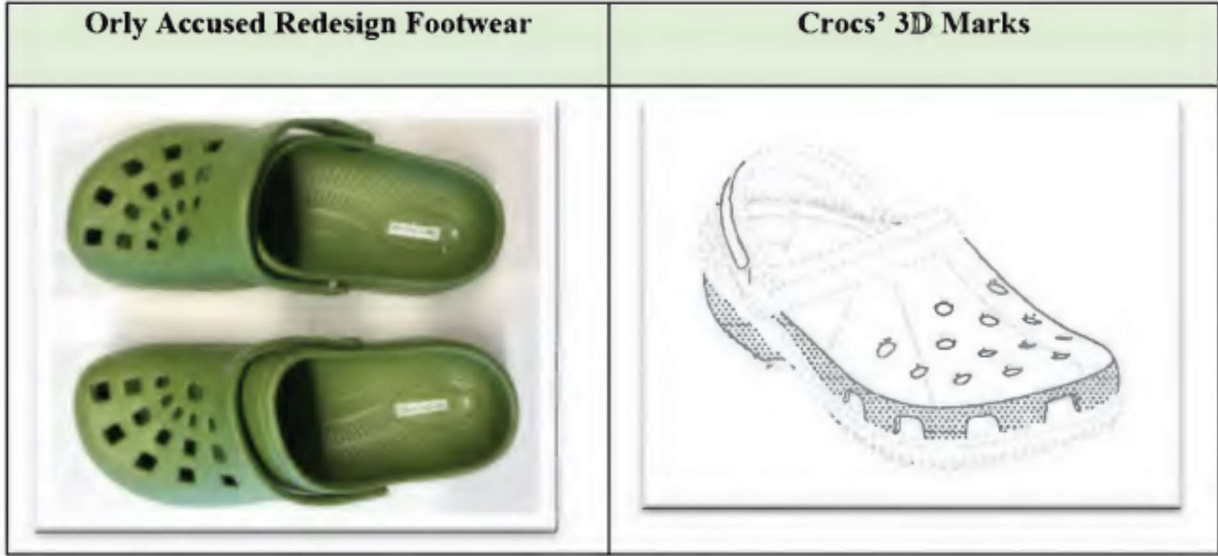
Orly Accused Products CX-1720 at p. 1	'328 Registration JX-0002	'875 Registration JX-0006

Appx239. Thus, the Court should not disturb the Commission's findings as to the Orly Gator or the balancing of the *DuPont* factors as to that product.

- *Orly Redesign*

As to the Gator Redesign, the Commission found that it is not similar to the 3D Marks. Appx239. The Redesign is entirely missing the seven drainage holes

("seven trapezoidal openings"), the textured strips on the heel and around the toes, and the decorate band on the heel strap. Appx240-242. The Redesign also does not include "a pattern of 13 round holes on the horizontal upper of the shoe," but "16 rectangle and square-shaped holes on the horizontal portion of the upper of the shoe in a different pattern." Appx239-240.



Appx240.

Appx241. The Commission properly found that "the Orly Redesign lacks all five elements of the 3D Marks and has a different overall appearance." Appx243.

Crocs's assertion that the Redesign is substantially similar to the 3D Marks, except for the "trapezoidal openings," is not sufficient to overturn the Commission's conclusion. C.Br. at 75-76. Crocs has not shown that the Commission's factual findings lack substantial evidence. In particular, Crocs notes that a design including the same pattern of holes was previously found "compatible with a substantially similar impression as the Crocs 3D Mark pattern." C.Br. at 78-79 (citing *Crocs I*, 598 F.3d at 1305-06). Yet the *Crocs I* case involved the design of the entire shoe, as protected by the '789 design patent, and not just the narrower 3D Marks. While the accused products in that case appeared to include square holes, they were otherwise "nearly identical" to the patented design. *Crocs I*, 598 F.3d at 1306. In contrast, the Redesign includes substantially rectangular holes of varying sizes, not uniformly circular holes of the 3D Marks, and completely omits the trapezoidal holes. Additionally, Crocs's expert conceded that the Orly Redesign lacks a textured strip, textured heel, and decorative band along the length of the heel strap. Appx241-243 (citing Appx22021-22022 (Tr. at 382:21-383:11 (Pittaoulis))). Under these facts, it cannot be said that the Commission's findings as to factor 1 lack substantial evidence. Thus, the Court should affirm the

Commission's findings on factor 1, the balancing of the *DuPont* factors, and its determination of no likelihood-of-confusion for the Gator Redesign.

- *Amoji Garden Clog*

The Commission found that the Amoji Garden Clog has "noticeable differences from the 3D Marks," including "a set of larger hexagonal holes (as opposed to smaller, round holes in the 3D Marks) on the upper, which are arranged in a somewhat more spread-out pattern." Appx30. The Amoji Garden Clog also includes "6 rounded openings (instead of 7 trapezoidal openings) on the vertical portion of the upper." Appx271. The Commission concluded that these differences, "individually and collectively, give the Amoji Garden Clog a generally more rugged, heavier appearance than the overall impression of the 3D Marks." Appx30.

ZhengDe Accused Products CPX-0027	'328 Registration JX-0002	'875 Registration JX-0006

Appx273.

The Amoji Garden Clog is not "extremely similar" in overall commercial appearance to the 3D Marks, contrary to Crocs's contention. C.Br. at 72. Even if the raised tread on the side and underside of the sole are not part of the 3D Marks, it contributes to creating a different overall appearance with the 3D Marks. Similarly, the Commission correctly found that the "larger hexagonal holes" are noticeably different, and arranged in "a somewhat more spread-out pattern" than the 3D Marks. Appx30.

Appx270. Thus, the Court should affirm the Commission's finding that factor 1 weighs only weakly in favor of likelihood of confusion for the Amoji Garden Clog and, when balanced against other *DuPont* factors, leads to a no likelihood-of-confusion determination for that product.

E. Crocs Failed to Establish Dilution

The Commission properly determined that Crocs failed to satisfy the stringent evidentiary standard required to prove fame for dilution. Appx46-47.

Crocs does not dispute the Commission's finding that Crocs cannot establish dilution absent a showing of fame. Appx46-47. Dilution requires a more stringent showing of "fame" than that required to show fame for purposes of a likelihood of confusion. *Coach*, 668 F.3d at 1373. Yet, Crocs merely repeats its arguments that it can show fame by relying on advertising, sales, and survey evidence relating to the Classic Clog without any attempt by Crocs to tie such evidence to the 3D marks. C.Br. at 79-82. Those arguments fail for the same reasons as discussed *supra* Part III.C in connection with the fame factor of likelihood of confusion.

IV. CROCS IS NOT ENTITLED TO A GEO

The Court has confirmed that the Commission is the "expert body to determine what remedy is necessary," and that it has "broad discretion in selecting the form, scope, and extent of the remedy." *Philip Morris*, 63 F.4th at 1339 (quoting *Viscofan*, 787 F.2d at 548). Crocs, however, misapprehends the requirements for a GEO and its discretionary nature under section 337. There is no basis for Crocs's argument that it is somehow entitled to a GEO based on a violation by the Defaulting Respondents under section 337(g)(1).

Crocs did not establish a violation against the Defaulting Respondents under the evidentiary standard required to support a GEO under section 337(d)(2), *i.e.*, the "reliable, probative, and substantial evidence" standard. 5 U.S.C. § 556; Appx43-45; Appx49-50. Instead, the Defaulting Respondents were found in default under section 337(g)(1), as Crocs requested, due to their failure to respond to the complaint, notice of investigation, or the order to show cause. Appx49-51; 19 U.S.C. § 1337(g)(1). Under section 337(g)(1), the Commission is required to "presume the facts alleged in the complaint to be true" and to issue an LEO and/or CDO limited to the defaulting respondents, if requested. This is exactly what the Commission did.

The Commission, however, had no obligation to issue a GEO under section 337(d)(2) based on a violation by the Defaulting Respondents under section 337(g)(1).[23] C.Br. at 22-24. First, Crocs, in seeking remedial orders against the Defaulting Respondents under section 337(g)(1), waived any argument for a violation and GEO as to those respondents under section 337(d)(2) because it failed to raise such argument in its pre-hearing briefs before the ALJ. Appx43-44. Second, the Commission may find a violation and issue a GEO under section

[23] Crocs did not dispute that it was not eligible for a GEO under section 337(g)(2) because the Participating Respondents appeared and opposed Crocs's allegations. Appx49 (citing 19 U.S.C. § 1337(g)(2)).

337(d)(2) only "as a result of an investigation," *i.e.*, under the reliable, probative, and substantial evidence standard. 19 U.S.C. § 1337(d); *Certain Pocket Lighters*, 2020 WL 4049935, at *7 & n.10 ("We see no difference between th[e] standard [under section 337(d)(2)] and the 'substantial, reliable, and probative evidence' standard of section 337(g)(2).") (citing, *inter alia*, 5 U.S.C. § 556); *see also* 19 U.S.C. § 1337(g)(2) (requiring that "a violation is established by substantial, reliable, and probative evidence"). There was no such finding here because Crocs failed to establish a violation under the appropriate evidentiary standard "as a result of an investigation." *Id*.

Instead, the Commission properly found that "*none* of the participating or default respondents was *found to be in violation*" under the evidentiary standard required to support a GEO under section 337(d)(2). Appx50 (emphasis added). Whereas the Commission was required to presume the facts alleged in the complaint to be true to enter default and issue an LEO and/or CDOs under section 337(g)(1) limited to the defaulting respondents, the Commission cannot make such presumptions or issue a GEO under section 337(d)(2) because no respondent was found in violation under the "substantial, reliable, and probative evidence" standard.

For these reasons, the Commission acted in accordance with its statute, and did not act arbitrarily or capriciously, in denying a GEO under section 337(d)(2).

Even so, no remedy could be issued unless this Court were to find Crocs's appeal timely, reverse the negative determination on violation, and remand this investigation to the Commission to resolve the undecided issues. Appx1; Appx4-5; *Beloit*, 742 F.2d at 1423 (this Court does not review what the Commission has not yet decided).

CONCLUSION

Crocs's appeal should be dismissed in its entirety because it is untimely under 19 U.S.C. § 1337(c). If the appeal is allowed to proceed on the merits, this Court should affirm the Commission's final determinations finding no violation of section 337 by the Participating Respondents and declining to issue a GEO.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE, AND TYPE STYLE REQUIREMENTS

Pursuant to Federal Rule of Appellate Procedure 32(g)(1) and Federal Circuit Rule 32(b)(3), I hereby certify that the foregoing brief complies with the typeface and style requirements of Federal Rule of Appellate Procedures 32(a)(5) and 32(a)(6). The brief was prepared in a proportionally-spaced typeface using Microsoft Office 365 ProPlus in a Times New Roman 14-point font. The undersigned further certifies that the foregoing brief complies with the type-volume limitations in Federal Circuit Rule 32(b), as it contains a total of 13,952 words, including 13,893 words obtained from a word-count function of the word processing system, including all footnotes and citations, plus 59 words counted manually in figures or non-text portions of the brief.

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