

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 06-cv-00605--PAB-BNB

CROCS, INC.

Plaintiff,

v.

**CHENG’S ENTERPRISES, INC.,
EFFERVESCENT, INC.,
HOLEY SOLES HOLDINGS, LTD.,
DOUBLE DIAMOND DISTRIBUTION, LTD.,
and U.S.A. DAWGS, INC.**

Defendants.

FIRST AMENDED COMPLAINT

Plaintiff, Crocs, Inc., through undersigned counsel, brings the following First Amended Complaint against Defendants Cheng’s Enterprises, Inc., Effervescent, Inc., Holey Soles Holdings, Ltd., Double Diamond Distribution, Ltd. and U.S.A. DAWGS, Inc., collectively “Defendants,” as follows:

THE PARTIES

1. Crocs, Inc. (“Crocs”) is a Delaware corporation having its principal place of business at 6273 Monarch Park Place, Niwot, Colorado 80503.

2. On information and belief, Cheng’s Enterprises, Inc. (“Cheng’s”), is a New Jersey corporation with its principal place of business at 68 Broad Street, Carlstadt, New Jersey 07072.

3. On information and belief, Effervescent, Inc. (“Effervescent”) is a Delaware corporation with its principal place of business at 24 Scott Road, Fitchburg, Massachusetts 01420.

4. On information and belief, Holey Soles Holdings, Ltd. (“Holey Soles”), is a Canadian federally incorporated company which is provincially registered in British Columbia. Holey Soles’ principal place of business is 1628 West 75th Avenue, Vancouver, Canada V6P 6G2. On information and belief, Holey Soles is undergoing or has completed bankruptcy proceedings under Canadian law.

5. On information and belief, Double Diamond Distribution, Ltd., (“DDD”) is a Canadian corporation with its principal place of business at 3715A Thatcher Avenue, Saskatoon, SK, Canada S7R 1B8.

6. On information and belief, U.S.A. DAWGS, Inc. (“USA DAWGS”), is a Nevada corporation with its principal place of business at 4120 W Windmill Lane, Las Vegas, NV 89139-5852.

JURISDICTION AND VENUE

7. The Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. §§ 1331, 1332, and 1338(a). This case presents federal questions arising under the Patent Act, 35 U.S.C. §§ 1, et seq.

8. On information and belief, Defendants knowingly and purposefully import infringing products, as described below, that are distributed throughout the United States, including into the State of Colorado.

9. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) and (d) and 28 U.S.C. § 1400(b).

GENERAL ALLEGATIONS

10. Crocs is a designer, manufacturer and marketer of Crocs-branded footwear for men, women and children, which incorporate Crocs's proprietary closed-cell resin material, Croslite™ – a substantial innovation in footwear comfort and functionality. This proprietary material enables Crocs to produce soft and lightweight, non-marking, slip and odor-resistant shoes, which are ideal for casual wear and recreational uses such as boating, hiking, fishing and gardening. By the Spring of 2006, Crocs offered 11 different models in up to 18 colors, and expected to offer 20 different models by the end of the year.

11. Crocs was formed in July 2002, when its founders decided to market an innovative shoe developed and manufactured by Foam Creations, Inc. In November 2002, Crocs introduced its first model, originally intended as a boating or outdoor shoe; however, by 2003, Crocs brand footwear were universally accepted as all purpose footwear for comfort and fashion. In 2003-2004, Crocs expanded its product line, acquired Foam Creations, and added warehouses and shipping programs for speedy assembly and delivery.

12. Crocs's footwear is sold through a wide range of distribution channels, including department stores, specialty footwear stores, sporting good and outdoor retailers. Crocs brand footwear are also sold through a variety of specialty channels, including gift

shops, uniform suppliers, independent bicycle dealers, specialty food retailers, and health and beauty stores. Crocs has distributed its products through over 6,500 store locations domestically and in over 40 countries worldwide. In addition, Crocs sells its footwear through its websites, www.crocs.com and www.crocsrx.com, and in kiosks in shopping malls throughout the country.

13. Following its formation, Crocs's sales increased dramatically. Crocs recorded \$1.2 million in revenues in 2003, which grew to \$13.5 million in 2004. In 2005, Crocs recorded over \$108 million in revenues from sales of its footwear

CROCS'S PATENT

THE '858 PATENT

14. On February 7, 2006, the U.S. Patent and Trademark Office duly, properly and legally issued U.S. Patent No. 6,993,858 B2, entitled "Breathable Footwear Pieces," with Crocs as the assignee. A copy of the '858 Patent is submitted with this Complaint as Exhibit 1.

15. The '858 Patent claims various footwear pieces. The claimed invention consists of comfortable footwear that is compatible with various work environments, such as a hospital setting, which may require secure and waterproof footwear. In some cases, the footwear pieces are molded from a lofted material. In some embodiments, the shoes also include liquid conductors formed around ventilators or openings that disperse liquids away from the individual's feet. The '858 discloses several embodiments of the claimed invention, including models that contain liquid conductors on the upper portion of the base section, and others that include a solid base section to protect the feet from direct contact with spilled liquids, for example. Other embodiments include models with an adjustable strap and/or open-toe.

16. The '858 Patent contains two independent claims. Claim 1 recites a footwear piece comprising a base section that is formed as a single part manufactured from a moldable foam material; a pivoting strap section formed of moldable foam material that is attached to opposite ends of the upper base section and is held in place by frictional forces at the contact points; an open rear region; and an upper region that forms a toe region which follows the contour of a human foot. Claim 2 additionally claims a decorative pattern of bumps in the upper opening perimeter; a plurality of ventilators in the substantially vertical and horizontal portions; and a sole that includes tread patterns and a foot base including a raised pattern.

THE '789 PATENT

17. On March 28, 2006, the U.S. Patent and Trademark Office duly, properly and legally issued U.S. Patent No. D 517,789, entitled "Footwear," with Crocs as the assignee. A copy of the '789 Patent is submitted with this Complaint as Exhibit 2.

18. The '789 Patent claims an ornamental design for footwear as shown and described in the following figures:

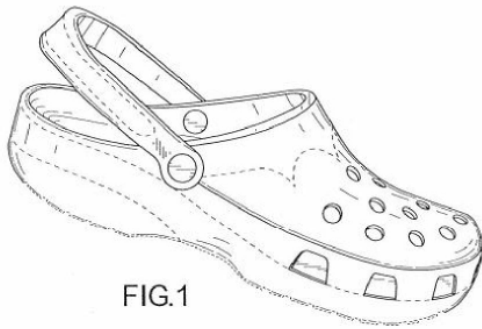


FIG.1

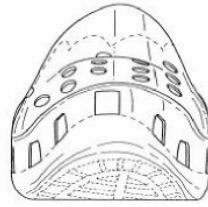


FIG.4



FIG.5

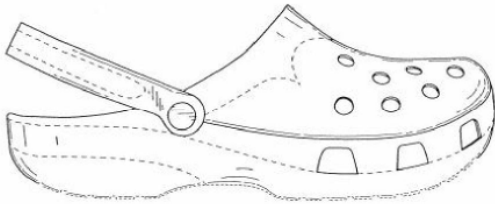


FIG.2

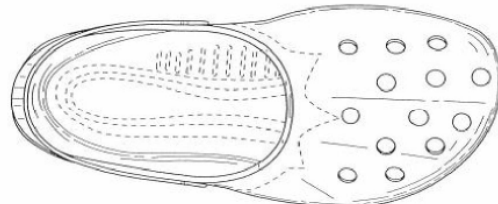


FIG.6

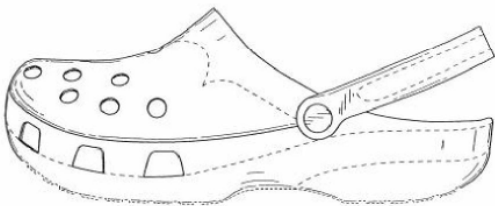


FIG.3

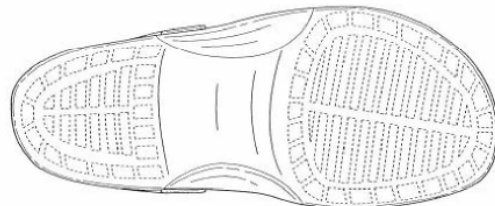


FIG.7

DEFENDANT'S INFRINGING ACTIVITIES

DEFENDANT CHENG'S ENTERPRISES INC.

19. On information and belief, Cheng's imports, exports and distributes footwear under the name Easy USA, including the Eva Clogs and/or Easy Clogs, throughout the United States.

20. On information and belief, Eva Clogs and/or Easy Clogs are manufactured in China and imported for sale in the U.S.

21. Cheng's Eva Clogs and/or Easy Clogs infringe claims 1 and 2 of the '858 Patent, and the '789 Patent.

DEFENDANT EFFERVESCENT INC.

22. On information and belief, Effervescent manufactures, distributes, markets and sells a line of footwear called Waldies worldwide, including in the U.S. On information and belief, Effervescent also sells its Waldies footwear through its website, www.waldies.net.

23. On information and belief, Waldies footwear are manufactured in China and imported for sale in the U.S.

24. Effervescent's Waldies footwear infringe claims 1 and 2 of the '858 Patent, and the '789 Patent.

DEFENDANT HOLEY SOLES HOLDINGS LTD.

25. On information and belief, Holey Soles is a developer, manufacturer, and distributor of injection molded footwear, including its Explorer model.

26. On information and belief, Holey Soles footwear is manufactured in China. According to its website, www.holeysoles.com, "The original product that was available on the market was made by a Canadian manufacturer. . . . Back in 2004, we created our own models and started producing in China. We visit the factory regularly and are constantly improving our processes."

27. On information and belief, Holey Soles sells its footwear throughout the world, including in the United States. On information and belief, Holey Soles has offered its footwear for sale through its website, www.holeysoles.com, where consumers can place an order via e-mail or phone.

28. Holey Soles footwear infringes claims 1 and 2 of the '858 Patent, and the '789 Patent.

DEFENDANTS DOUBLE DIAMOND DISTRIBUTION LTD. AND U.S.A. DAWGS, INC.

29. On information and belief, DDD and USA DAWGS are related entities that manufacture, distribute, market and sell a line of footwear called Dawgs Clogs.

30. On information and belief, Dawgs Clogs are manufactured in China and imported for sale into the U.S. On information and belief, Dawgs Clogs can be purchased through the DDD/USA DAWGS website, www.dawgsclogs.com.

31. DDD and USA DAWGS's Dawgs Clogs footwear infringes claims 1 and 2 of the '858 Patent, and the '789 Patent.

INTERNATIONAL TRADE COMMISSION DETERMINATION OF VIOLATION

32. On July 15, 2011, after a multi-year process including a decision by the United States Court of Appeals for the Federal Circuit in *Crocs, Inc. v. United States Int'l Trade Comm'n*, 598 F.3d 1294, 1311 (Fed. Cir. 2010), the United States International Trade Commission (the "Commission") issued a Final Commission Determination of Violation. The Commission found a violation of 19 U.S.C. § 1337 by DDD, Effervescent and Holey Soles. The violation was predicated on infringement of the '858 Patent by DDD and Effervescent and on infringement of the '789 Patent by DDD, Effervescent and Holey Soles.

COUNT I

INFRINGEMENT OF THE '858 PATENT

33. Crocs hereby incorporates by reference the foregoing paragraphs.

34. Defendants infringe claims 1 and 2 of the '858 Patent with certain products manufactured, offered for sale, or sold within the United States, or imported into the United States, including but not limited to: Holey Soles's Explorer, Effervescent's Waldies, Cheng's Eva Clogs and/or Easy Clogs, DDD's and USA DAWGS's Dawgs Clogs.

35. Defendants' patent infringement is willful, in bad faith and continuing, and Plaintiff has no adequate remedy at law for such infringement.

COUNT II

INFRINGEMENT OF THE '789 PATENT

36. Crocs hereby incorporates by reference the foregoing paragraphs.

37. Defendants infringe the '789 Patent with certain products manufactured, offered for sale, or sold within the United States, or imported into the United States, including but not limited to: Holey Soles's Explorer, Effervescent's Waldies, Cheng's Eva Clogs and/or Easy Clogs, DDD's and USA DAWGS's Dawgs Clogs.

38. Defendants' patent infringement is willful, in bad faith and continuing, and Plaintiff has no adequate remedy at law for such infringement.

JURY DEMAND

Crocs demands a trial by jury on all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, by reason of the foregoing, Crocs requests that this Court enter judgment in its favor and for relief against Defendants, and each of them, as follows:

A. That Defendants be immediately and preliminarily enjoined from all further manufacturing, use, marketing, distribution, sale, offers to sell, and importation of any shoes that

infringe the '858 Patent or the '789 Patent;

B. That Crocs be awarded its actual damages in an amount according to proof;

C. That Defendants' infringement and other wrongful acts herein alleged be determined deliberate, willful, and in conscious disregard of Crocs's rights pursuant to 35 U.S.C. § 284 and at common law;

D. That Crocs be awarded Defendants' profits after an accounting;

E. That Crocs be awarded treble or punitive damages, as applicable, against Defendants;

F. That the Court award Crocs pre-judgment and post-judgment interest as allowed by law;

G. That Crocs be awarded all of its litigation expenses, including without limitation, its reasonable attorney's fees and costs; and,

H. That the Court order such other relief as it deems proper and just.

Dated: July 3, 2012

s/ Michael A. Berta

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