

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

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CROCS, INC.,  
*Plaintiff-Appellee,*

v.

EFFERVESCENT, INC., HOLEY SOLES HOLDINGS, LTD.,  
*Defendants.*

DOUBLE DIAMOND DISTRIBUTION, LTD.,  
U.S.A. DAWGS, INC., MOJAVE DESERT HOLDINGS, LLC,  
*Defendants-Appellants.*

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*Appeal from the United States District Court for the District of Colorado  
in Case No. 1:06-cv-00605-PAB-MDB, Judge Philip A. Brimmer*

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**CORRECTED AMICUS CURIAE BRIEF OF THE INTERNATIONAL  
TRADEMARK ASSOCIATION IN SUPPORT OF NEITHER PARTY**

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**UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT****CERTIFICATE OF INTEREST****Case Number** No. 2022-2160**Short Case Caption** Crocs, Inc. v. Effervescent, Inc., et al.**Filing Party/Entity** The International Trademark Association**Instructions:**

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Date: 3/15/2023Signature: /s/ Jordan A. FeirmanName: Jordan A. Feirman

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

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**CERTIFICATION PURSUANT TO FED. R. APP. P. 29**

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *amicus curiae* certifies that all parties have consented to the filing of this brief. Additionally, in accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus curiae* states that only the International Trademark Association and its counsel authored this brief, and no part of this brief was authored by counsel to a party. No party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* and its counsel made such a monetary contribution to its preparation or submission.

The International Trademark Association (“INTA”) respectfully submits this brief in support of neither party.

**INTEREST OF AMICUS CURIAE**

Founded in 1878 as the United States Trademark Association, INTA is a not-for-profit organization dedicated to the advancement of trademarks and related intellectual property concepts as essential elements of trade and commerce. With more than 6,500 member organizations from 185 countries, and representing tens of thousands of trademark owners, professionals, and members of the academic community, INTA’s members share the goals of fostering fair competition and informed decisions by consumers.

For decades, INTA has provided recommendations and assistance to legislators in connection with almost all major federal trademark and related legislation. In addition, INTA’s members frequently are plaintiffs, defendants, and advisors in legal actions under the Lanham Act, including actions alleging false advertising under Section 43(a)(1)(B) of the Lanham Act.

INTA is interested in the development of clear, consistent, and equitable principles of trademark and advertising law. Accordingly, INTA has participated as

*amicus curiae* in numerous cases on significant Lanham Act issues, including false advertising issues.<sup>1</sup>

At its core, the Lanham Act is about protecting consumers. Trademark protections and prohibitions against deceptive advertising enable consumers to identify the source of products and services, as well as to have an accurate understanding of the nature, characteristics, and qualities of those products and

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<sup>1</sup> Cases in which INTA has filed amicus briefs since 2000 include: *Jack Daniel's Props., Inc. v. VIP Prods., LLC*, No. 22-148 (pending); *Abitron Austria GmbH et. al. v. Hetronic Int'l, Inc.*, No. 21-1043 (pending); *U.S. Patent & Trademark Office v. Booking.com B.V.*, 140 S. Ct. 2298 (2020); *Romag Fasteners, Inc. v. Fossil, Inc.*, 140 S. Ct. 1492 (2020); *Peter v. NantKwest, Inc.*, 140 S. Ct. 365 (2019); *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652 (2019); *Matal v. Tam*, 582 U.S. 218 (2017); *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138 (2015); *Hana Fin., Inc. v. Hana Bank*, 574 U.S. 418 (2015); *Pom Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102 (2014); *Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc.*, 574 U.S. 815 (2014); *Already, LLC v. Nike, Inc.*, 568 U.S. 85 (2013); *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111 (2004); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003); *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003); *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23 (2001); *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205 (2000); *Vans, Inc., et al. v. MSCHF Product Studio, Inc.*, No. 22-1006-cv (2d Cir. pending); *LTTB LLC v. Redbubble, Inc.*, 840 F. App'x. 148 (9th Cir. 2021); *Ohio State Univ. v. Redbubble, Inc.*, 989 F.3d 435 (6th Cir. 2021); *Ferring Pharms., Inc. v. Watson Pharms., Inc.*, 765 F.3d 205 (3d Cir. 2014); *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holdings, Inc.*, 696 F.3d 206 (2d Cir. 2012); *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144 (4th Cir. 2012); *Fleischer Studios, Inc. v. A.V.E.L.A., Inc.*, 654 F.3d 958 (9th Cir. 2011) (on rehearing); *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97 (2d Cir. 2009); and *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252 (4th Cir. 2007).

services. INTA therefore seeks to protect the interests of brand owners and consumers alike.

As applied to this case, INTA's principal interest is in ensuring that brand owners and the public have adequate and robust protections against deceptive advertising, and that claims provided by Congress to address deceptive advertising are not unnecessarily limited or foreclosed.

In that regard, the full scope and nature of the District Court's reasoning when rejecting Appellants' Lanham Act false advertising counterclaim is not entirely clear. The decision could be construed as holding that the Supreme Court's decision in *Dastar Corporation v. Twentieth Century Fox Film Corporation*, 539 U.S. 23 (2003), creates a *categorical* bar against all Lanham Act false advertising claims based on statements that products are protected by different forms of intellectual property, including statements that products are "patented," "proprietary," or "exclusive." In addition to describing its reasoning in absolute terms—*e.g.*, that "[f]alsely claiming to have 'patented' something is akin to claiming to have 'invented' it . . . and to plagiarizing or reverse passing off" (Appx14)—the District Court held the false advertising claims precluded despite recognizing that Appellee admitted that its advertisements using those three words were intended "to imply that its products have 'superior characteristics, qualities, and features'" (Appx3).

INTA takes no position on either the ultimate merits of Appellants' false advertising counterclaim or whether the District Court properly characterized Appellants' pleadings in evaluating how Appellants presented their false advertising theory. Rather, INTA respectfully offers this submission to caution against overextension of the narrow holding in *Dastar*,<sup>2</sup> and against creation of a *per se* rule that words such as "patented," "proprietary," and "exclusive" necessarily cannot give rise to a Lanham Act false advertising claim.

### **SUMMARY OF ARGUMENT**

Section 43(a)(1)(B) of the Lanham Act creates liability for false advertising where "commercial advertising or promotion [ ] misrepresents the nature, characteristics, [or] qualities" of goods or services. 15 U.S.C. § 1125(a)(1)(B).

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<sup>2</sup> This is not the first time that INTA has submitted an amicus brief cautioning against overextension of *Dastar* (after having participated as amicus in *Dastar* to address issues not pertinent to the current appeal). In *American Society for Testing & Materials v. Public.Resource.Org, Inc.*, INTA explained that the unaccredited copying concerns in *Dastar* did not apply to Section 32 infringement claims and could not justify preclusion of Section 43(a) claims based on alleged use of another party's trademarks. No-17-7035 (D.C. Cir. Dec. 6, 2017). Among other concerns, INTA noted that an "overly-broad" interpretation of *Dastar* "would create a blunt and inflexible standard that would hamper trademark owners' right to protect and maintain quality control over their goods in any instance where those goods happen to contain or involve copyrightable materials." The Court of Appeals for the D.C. Circuit subsequently agreed that *Dastar* did not bar the trademark claims in that case. *Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 455 (D.C. Cir. 2018).

The Supreme Court’s holding in *Dastar* did not limit that language or create any *per se* rule that certain words used in advertising—in this case, “patented,” “proprietary,” or “exclusive”—have immutable and absolute meanings that invariably invoke *Dastar* preclusion. Any such rule would be blunt, overbroad, and inconsistent with the fundamental principle that the complete context of the advertising is crucial to understand its meaning.

The holding in *Dastar* pertained to Section 43(a)(1)(A) false designation of origin claims (and more specifically, to unattributed copying of film content), and did not suggest that false advertising claims are necessarily precluded any time they involve words that arguably suggest issues of “authorship” or “inventorship.” To the extent that courts have applied *Dastar* to Lanham Act Section 43(a)(1)(B) false advertising claims, courts have precluded those claims only after determining that the plaintiffs’ theories *solely* concerned source confusion and attribution. Moreover, numerous courts have recognized that words or concepts that could potentially implicate concepts of authorship or inventorship may still provide a basis for false advertising claims if those words or concepts could plausibly convey messages about the nature, characteristics, or qualities of goods or services.

The categorical application of *Dastar* to preclude false advertising claims based on the word “patented” is even more difficult to justify. Authorities have long recognized that false claims that products are “patented,” or otherwise making



misrepresentations with respect to patent status, may give rise to causes of action under both the “false marking” provision of the Patent Act, 35 U.S.C. § 292, *and* under Section 43(a)(1)(B) of the Lanham Act, provided that the false advertising claim includes an element of bad faith. Indeed, this Court has expressly considered the question of whether permitting causes of action under both statutes would create an impermissible conflict between the two federal intellectual property schemes and answered that question in the negative. *See Zenith Elecs. Corp. v. Exzec, Inc.*, 182 F.3d 1340, 1354 (Fed. Cir. 1999). Many other courts have concluded the same.

Finally, it is an oversimplification to suggest—as the District Court appears to have done in this case—that referring to technology as “proprietary” and “exclusive” necessarily equates to a general claim of “superiority” and thus must constitute nonactionable puffery. Depending on the advertising context in which the words appear, “proprietary” and “exclusive” may convey more definite, factual meanings to consumers as opposed to mere boasting or opinion. To be sure, Lanham Act plaintiffs need to plausibly allege and ultimately prove how those words (or similar words) in their complete context convey messages that can be verified or shown false. But plaintiffs should not be unnecessarily deprived of the opportunity to do so.

## ARGUMENT

### **I. A *PER SE* RULE THAT THE WORDS “PATENTED,” “PROPRIETARY,” AND “EXCLUSIVE” CANNOT SUPPORT A SECTION 43(A)(1)(B) FALSE ADVERTISING CLAIM WOULD BE AN IMPROPER AND UNWARRANTED EXTENSION OF *DASTAR***

The District Court concluded that the holdings in *Dastar* and its progeny foreclosed Appellants’ Lanham Act false advertising claim because Appellee’s references to the “CrosLite” material in Appellee’s shoe products as “patented,” “proprietary,” or “exclusive” constituted nonactionable representations about “authorship” or “inventorship.” (Appx13-15.) *Dastar*, however, does not preclude false statements using those words (or other words arguably connoting that products or services are protected by different forms of intellectual property) from giving rise to a false advertising claim. Considerable daylight exists between: (1) Section 43(a)(1)(A) claims based solely on an alleged failure to provide attribution, which *Dastar* held precluded; and (2) Section 43(a)(1)(B) false advertising claims that concern misrepresentations about the “nature, characteristics, [or] qualities” of products, which the statute expressly authorizes. 15 U.S.C. § 1125(a)(1)(B).

#### **A. *Dastar* Addressed Facts and Policy Concerns Pertaining To The Specific Issue Of Unaccredited Copying**

The narrow question addressed in *Dastar* was whether liability for false designation of origin under Section 43(a)(1)(A) of the Lanham Act extends to “the unaccredited copying of a work.” 539 U.S. at 25. The Supreme Court’s focus thus

was squarely on Section 43(a)(1)(A)'s creation of a cause of action arising out of likely confusion regarding the "origin of goods." *Id.* at 30-38; *see* 15 U.S.C. § 1125(a)(1)(A) (civil action arising out of conduct "likely to cause confusion . . . as to the origin, sponsorship, or approval of his or her goods"). Concluding that "origin of goods" as used in the statute refers only to "the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods," the Court rejected the notion that the Lanham Act created liability for "in effect, plagiarism—the use of otherwise unprotected works and inventions without attribution." 539 U.S. at 36-37.

The Court reasoned that such a cause of action "would create a species of mutant copyright law" because the lone conduct giving rise to the Lanham Act claim would be precisely the same as the conduct actionable under the Copyright Act (a claim for relief that was unavailable in *Dastar* because the work at issue was in the public domain): the unauthorized copying of creative works. *Id.* at 34. In addition, although patent law was not at issue in *Dastar*, the Court in dicta analogized the limited term of copyright protection to the limited term of patent protections, and suggested that "origin of goods" should not be construed in a manner that could "creat[e] . . . perpetual patent." *Id.* at 37.

As such, the concerns that precluded the claim in *Dastar* are only potentially implicated when Section 43(a) of the Lanham Act is invoked to create liability solely

for an alleged failure to attribute authorship or inventorship. The Supreme Court did not suggest that any and all Lanham Act claims are automatically barred whenever an advertiser refers to products or services using words that, depending on their context, may be interpreted in a manner that conveys something about attribution. Indeed, the Court acknowledged that Section 43(a)(1)(B) false advertising claims are separate from Section 43(a)(1)(A) claims, and the two subsections of the statute do not simply rise and fall together:

If, moreover, the producer of a video that substantially copied the Crusade series were, in advertising or promotion, to give purchasers the impression that the video was quite different from that series, then one or more of the respondents might have a cause of action—not for reverse passing off under the “confusion . . . as to the origin” provision of § 43(a)(1)(A), but for misrepresentation under the “misrepresents the nature, characteristics [or] qualities” provision of § 43(a)(1)(B).

*Id.* at 38 (alterations in original).

**B. *Dastar* And Its Progeny Provide No Basis For A *Per Se* Rule That Certain Words Cannot Bear On The “Nature, Characteristics, [or] Qualities” Of Products Under Section 43(a)(1)(B)**

As Professor McCarthy has noted, “[t]he scope of the *Dastar* opinion is ambiguous and unclear,” and thus “[d]ifferent courts and commentators have read it to mean different things as to its impact on claims of infringement, passing off and false advertising.” 5 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 27:78 (5th ed. 2022) (“McCarthy”). Pertinent to the current appeal, some courts have interpreted the Supreme Court’s holding and dicta to find

preclusion of Section 43(a)(1)(B) claims when false advertising is based on a misrepresentation of authorship, inventorship, or related concepts. While INTA does not take a position as to whether these cases were correctly decided, the decisions typically have concluded that the false advertising in those specific cases referred to authorship or inventorship and did not concern the “nature, characteristics, [or] qualities” of goods or services that are actionable under Section 43(a)(1)(B). *See, e.g., Sybersound Recs., Inc. v. UAV Corp.*, 517 F.3d 1137, 1144 (9th Cir. 2008) (alleged misrepresentation that company had licenses to use songs for karaoke precluded by “the reasoning in *Dastar* . . . to avoid overlap between the Lanham and Copyright Acts”); *Antidote Int’l Films, Inc. v. Bloomsbury Publ’g, PLC*, 467 F. Supp. 2d 394, 399-400 (S.D.N.Y. 2006) (false advertising claims concerning book content “sound in false authorship”).

In the current case, the District Court relied substantially on two such decisions: this Court’s decision (applying Ninth Circuit law) in *Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d 1300 (Fed. Cir. 2009), and the Sixth Circuit’s decision in *Kehoe Component Sales Inc. v. Best Lighting Products, Inc.*, 796 F.3d 576 (6th Cir. 2015). Like *Dastar*, however, those decisions did not purport to bar categorically any and all false advertising claims that used particular words potentially indicative of authorship or inventorship; rather, the preclusion was based

on the courts' specific and fact-intensive determinations that the false advertising theories offered in those cases were nothing more than alleged attribution failures.

In *Baden Sports*, this Court concluded that the marketing of a basketball as “proprietary,” “exclusive,” and “innovative” could not support a Lanham Act false advertising claim in light of *Dastar*. 556 F.3d at 1305. The Court, however, only reached that conclusion after analyzing the record to “determine whether Baden has alleged anything more than false designation of authorship,” at least implicitly recognizing the possibility that “proprietary,” “exclusive,” and “innovative” could “implicate the nature, characteristics, or qualities of the basketballs.” *Id.* at 1307. The Court pointed, for example, to the fact that “[t]hroughout the trial, Baden steadfastly argued that [defendant’s] advertisements were false precisely because [defendant] was not the source of the innovation,” and found that other arguments concerning whether the advertising was false by conveying that the basketball was “new” were waived on appeal. *Id.* Therefore, as in *Dastar*, the alleged Section 43(a)(1)(B) false advertising claims were in reality Section 43(a)(1)(A) false designation of origin claims in disguise.

Similarly, in *Kehoe Component Sales*, the Sixth Circuit concluded that a Lanham Act false advertising claim was not viable because the lower court had specifically “found that [defendant]’s advertisements were false *only because* they represented that [defendant], rather than [plaintiff], was the intellectual origin of the

products.” 796 F.3d at 590 (emphasis added). As a result, the Section 43(a)(1)(B) claim was wholly duplicative of the Section 43(a)(1)(A) false designation of origin claim that the court already rejected on *Dastar* preclusion grounds. *Id.*

Other courts have recognized the limits of *Dastar*, and have *declined* to preclude false advertising claims even where statements in commercial advertising arguably could be construed to invoke authorship or inventorship concepts as well as implicate concepts actionable under Section 43(a)(1)(B). *See, e.g., Blue Spike, LLC v. Tex. Instruments, Inc.*, Nos. 6:12-cv-499, 6:12-cv-576, 2014 WL 11848751, at \*4-5 (E.D. Tex. July 25, 2014) (alleged false claim of being “first to create” digital fingerprinting technology actionable under Section 43(a)(1)(B) because “connot[ing] to the public who was first to use the technology in a product” concerns the “nature, characteristics, [or] qualities” of goods); *Nippon Steel & Sumitomo Metal Corp. v. Posco*, No. 12-2429, 2013 WL 3285206, at \*4 (D. N.J. June 27, 2013) (rejecting application of *Dastar* and distinguishing *Baden Sports* where defendant allegedly misrepresented that its products contained technology that it created and owned because such misrepresentation could pertain to the physical or functional attributes of the products); *Zobmondo Ent. LLC v. Imagination Int’l Corp.*, No. CV 90-02235, 2009 WL 8714439, at \*4-5 (C.D. Cal. June 23, 2009) (finding that representation of board game as “original” was potentially actionable); *Cf. Bobbleheads.com, LLC v. Wright Bros.*, 259 F. Supp. 3d 1087, 1098 (S.D. Cal. 2017)

(claim that product was “official” constitutes potential false endorsement not precluded by *Dastar*).

Indeed, one recent district court decision explicitly rejected the notion that *Dastar* precluded Section 43(a)(1)(B) claims based on alleged misrepresentations that a product was patented. In *Roof Maxx Technologies, LLC v. Rourk*, the court succinctly explained why the rationale of *Dastar* need not apply to false statements regarding patent status:

Roof Savers’ claim does not center on claims of ownership through the patent application itself. Indeed, Roof Savers does not raise a false authorship claim, nor does it argue that Roof Maxx infringed on some ownership right Roof Savers has in the same or similar goods. Instead, Roof Savers alleges that Roof Maxx misrepresented that the Product was subject to an active patent, creating a false impression that Roof Maxx was the exclusive source of the Product and that prospective dealers would face little or no direct competition. As such, these statements go directly to the Products’ nature, characteristics, and qualities.

No. 2:20-cv-03151, 2021 WL 3617154, at \*10 (S.D. Ohio Aug. 16, 2021).

**C. Whether Claims That Products Are “Patented,” “Proprietary,” Or “Exclusive” Solely Convey Nonactionable Attribution Messages Depends On Context**

Across the Circuits—including in this Court and in the Tenth Circuit, whose law governs the Lanham Act issues in the pending appeal—interpretation of advertising materials for purposes of a false advertising claim requires consideration of those materials in their complete context. *See, e.g., Int’l Code Council, Inc. v. UpCodes Inc.*, 43 F.4th 46, 61 (2d Cir. 2022) (explaining that “[c]ourts ‘must analyze



the [advertising] message in full context’ and ‘must consider the advertisement in its entirety’” without “engag[ing] in disputatious dissection” (citations omitted)); *Hall v. Bed Bath & Beyond, Inc.*, 705 F.3d 1357, 1372 (Fed. Cir. 2013) (“In considering a false advertising claim, fundamental to any task of interpretation is the principle that text must yield to context.” (citation omitted)); *Zoller Labs., LLC v. NBTY, Inc.*, 111 F. App’x 978, 984 (10th Cir. 2004) (“[W]hen ‘assessing whether an advertisement is literally false, a court must analyze the message conveyed within its full context.’” (citation omitted)); *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997) (“When evaluating whether an advertising claim is literally false, the claim must always be analyzed in its full context.”). Such a rule comports with common sense; the meaning or intended meaning of words may be informed by the presence of other words and images that surround them.<sup>3</sup> Accordingly, it cannot be the case that particular words—such as “patented,” “proprietary,” and “exclusive”—invariably connote only attribution-related claims foreclosed by *Dastar*.<sup>4</sup>

The foregoing can be illustrated by a hypothetical based on the facts of the pending case: If Appellee had disseminated marketing materials that expressly, but

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<sup>3</sup> Indeed, much legal interpretation is founded on this principle.

<sup>4</sup> Also fallacious is an assumption that words cannot simultaneously convey messages concerning authorship and concerning the nature, qualities, or characteristics of a product. Those concepts are not mutually exclusive.

falsely, stated that its products “are the only shoes to include eco-friendly and durable Croslite technology, and no other company’s shoes can offer that technology,” there could be no doubt that a Section 43(a)(1)(B) false advertising claim may lie and is not foreclosed by *Dastar*; that advertising statement plainly goes to the “nature, characteristics, [or] qualities” of both Appellee’s and its competitors’ shoes. By extension, then, if it could be proven that a significant number of consumers understood Appellee’s advertising featuring terms such as “patented,” “proprietary,” or “exclusive”—either alone or in combination—to convey that same message that Appellee’s shoes had the superior and desirable technology while other shoes did not, and that such perception was material to consumers’ purchasing decisions, the same Lanham Act claim should be viable. The mere fact that the particular words used in the advertising could also convey a message of authorship or inventorship cannot alone be dispositive. To hold otherwise would permit deceptive advertisers to immunize themselves from liability merely by sprinkling in certain *Dastar*-invoking words, and deprive competitors of an important tool to hold such advertisers accountable.

## **II. IT IS WELL-ESTABLISHED THAT FALSE STATEMENTS THAT A PRODUCT IS “PATENTED” MAY GIVE RISE TO CLAIMS UNDER BOTH THE PATENT ACT AND LANHAM ACT**

As the District Court acknowledged, neither *Dastar* nor *Baden Sports* considered the use of the word “patented.” (Appx13-14.) Nevertheless, the court

concluded that “falsely claiming to have ‘patented’ something is akin to claiming to have ‘invented’ it . . . and to plagiarizing or reverse passing off,” thus precluded by *Dastar*. *Id.* As the *Roof Maxx Technologies* decision above illustrates, such an assumption about what “patented” conveys to consumers is unwarranted.

But the District Court also failed to recognize a substantial body of law—including in this Court—holding that false claims that products are “patented” and other misrepresentations about patent status may give rise to claims for both “false marking” under the Patent Act and false advertising under the Lanham Act.

As the Court is aware, the “false marking” section of the Patent Act authorizes fines and private civil actions arising out of acts in which (in pertinent part), a party “marks upon, or affixes to, or uses in advertising in connection with any unpatented article, the word ‘patent’ or any word or number importing that the same is patented, for the purpose of deceiving the public.” 35 U.S.C. § 292(a)-(b). This Court has further explained that a false claim of being “patented” harms the “important public interest in permitting full and free competition in the use of ideas which are in reality a part of the public domain.” *ClontechLabs, Inc. v. Invitrogen Corp.*, 406 F.3d 1347, 1356-57 (Fed. Cir. 2005) (citation omitted).

In *Zenith Electronics Corp. v. Exzec, Inc.*, this Court specifically examined whether a Lanham Act false advertising claim based on misrepresentations related to patent status or infringement impermissibly conflicted with the Patent Act, and

concluded that no such conflict exists provided that the Lanham Act claim includes an element of bad faith:

By adding a bad faith requirement to a § 43(a) claim in the context of this case, we give effect both to the rights of patentees as protected by the patent laws under ordinary circumstances, and to the salutary purposes of the Lanham Act to promote fair competition in the marketplace. As thus understood, there is no conflict between the demands of the Lanham Act and the Patent Act, and a patentee is easily able to comply with both Acts. Furthermore, patent law is not frustrated because bad faith marketplace statements concerning patents do not further the purposes of the patent law.

182 F.3d 1340, 1354 (Fed. Cir. 1999). The Court further noted that “[e]xactly what constitutes bad faith remains to be determined on a case by case basis,” but “[o]bviously, if the patentee knows that the patent is invalid, unenforceable, or not infringed, yet represents to the marketplace that a competitor is infringing the patent, a clear case of bad faith representations is made out.” *Id.*

The Tenth Circuit has had no occasion to address specifically the fact pattern presented in the current appeal—that is, where a party asserts that something is “patented” and it is undisputed that it is not patented (and that the advertising party did not even seek a patent)—but numerous other courts considering that situation and analogous situations uniformly conclude that Lanham Act false advertising claims are viable in addition to false marking claims.<sup>5</sup> *See, e.g., Proportion—Air,*

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<sup>5</sup> In *Hall v. Bed Bath & Beyond*, this Court considered a false advertising claim based on representations that a product was patented when its true status was

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*Inc. v. Buzmatics, Inc.*, 57 F.3d 1085 (Fed. Cir. 1995) (remanding for specific fact findings as to whether there was “intent to deceive the public” for the false marking claim and “a likelihood of consumer deception” for the Lanham Act claim); *BPI Sports, LLC v. Thermolife Int’l LLC*, No. 19-60505-CIV, 2020 WL 10180910, at \*5-6 (S.D. Fla. Jan. 8, 2020) (alleged misrepresentation that chemical compound falls within the scope of patents and that defendant is “the only legitimate source for patented” compounds); *ERBE USA, Inc. v. Byrne Med., Inc.*, No. 1:11-cv-1480, 2011 WL 13220386, at \*6 (N.D. Ga. July 22, 2011) (denying motion to dismiss, noting that “[a]t least one other district court has held that an allegation that a manufacturer falsely claimed in its advertising materials that a product is patented is sufficient to state a false advertising claim under the Lanham Act”); *Azimuth Unlimited, LLC v. Sea Tel, Inc.*, No. 10-60253, 2011 WL 13173548, at \*5 (S.D. Fla. Apr. 14, 2011) (allegation that competitor “marked its products with inapplicable and expired patents, knowing that such patents did not cover the products”); *Third Party Verification, Inc. v. SignatureLink, Inc.*, 492 F. Supp. 2d 1314, 1324 (M.D. Fla. 2007) (advertising product as patented and claiming that no other companies have the same technology); *DP Wagner Mfg. Inc. v. Pro Patch Sys., Inc.*, 434 F. Supp. 2d 445, 461 (S.D. Tex. 2006) (alleged misrepresentations pertaining to “over-marking”

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“patent pending,” and rejected that claim due to a lack of intentional deception and failure to plausibly allege that the claim was misleading. 705 F.3d at 1372.

products by reference to inapplicable patents); *Blank v. Pollack*, 916 F. Supp. 165, 172 (N.D.N.Y. 1996) (explaining that “claims as to the existence of a patent for a product, or lack thereof, bear on the nature or qualities of the product, such that such claims fall within the scope of the Lanham Act’s false advertising protection”); *see also Roof Maxx Techs.*, 2021 WL 3617154, at \*10 (discussed *supra*, not finding any conflict with patent laws where misrepresentation was that product is subject to an active patent); *see generally* McCarthy § 27:66.40.

To the extent that the District Court assumed that claims that products are “patented” necessarily equate to claims of inventorship foreclosed by *Dastar*, that assumption cannot be squared with the foregoing jurisprudence. Indeed, insofar as there seems to be no dispute that Appellee advertised material in its shoe as “patented” despite never having (or seeking) a patent, a basis likely exists to assert the “bad faith” element that is required for the Lanham Act claim to survive. If, as this Court found in *Zenith Electronics*, it is “obvious[ ]” that it constitutes bad faith to represent to the marketplace that a competitor is infringing when a party “knows that the patent is invalid,” 182 F.3d at 1354, it would seem equally obvious that representing a product as “patented” when the party knows that the product is not subject to any patent also meets that bad faith standard.

### **III. A *PER SE* RULE THAT CERTAIN WORDS CONSTITUTE PUFFERY WOULD IGNORE THE IMPORTANCE OF CONTEXT WHEN ANALYZING THE MEANING OF ADVERTISING**

As an alternative ground for rejecting the Lanham Act counterclaim, the District Court concluded that advertising claims that Croslite was “exclusive” and “proprietary” merely equated to “a claim of superiority,” and that such claims constitute puffery not actionable under the Lanham Act.<sup>6</sup> (Appx15.) But the District Court did not state a basis for its implicit determination that consumers must construe those two words as nothing other than a general, boasting-type assertion of superiority and not something more specific or verifiable. Like a *per se* rule that certain words must connote authorship or inventorship, a *per se* rule that such words are necessarily puffery is unwarranted, and would similarly fail to account for the crucial role of context in evaluating the meaning of advertising.

“Puffing” generally comes in two varieties: (1) grossly exaggerated advertising claims such as blustering and boasting; and (2) a general claim of superiority that is so vague and indeterminate that it will be understood as an expression of opinion, frequently in the context of comparative advertising. McCarthy § 27:38; *see Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144,

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<sup>6</sup> The District Court did not refer to the “patented” advertising claim in connection with this alternative ground. As detailed *supra*, however, “patented” is plainly an objectively verifiable (or disprovable) fact that may give rise to Lanham Act false advertising claims.

160 (2d Cir. 2007); *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 496-97 (5th Cir. 2000). Neither “[a]n exaggerated advertising claim which influences the consumer’s buying decision” nor “[d]efinite measurable claims” qualify as mere “puffing.” McCarthy §§ 27:108, 27:109; *see, e.g., Ford Motor Co. v. Intermotive, Inc.*, No. 4:17-CV-11584, 2019 WL 4746811, at \*17 (E.D. Mich. 2019) (denying summary judgment and rejecting puffery argument because advertisement that “Ford is the only product that is actually programmable in these upfitter interface modules” is “a specific representation that can be refuted”).

Courts consistently recognize that determining whether an advertising claim or other representation<sup>7</sup> is puffery cannot be done in isolation; rather, the context of the advertising or representation matters. *See, e.g., Int'l Code Council*, 43 F.4th at 60 (explaining that “when an advertisement might fall within the second form of puffery—statements that are provable but are so exaggerated that no reasonable buyer would be justified in relying on them—the court must evaluate how a reasonable buyer would react”); *Alpine Bank v. Hubbell*, 555 F.3d 1097, 1106 (10th Cir. 2009) (“In determining whether a statement is puffery, the context matters”); *FTC v. Trudeau*, 579 F.3d 754, 766 (7th Cir. 2009) (“To determine whether

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<sup>7</sup> Puffery is often analyzed by courts in connection with not only Lanham Act false advertising claims, but also various other causes of action based on false or fraudulent representations, including under federal securities laws, state unfair competition and consumer deception laws, and common law.



[defendant] violated the Order, we look not to isolated claims of relative ease but to what the infomercial as a whole conveyed.”); *Painaway Austl. Pty. Ltd. ACN 151146 977 v. MaxRelief USA, Inc.*, No. 13-3854, 2022 WL 1028024, at \*5 (E.D. Pa. Apr. 6, 2022) (“looking at the slogan’s context” when determining whether it constituted puffery).

Moreover, “[t]he advertising context in which a message, otherwise classified as puffing, appears might transform the message into one having a definite, factual meaning.” McCarthy § 27:106. Thus, in the oft-cited decision in *Pizza Hut, Inc. v. Papa John’s International, Inc.*, the Fifth Circuit recognized that although the advertising slogan “Better Ingredients. Better Pizza” was nonactionable opinion puffery when presented alone, the slogan had an objective and fact-specific meaning (and thus was *not* puffery) when it was presented in advertising comparing specific ingredients with those of competitors. 227 F.3d at 501-02.

Other courts similarly find terms or phrases that might otherwise seem like puffing—including terms or phrases that suggest superiority—sufficiently definite in context for a potential false advertising claim to lie. *See, e.g., Groupe SEB USA, Inc. v. Euro-Pro Operating LLC*, 774 F. 3d 192, 199 (3d Cir. 2014) (affirming preliminary injunction where advertising claim that steam iron had “more powerful steam” found explicit, unambiguous, and literally false based on context); *Evolve BioSystems, Inc. v. Abbott Labs.*, No. 19 C 5859, 2022 WL 846900, at \*6 (N.D. Ill.

Mar. 22, 2022) (considering the “backdrop” of advertising to reject puffery argument at pleading stage and conclude “it is a small step to infer that customers of infant probiotic products rely on such commercial language as ‘poten[t],’ ‘stabl[e],’ and ‘high-quality’ to denote the products’ function and efficacy” (alterations in original)); *EP Henry Corp. v. Cambridge Pavers, Inc.*, No. 17-1538, 2017 WL 4948064, at \*4 (D. N.J. Oct. 31, 2017) (“Viewed in conjunction with Cambridge's representations about the uniqueness of its proprietary ArmorTec technology, it is plausible that a potential customer could reasonably come to the conclusion that Cambridge is not puffing, but has actually found the ‘secret sauce’ to enable pavingstones to ‘look like new forever’ or ensure that ‘the color will never fade.’”)

The lone decision relied on by the District Court in the pending case, *Intermountain Stroke Center., Inc. v. Intermountain Health Care, Inc.*, 638 F. App'x 778 (10th Cir. 2016), does not counsel otherwise, let alone compel a conclusion that advertising claims that a product is “proprietary” or “exclusive” necessarily constitute puffery. To the contrary, the Tenth Circuit expressly acknowledged “the importance of context in determining whether a transactional representation constitutes puffery.” *Id.* at 788. While recognizing that a mere “simple claim of superior quality” may be nonactionable, the court did not suggest a categorical rule, and instead grouped the alleged false advertising claims regarding medical practices into (1) “general advertising claims of best practices and high-quality customer

service,” which the court concluded were “not particular enough to constitute literally false representations,” and (2) specific statements of facts, which the court concluded were “true and not misleading.” *Id.* at 785-87 & 785 n.3. Indeed, the court devoted substantial effort to analyzing the particular healthcare context and medical standards pertinent to the advertising claims in determining that those claims “would ultimately be based on opinions, not facts—which are the essential ingredient of any Lanham Act claim.” *Id.* at 789 n.5. In short, the court carefully analyzed context and did not merely assume that the claims were “puffery.”

Similarly here, a court should not automatically assume that a claim that a product is “proprietary” and “exclusive” is nothing more than a general “superiority” claim that is not actionable under the Lanham Act. That would short circuit the necessary analysis of the context of Appellee’s advertising in which those words appeared.

Although INTA takes no position with respect to whether the District Court’s puffery conclusion ultimately was correct, the summary judgment decision alludes to context for Appellee’s advertising that suggests consumers could have taken away a more definite, fact-based message from the description of Croselite as “proprietary” and “exclusive”—particularly when paired with the objectively verifiable claim of being “patented.” For example, the District Court recognized that Appellee admitted that “its advertisements have ‘linked’ [these terms] . . . to features, characteristics,

and qualities of the product material.” (Appx3.) Before dismissing claims on the basis of puffery, then, one must at least address the theory that those “links” could lead a reasonable consumer to understand “proprietary” and “exclusive” to refer to objectively verifiable characteristics of Croslite, such as whether it was offered solely by Appellee but no other competitors, or is based upon a trade secret accessible to none of Appellee’s competitors.

To be clear, naked claims that a product is “proprietary” or “exclusive” may under particular circumstances be readily recognizable as puffery, including at the pleading stage. Additionally, depending upon the facts, it may be difficult for a Lanham Act plaintiff to show that the use of these terms in context can be proven true or false. But context should not be ignored in favor of a categorical rule deeming certain words to be non-actionable puffing. Where a court examines the context, and the terms are objectively verifiable, a court should not reject them as puffery.

### **CONCLUSION**

For the reasons detailed above, INTA respectfully submits that, in ruling on the current appeal, this Court should neither overextend *Dastar* nor limit the scope of Section 43(a)(1)(B) false advertising claims where advertising misrepresents the “nature, characteristics, [or] qualities” of goods or services. To the contrary, the Court should make clear that no *per se* rule exists that words such as “patented,”

“proprietary,” and “exclusive” necessarily cannot give rise to false advertising liability due to either *Dastar* or the puffery doctrine.

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

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

**Case Number:** No. 2022-2160

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