

In the
United States Court of Appeals
For the
Federal Circuit

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.

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

CERTIFICATE OF INTEREST

Case Number 2022-2160

Short Case Caption CROCS, INC., v. EFFERVESCENT, INC

Filing Party/Entity Double Diamond Distribution, Ltd., U.S.A. Dawgs, Inc. and Mojave Desert Holdings, LLC

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<p>Double Diamond Distribution, Ltd.</p>	<p>Double Diamond Distribution, Ltd.</p>	

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STATEMENT OF RELATED CASES

The following appeals were previously before this Court and involved patents originally at issue in the underlying trial court action: *Crocs, Inc. v. Int'l Trade Comm'n*, 598 F.3d 1294 (Fed. Cir. Feb. 24, 2010); *Mojave Desert Holdings, LLC v. Crocs, Inc.*, 995 F.3d 969 (Fed. Cir. Apr. 21, 2021).

This appeal arises from a consolidated action before the United States District Court for the District of Colorado: *Crocs, Inc. v. Effervescent et al.*, Case No. 06-cv-00605-PAB-KMT (D. Colo.) (“-00605 case”) and *U.S.A. Dawgs, Inc. v. Snyder et al.*, Case No. 16-cv-02004-PAB-KMT (D. Colo.) (“-02004 case.”) (consolidated). Final judgment in this case was entered on July 11, 2022. Appx23. On November 29, 2022, this Court dismissed Appellants’ appeal in the -02004 case. ECF No. 19. The appeal from the district court’s decision in the -00605 case remains.

There are no other appeals pending in this action. Appellants are not aware of any other cases pending in any court or agency that will directly affect or be affected by the Federal Circuit’s decision in the appeal being briefed.

INTRODUCTION

Appellee Crocs is an admitted false advertiser. As the district court recognized, “Crocs admits that its advertisements have ‘linked’ such terms as ‘patented,’ ‘proprietary,’ and ‘exclusive’ to features, characteristics, and qualities of [its footwear] product material, and that Crocs’ goal in its Croslite messaging was to imply that its products have ‘superior characteristics, qualities, and features.’” Appx3 (internal citations omitted). But Crocs’ material (Croslite™) is not patented, and never has been. This alone should have been enough to defeat Crocs’ motion for summary judgment on Dawgs’¹ Lanham Act claim.

But, the district court nevertheless held that Dawgs’ false advertising claim under 15 U.S.C. § 1125(a)(1)(B) was barred by *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), and this Court’s subsequent decision in *Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d 1300 (Fed. Cir. 2009). The district court held that “[f]alsely claiming to have ‘patented’ something is akin to claiming to have ‘invented’ it [citing *Baden Sports*], and to plagiarizing or reverse passing off, which *Dastar* held not to be covered by the Lanham Act’s false advertising prohibition.” Appx14. The court reasoned that Dawgs’ claim was really nothing more than a false claim of authorship “i.e., that Crocs falsely

¹ “Dawgs” refers individually and/or collectively to Appellants U.S.A. Dawg’s Inc., Double Diamond Distribution, Ltd., and Mojave Desert Holdings, LLC.

claimed it created Croslite, when, in fact, Croslite is ‘merely the common ethyl vinyl acetate used by many footwear companies around the world.’” Appx14.

The district court’s decision is erroneous as a matter of law. Linking the term “patented” to product qualities and characteristics is not the same as calling it innovative—the issue addressed in *Baden Sports*. Indeed, in *Baden Sports* “the *only* thing” that plaintiff Baden was alleging was that defendant Molten falsely claimed to have innovated certain products when, in fact, it was Baden who had done the innovation. *Baden Sports*, 556 F.3d at 1308 (emphasis added). There was no dispute that the allegedly falsely advertised product was, in fact, innovative.

In this case, there is no question of “who” patented Crocs’ Croslite™ material. The falsity here is that the material was not patented *at all*. Crocs’ material was not new or non-obvious, like an actual patented material would be. And it was not exclusive to Crocs, as it would have been had it been patented.

Accordingly, the district court erroneously equated the false “patented” advertising to a dispute about authorship or “credit,” as was the case in *Baden Sports* and *Dastar*. As the evidence showed (all of which the district court ignored in its opinion), consumers understand “patented” to imply uniqueness, exclusivity, superiority, and benefits vis-à-vis competitors in terms of a range of product qualities and characteristics. Croslite™ is none of these things—it is a generic material with properties that competitors can and do replicate. Crocs’ false

advertising, therefore, gave consumers the false impression, and lent credibility to Crocs' claims, that Croslite™ had qualities and characteristics that were exclusive to Crocs and that were superior to those of competitors.

At the very least, the district court was not entitled to simply decide the meaning of “patented” as if it were a matter of law like claim construction or contract interpretation. The relevant question under the Lanham Act is what the advertising means to *consumers*, which is undisputedly a fact question. To this end, Dawgs submitted survey evidence from *both* parties' experts showing that consumers believe that “patented,” in the context of the accused footwear, connotes some degree of superiority, durability, and/or other beneficial qualities. The district court refused to consider it, ruling that it was submitted too late, notwithstanding the fact that the survey evidence was developed during expert discovery and did not exist at the time of summary judgment briefing. Instead, the court simply decided on its own, and without so much as a dictionary citation, what it believed “patented” meant to consumers in the context of the accused advertising.

For these reasons and those set out below, this Court should reverse the district court's summary judgment ruling. The advertising at issue is nothing like that in *Dastar* or *Baden Sports*. Instead, it falls squarely within the four corners of 15 U.S.C. § 1125(a)(1)(B).

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331, which grants the district courts “original jurisdiction of all civil actions arising under the . . . laws . . . of the United States,” and 28 U.S.C § 1338, which provides jurisdiction for “any civil action arising under any Act of Congress relating to patents.” On September 14, 2021, the United States District Court for the District of Colorado granted summary judgment on Dawgs’ Lanham Act counterclaims under 15 U.S.C. § 1125(a)(1)(B)² against Crocs. Appx1-22. In the same Order, the district court denied Dawgs’ motion for leave to supplement its summary judgment opposition with new survey evidence from both parties, developed after the original summary judgment briefing was completed, showing how consumers understand the term “patented.” Appx15-17. On October 11, 2021, Dawgs requested, *inter alia*, reconsideration of the summary judgment decision. Appx1884-1886. On July 1, 2022, the district court denied the motion for reconsideration. Appx1966-1981. On July 12, 2022, the district court issued its only Final Judgment in the action, disposing of all claims between the parties, including Crocs’ separate patent infringement claims against Dawgs. Appx23.

² Dawgs may refer to 15 U.S.C. § 1125(a) as Section § 43(a) throughout this Brief.

Dawgs timely filed its Notice of Appeal on July 12, 2022. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1295(a)(1).

STATEMENT OF THE ISSUES

Whether the district court—which found that “Crocs admits that its advertisements have ‘linked’ such terms as ‘patented,’ ‘proprietary,’ and ‘exclusive’ to features, characteristics, and qualities of the product material, and that Crocs’ goal in its Croslite messaging was to imply that its products have ‘superior characteristics, qualities, and features’”—erred in granting summary judgment in favor of Crocs on Dawgs’ false advertising counterclaims under Section 43(a)(1)(B) of the Lanham Act.

STATEMENT OF THE CASE

Dawgs files this appeal from the District Court for the District of Colorado’s Order granting summary judgment in favor of Crocs, dismissing Dawgs’ false advertising claims under 15 U.S.C. § 1125(a)(1)(B). Appx1. The court erred in holding that, as a matter of law, Dawgs’ false advertising claims were outside the coverage of the Lanham Act and foreclosed by *Dastar* and *Baden Sports*. Appx13-15.

I. THE ADVERTISING AT ISSUE

Crocs and Dawgs compete in the molded footwear business. Appx984. From its inception in 2002, Crocs has advertised that its footwear products are

made of a “patented” (and sometimes “proprietary”) closed-cell resin, which it later branded as “Croslite.” Appx3. Per at least one of Crocs’ statements, “All Crocs shoes feature Croslite material.” Appx1429. Crocs’ advertising, which has taken various forms over the years, has consistently linked the alleged “patented” and “proprietary” nature of the closed-cell resin material, Croslite™, to various product qualities. Appx3. The following are exemplary:

- “The special Patented Closed Cell Resin (PCCR) warms and softens with your body heat and molds to your feet.” Appx1449.
- “We’ve discussed our Proven comfort from our patented Croslite™ material to certifications with the U.S. Ergonomics Council, American Podiatric Medical Associations, and others.” Appx1451.
- A Crocs founder and executive wrote to a customer: “The reason the shoes are so comfortable is that they are made of a patented ‘closed cell’ resin. This resin has many positive aspects including the fact that bacteria and fungus can’t stick to the material so they won’t get that bad ‘boat shoe’ smell.” Appx1457.
- Crocs’ website stating shoes are “Built for your job with the comfort of our patented Croslite™ material.” Appx601.
- Crocs Investors Press Release stating that “The Crocs @work™ collection is built with the patented Croslite™ material to provide all-day, on-the-job comfort.” Appx603.

Internally, Crocs emphasized the importance of differentiating the Croslite™ material from competitors’ materials as a way to sell its products. For example, Crocs’ former Senior Vice President of Global Sales and Marketing stated: “Our hope is to link Croslite to the brand and position it as a superior product/material . .

..” Appx1437. Crocs wanted consumers to believe that Croslite™ was technologically advanced, like GORE-TEX and Lycra. Appx1441. Numerous other documents and communications suggest the same, emphasizing the importance of the alleged “unique,” “patented” or “proprietary” nature of the material to drive an image of superiority. *See, e.g.*, Appx1483 (Crocs’ former General Counsel states, “The unique Croslite material is one of many key differentiators that enable Crocs to successfully market its footwear products to a broad range of consumers worldwide to set itself apart from imitators”).

As it turns out, Crocs’ advertising was always false. *See* Appx493 (discussing Crocs’ SEC filings, in which Crocs disclosed that it has never “attempted to seek patent protection for the formula . . .”). And Crocs has admitted as much. *See* Appx1548 (“The documents referenced in Paragraph 47 [of Appx493] speak for themselves.”).

The effect of Crocs’ false advertising on consumers was (and still is) profound. Over time, consumers were misled into believing that Crocs’ shoe material was better than comparable shoes on the market because it was advertised as being made of a superior, patented, proprietary, and/or exclusive material that no other competitor could use. The following examples illustrate how consumers and the media alike were misled into believing that Crocs’ Croslite™ material was superior, patented, or proprietary:

- One consumer asked, in a Quora.com post: “Are fake crocs as good as real crocs?” Appx1461. Another consumer responded: “No. Fake Crocs are not as good as the real brand. There are many cheap brands knocking off the look of the original Crocs beach clog, but they are not made from the same durable odor reducing and comfortable patented Croslite material.” Appx1461.
- In an Amazon.com customer review, a customer wrote: “I prefer Crocs to their \$1 to \$7 knock-offs. The patented Croslite material of Crocs conform to your feet after a day or two, and is much more durable than the material used in inexpensive knock-offs.” Appx1465.
- One Crocs customer wrote, in a Facebook.com post: “the patented technology that you see in the inside insert is what makes these shoes so comfortable . . .”). Appx1467.
- On an open forum website, “DISboards.com,” one customer asked: “Are real crocs worth the money?” Another consumer responded, “Real crocs are made of a special material that is patented, they aren’t just rubber, so I think that makes a difference.” Appx1469.
- One customer wrote, in a TripAdvisor.com forum: “I walked on wet tile, wet cement, hot sand, and even floated them in the pool. Mine are crocs brand, which I believe are patented.” Appx1475.
- In an internal Crocs email, one employee forwarded an article stating “[b]elow is an article in yesterday’s Finger Lake[s] Times (circ. 12,000) located on the west side of upstate New York. The journalist captures the buzz of CROCS and does an excellent job of differentiating between the materials used in knock-offs vs.[] CROCS.” Appx595.
 - The Finger Lakes Times article stated that “[t]he biggest difference between Crocs and their distant cousins are their make-up. The Boulder, Colo.-based company uses a patented closed-cell resin. The compound allows Crocs to stay free of bacteria and foot odor and makes them easy to clean” Appx597.

Furthermore, both parties' experts conducted consumer surveys (after fact discovery and after the briefing on Crocs' summary judgment was complete) testing the meaning of the term "patented" amongst consumers. The results show that many actual and/or likely Crocs consumers understood the term "patented" to imply superior product qualities and characteristics. Appx1661-1664. For example, in the survey conducted by Dawgs' expert, Dr. Lynne Weber, consumers were asked the following question:

Q. 13. Suppose that when you were considering the purchase of this pair of Crocs, you learned that the material was patented, i.e., suppose it had been described as:

"Patented material which softens as it warms to better conform to your feet."

"What advantages or disadvantages, if any, do you perceive because the material is "patented"?"

Appx1661; Appx1692. In response, numerous survey participants stated that they perceived advantages related to product characteristics, attributes, and/or qualities. See Appx1685-1687. The following responses are exemplary:

- **Mold to my fee[t] better/fits better/better comfort/softer.** Answers included: (1) "it should fit better by conforming to the shape of your foot"; (2) "I think it makes it more customized to my feet, which makes them fit perfectly"; (3) "better comfort"; (4) "Fit better"; (5) "Keep the shoes from rubbing blisters"; and (6) "I perceive that it is softer than the average foot wear."

- **Unique, special.** Answers included: (1) “I would think the material is special and proprietary therefore providing a special level of comfort not available anywhere else”; (2) “Unique, knock off ones don’t feel the same as the real ones”; (3) “no other brands have this type of material”; (4) “Makes me think it is unique”; (5) “that it’s a one of a kind product [sic]”; and (6) “The advantage of patented is that it makes the product seem special and unique, that is, you won’t find that feature in competitive footwear.”
- **Superior to other brands.** Answers included: (1) “I love the material of Crocs and by that brand for its patented material;” (2) “they are made of better material than other ones”; (3) “the material is of better quality”; (4) “makes me feel its better quality”; (5) “The material being patented makes me more likely to buy from Crocs because I know I cannot get that exact comfort level just anywhere”; (6) “Patented sounds fancy and premium”; and (7) “A material patented [sic] could assure more quality.”
- **Technologically advanced/innovative.** Answers included: (1) “It is a new material having some new properties”; (2) “A patent suggests that the technology is new and demonstrably separate from other brands’ offerings”; and (3) “If a material is patented then I think it would have advantages since they have come up with a new or better way to help conform and comfort your feet.”
- **Last longer, more durable.** Answers included: (1) “they’re long lasting & comfortable”; (2) “It is more durable than cheap sandals”; and (3) “something that should be high quality and durable.”
- **Tested/trustworthy.** Answers included: (1) “It has been rigorously tested in a lab”; (2) “Patented means the materials are tested and approved”; (3) “There has been a lot of research and testing done on the material”; (4) “Trustworthy and original”; (5) “I believe if the material is patented he’s going through rigorous studies and is more conditioned to do a better job for their products so I’d be more inclined to want to purchase”; and (6) “The advantage of this is that it is more formal and feels like it has been researched and proven.”

Appx1662; *see* Appx1685-1688.

Crocs' survey expert, Sarah Butler, obtained similar results. Appx1663. Specifically, some test group participants were shown an advertisement describing Crocs' shoes as made of "patented Croslite™" material. Appx1663; Appx1697-1698. They were then asked to indicate which of several features—including, for example, price and color—were important to them (selecting all that apply). Appx1663; Appx1718-1719. 21.3% of participants indicated that "Patented Croslite™" material was important. Appx1663. These 21.3% of respondents were then asked, "What does Patented Croslite™ material mean to you"? Appx1663; Appx1719. Participants' responses included the following:

- "lightweight and indestructible"
- "yeh [sic] it is very high quality"
- "it is a famous brand so I like that it has the patented croslite material. It speaks quality to me."
- "It means it is high quality and is a good value."
- "It means comfort which is important."
- "because they are durable but comfortable at the same time."
- "This material makes the crocs lightweight, ergonomic and odor resistant!"
- "It means they feel goof [sic] on my feet and they protect from bad odor"
- "does not wear out or break down"
- "waterproof and sturdy"
- "It's a light weight material that provides comfort to your feet."
- "very lightweight but durable"

Appx1663.

Moreover, Crocs' expert obtained similar results from a second test group that was shown "proprietary" messaging instead of "patented." Appx1664.

II. THE LAWSUIT AND CURRENT PROCEDURAL POSTURE

The parties' dispute began on April 3, 2006, when Crocs sued Double Diamond Distribution Ltd. (and several other shoe distributors) and, later, U.S.A. Dawgs, LLC, for alleged patent infringement, in both the district court and in the United States International Trade Commission. *Crocs, Inc. v. Effervescent, Inc.*, Civ. Action No. 06-cv-00605-PAB-KMT (D. Colo. Apr. 3, 2006); *In the Matter of Certain Foam Footwear*, 71 Fed. Reg. 27514-15 (May 11, 2006).

In between various procedural detours³ and amended pleadings, Dawgs filed its operative counterclaim against Crocs under the Lanham Act. Appx469. As Dawgs alleged in its pleadings, "Double Diamond and USA Dawgs have been manufacturing and selling a variety of footwear, including molded clog footwear in Canada since 2005 and in the United States since 2006." Appx495.

Dawgs' counterclaim alleged that Croslite™ "was merely a run-of-the-mill common rubber-like copolymer EVA used by many footwear companies, including Double Diamond, USA Dawgs," and others. Appx493. "Crocs has consistently and persistently falsely claimed in promotional materials over the

³ Those procedural detours are not relevant to this appeal, but are generally set forth in Dawgs' brief before this Court filed on December 9, 2019 in Appeal No. 20-1167. *U.S.A. Dawgs, Inc. v. Crocs, Inc.*, No. 20-1167, 2020 WL 2111215, at *6-25 (Fed. Cir. 2020) (summarizing procedural history).

course of thirteen years, that Crocs owns patent rights in the ‘Croslite material’, including the statement on its website that [Crocs are] ‘[b]uilt for your job with the comfort of our patented Croslite™ material’” Appx494 (incorporating by reference Appx599). The counterclaim further alleged that “Crocs actively misled its own customers to believe that Croslite was patented and therefore contained some unique or special properties, when it did not.” Appx493. Specifically, “Crocs’ promotional materials touted Croslite was unique enough to be ‘patented’, but in truth Crocs never sought a patent. Nor was Croslite ‘proprietary’ or ‘exclusive’—as Crocs has claimed—when Crocs just copied it from FinProject N.A. Crocs perpetuated this decade-old fraud against its own consumers . . . and in turn denigrate[d] the foam materials its competitors used” Appx481. And Dawgs provided support for these allegations with specificity, incorporating exhibits by reference in its pleading. *See, e.g.*, Appx602-604 (Crocs’ company news release publicizing that “[t]he Crocs @ Work™ collection is built with the patented Croslite™ material”); Appx605-606 (Crocs touting its “proprietary Croslite™ material”); Appx607-608 (Crocs’ website claiming “All Crocs™ shoes feature Croslite™ material, a proprietary, revolutionary technology”).

III. THE ARGUMENTS AND DECISIONS BEFORE THE DISTRICT COURT

A. Crocs' Motion for Summary Judgment

On November 25, 2020, Crocs moved for summary judgment on Dawgs' counterclaims under the Lanham Act. Appx1393.

Crocs did not dispute that the terms "patented," "proprietary" or "exclusive" are false when referring to Croslite™. Rather, Crocs argued that, as a matter of law, the Lanham Act cannot reach claims premised on false statements that products are "patented," "proprietary," and "exclusive," no matter the context of the advertising, no matter the effect on a competitor's products, and no matter how consumers actually understand those terms. Appx1393-1395, Appx1398-1399.

Without citing any evidence, Crocs argued that the "plain meaning" of these terms were centered on "authorship, inventorship, or ownership of rights in the Croslite material." Appx1398-1399. Accordingly, Crocs argued that Dawgs' Lanham Act claims were barred under barred by *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003) and its progeny. Appx1398-1399.

B. Dawgs' Response to Summary Judgment

On December 16, 2020, Dawgs opposed Crocs' motion for summary judgment ("Dawgs' Opposition"). Appx1409.

Dawgs disputed Crocs' characterization of Dawgs' Lanham Act claims and explained that Crocs improperly linked the false "proprietary," "exclusive" and

“patented” narrative to product qualities. Appx1411. Dawgs referenced its operative counterclaim to explain that its allegations were directed to Crocs’ intentional use of false statements (including that Croslite™ was “patented”) to bolster the credibility of its product superiority claims. Appx1411-1412. The following arguments are exemplary:

Crocs has, for much of its existence, falsely advertised Croslite as patented, proprietary, and/or exclusive **in order to create the false impression** that specific qualities and characteristics of its shoe material (including, for example, odor and slip resistance, comfort, and warming and softening qualities) are superior to the shoe materials used by its competitors. Crocs’ advertisements explicitly state as much. For example, a 2013 Crocs press release states that “The Crocs @ Work collection is **built with the patented Croslite material to provide all-day, on the job comfort** . . . These work shoes are also odor-resistant and easy to clean”)

* * *

Worse, Crocs knew that this advertising was false, but nonetheless used it to build the brand image and drive a price premium. *See* Berkowitz Decl., Ex. E (“Our hope is to link Croslite to the brand and **position it as a superior product/material**”). Crocs wanted consumers to believe that Croslite was technologically advanced, like GORE-TEX and Lycra. *See* Berkowitz Decl., Ex. F. **This false advertising created a reputation of superiority for Crocs and Croslite that persists to this day, and Crocs continues to drive a price premium.**

* * *

[Crocs] claimed Croslite had unique characteristics that its competitors could not offer. As late as June 2016, Crocs’ promotional materials touted that Croslite was **unique**

enough to be ‘patented’ . . . Crocs perpetuated this decade-old fraud against its own consumers to drive brand loyalty, increase sales, and in turn denigrate the foam materials its competitors used, thereby depriving them of sales.

Appx1409-1412 (emphases added) (internal citations omitted).

In addition to referencing its Second Amended Complaint and Counterclaim, Dawgs pointed to its interrogatory responses (attached as an exhibit), which further detailed Dawgs’ false advertising theory with supporting evidence. Appx1414; Appx1499-1506 (“Crocs used the terms patented, proprietary, and/or exclusive to create the false impression that the nature, characteristics, and/or quality of the Croslite material was superior to that of its competitors . . .”).

Dawgs then referenced, cited, and attached as exhibits several documents showing that Crocs’ advertisements linked the terms “patented” “proprietary” and “exclusive” to the material’s “soft, comfortable, lightweight, non-marking and odor-resistant qualities.” Appx1412-1414; Appx1449 (Crocs.com advertisement stating “CROCS brand shoes are a new breed of shoe that mixes the comfort of clogs with a space age material that has incredible benefits. The Patented Closed Cell Resin (PCCR) warms and softens with your body heat and molds to your feet.”); Appx1451-1452; Appx1454 (“CROCS Key Messaging” document stating “CROCS shoes are made up of Croslite, a proprietary closed cell resin. CROCS resin is a unique, lightweight, slip resistant, non-marking” material); Appx1457.

Additionally, Dawgs submitted evidence that it was Crocs' *goal* to create an image that its material has superior characteristics, qualities, and features.

Appx1413; Appx1454 (“What differentiates CROCS from other competitors . . . [o]nly CROCS shoes are made of Croslite . . . the unprecedented benefits of CROCS resin can only be found in CROCS shoes.”); Appx1482-1484; Appx1487; Appx1490.

Finally, Dawgs cited evidence showing that, as a result of Crocs' false advertising, consumers have been misled into believing Crocs' material has various superior qualities. Appx1413; Appx1431; Appx1433; Appx1435; Appx1459; Appx1461; Appx1465; Appx1467; Appx1469; Appx1475.

Dawgs argued that *Dastar* and its progeny simply stand for the proposition that false designations of authorship, and misrepresentations about the intellectual origin of a product, are not, by themselves, within the literal scope of the Lanham Act. Appx1411, Appx1415-1421. Dawgs explained that Crocs' advertising was nothing like that in *Dastar* or *Baden Sports*, and that the *Dastar* Court explicitly stated that its holding did not extend to misrepresentations relating to the nature of a product itself. Appx1416 (internal citations omitted). In support, Dawgs cited numerous district court cases distinguishing *Dastar* and holding that misrepresentations about whether a company was the “first” to develop technology

and whether a purported “innovation” had uniquely superior characteristics, are actionable under the Lanham Act. Appx1419-1420.

C. Dawgs’ Motion For Leave To File A Supplemental Opposition

On June 30, 2021, Dawgs moved for leave to supplement its opposition based upon newly-developed survey evidence from both parties’ experts. Appx1658. Specifically, Dawgs presented evidence from its expert, Dr. Lynne Weber, that actual or likely Crocs consumers perceived certain advantages from the term “patented” as it relates to Crocs’ material, including, but not limited to, better comfort, better quality, uniqueness, technological advancements, and durability. Appx1661-1662. Dawgs also presented evidence that Crocs’ expert, Sarah Butler, obtained similar results from participants in her own survey, which asked certain respondents “What does Patented Croslite™ material mean to you?” Appx1663. Responses included, but were not limited to, that the material is lightweight, indestructible, higher quality, durable, comfortable, waterproof, sturdy, and protective from bad odor. Appx1661-1663.

D. The Court’s Decision on Summary Judgment

The district court found that “Crocs admits that its advertisements have ‘linked’ such terms as ‘patented,’ ‘proprietary,’ and ‘exclusive’ to features, characteristics, and qualities of the product material . . . and that Crocs’ goal in its Croslite messaging was to imply that its products have ‘superior characteristics,

qualities, and features.” Appx3. The district court accepted, however, Crocs’ characterization of Dawgs’ counterclaims and its unsupported definition of “patented,” finding that “Dawgs has alleged nothing more than a false designation of authorship, i.e., that Crocs falsely claimed it created Croslite, when, in fact, Croslite is ‘merely the common ethyl vinyl acetate used by many footwear companies around the world.’” Appx13. Furthermore, the district court held that “Dawgs did not mention [in its pleadings] anything about Croslite being soft, comfortable, lightweight, odor-resistant, or nonmarking” and thus failed to plead an actionable Lanham Act allegation. Appx12.

The district court overlooked significant portions of Dawgs’ counterclaims, all of which were cited in the parties’ briefing (including, for example, Appx481), specifically alleging that Crocs’ advertising touted its material as unique. The court also overlooked the exhibits cited therein, including, for example, Appx603, a Crocs press release stating “The Crocs @ Work™ collection is built with the patented Croslite™ material to provide all-day, on-the-job comfort,” and Appx608, stating “All Crocs™ shoes feature Croslite™ material, a proprietary, revolutionary technology that gives each pair of shoes the soft, comfortable, lightweight, non-marking and odor-resistant qualities[.]”

The district court also overlooked the evidence referenced and cited in Dawgs’ statement of additional facts, and the exhibits (including Crocs-produced

documents, Dawgs-produced documents, and interrogatory responses detailing Dawgs’ Lanham Act theory) cited therein. Appx1411-1415. In a footnote, the district court agreed with Crocs’ objection that certain of these exhibits were inadmissible, and summarily rejected the exhibits, finding that the evidence “cannot create a genuine issue of material fact to overcome summary judgment.” Appx13.

Furthermore, after acknowledging that “neither the Supreme Court in *Dastar* nor the Federal Circuit in *Baden Sports* considered the use of the word ‘patented,’” the district court simply interpreted the term on its own, and without any evidentiary citation, holding that “[f]alsely claiming to have ‘patented’ something is akin to claiming to have ‘invented’ it . . . [and] to plagiarizing or reverse passing off, which *Dastar* held not to be covered by the Lanham Act’s false advertising prohibition.” Appx14. The district court did not consider Dawgs’ evidence of how customers understand the accused advertising, including both direct evidence (such as consumer reviews) and the survey evidence from both parties. Appx17.

E. Dawgs’ Motion for Reconsideration

On October 11, 2021, Dawgs sought reconsideration of the district court’s summary judgment order (the “Motion for Reconsideration”). Appx1869.

Dawgs argued that the district court had taken a narrow view of Dawgs’ Lanham Act claims and counterclaims and that, by overlooking key allegations

cited in the parties' summary judgment briefing, the court found the present facts akin to those in *Baden*, when the facts and issues in this case are very different. Appx1871-1874.

F. The Court's Decision on Reconsideration

The district court denied Dawgs' Motion for Reconsideration. Appx1966. This time, however, the district court addressed some of the allegations in Dawgs' counterclaim (as discussed above) but found that they still failed to do more than allege misrepresentations about authorship. Appx1973-1978. The court also again failed to explain its admissibility ruling as to certain of the exhibits Dawgs provided in summary judgment ruling.

SUMMARY OF THE ARGUMENT

The district court misapplied *Dastar* and *Baden Sports* in granting Crocs' motion for summary judgment. The advertising in each of those cases was expressly directed to the intellectual origin of a product, and not the nature, qualities, or characteristics of the goods, as it is here. In other words, the questions in *Dastar* and *Baden Sports* were about whether an action could be sustained under the Lanham Act where a company misrepresents the source of an innovation or copyrighted work, *i.e.*, "who" came up with the idea for a product or work of art. Here, Croslite™ was never "patented"—not by Crocs and not by anybody else. Croslite™ is little more than a common material that all competitors can and do

use; there is nothing unique or differentiated about Croslite™ that would justify Crocs' advertising. Crocs' advertising, which, per the district court, admittedly linked the term "patented" to product qualities and characteristics, lent credibility to its product attribute claims, and misled consumers into believing that Crocs' products were superior, and were the *only ones* that had, or legally could have, the advertised properties. Appx3.

Dastar involved Section 43(a)(1)(A) of the Lanham Act (which is not at issue here) and concerned the question of whether the word "origin" in the statute refers only to the manufacturer, or whether it also covers the intellectual creator of the underlying copyrighted work that Dastar copied. *Dastar*, 539 U.S. at 30-35. The Court held that "origin" in the statute refers only to the manufacturer, and that the particular intellectual origin of a product is "typically of no consequence to purchasers." *Id.* at 32-33. The Court, however, was clear that its ruling did not touch misrepresentations about product qualities, explaining that had the Defendant given purchasers the impression that the product at issue was quite different from the original source, then the plaintiff may have had "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.

Baden Sports is fundamentally no different than *Dastar*. It involved Section 43(a)(1)(B) of the Lanham Act, but equally involved an alleged misrepresentation about the source of a product's innovation. *Baden Sports*, 556 F.3d at 1307-08. In other words, in *Baden Sports*, there was no dispute about *whether* the advertised product was actually innovative; to the contrary, plaintiff Baden admitted that it was innovative, arguing only that defendant Molten had misrepresented *who* innovated it. *Id.* at 1308. This Court held that the answer is “no,” and that “to allow Baden to proceed with a false advertising claim that is fundamentally about the origin of an idea, is contrary to the Ninth Circuit’s interpretation of *Dastar*.” *Id.*

The facts in this case should have led to a different result than in *Baden Sports*. Crocs advertised its shoes as being made of a “patented” material and, as the district court already found, admittedly “linked such terms as ‘patented,’ . . . to features, characteristics, and qualities of the product material.” Appx3. Crocs’ goal in its Croslite™ messaging was to imply that its products have superior characteristics, qualities, and features. Appx1437 (The goal was to “position it as a superior product/material due to all these magical elements to it”). Accordingly, this is not a question of *who owns* a patent on Croslite™; there simply is *no patent at all on Croslite™*, and there never was. Croslite™ is functionally no different than a common material used by all competitors such as Dawgs. And, the

evidence in the case, which the district court never discussed, demonstrates that consumers view “patented” products as superior in numerous ways to their non-patented counterparts. Appx1413-1414; Appx1661-1663; Appx1683-1693 (Dawgs’ survey expert’s findings); Appx1694-1730 (Crocs’ survey expert’s findings). Indeed, that view was always what Crocs intended to leverage. Appx1441 (“Croslite . . . one of many olefin foamed resins . . . it can be much more. Most people still do not know yet what EVA foam is. They could learn Croslite instead of EVA . . . it is up to us.”).

Accordingly, the district court erred in holding on summary judgment that “as in *Baden Sports*, Dawgs has alleged nothing more than a false designation of authorship[.]” Appx14. To the contrary, this case has nothing to do with authorship; this case is about Crocs’ linkage of false terms like “patented,” “proprietary” and “exclusive” to build credibility for its product attribute claims, and to differentiate Croslite™ in the minds of consumers from the material offered by competitors. Appx3. This is what Dawgs alleged in its counterclaim, it is what the evidence shows, and it is consistent with the district court’s factual findings that Crocs “linked” its advertising to product qualities. Appx3.

Even setting aside the clear evidence submitted, the district court was not entitled to simply decide the meaning of the term “patented” to consumers, in the context of the advertising, as a matter of law. Appx14. It is well-established that

the meaning of advertising to consumers is a question of fact, and to this end, all of the evidence demonstrates that consumers understood “patented” to imply superiority.⁴ See *Bell v. Publix Super Mkts., Inc.*, 982 F.3d 468, 479 (7th Cir. 2020) (“Regardless of the [false advertising] theory advanced by the plaintiff . . . ‘It is not for the judge to determine, based solely upon his or her own intuitive reaction, whether the advertisement is deceptive.’ . . . Rather, the question is ‘what does the person to whom the advertisement is addressed find to be the message? That is, what does the public perceive the message to be?’”) (internal citations omitted); *Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc.*, 653 F.3d 241, 254-55 (3d Cir. 1993); *Berner Int’l Corp. v. Mars Sales Co.*, 987 F.2d 975, 982-84 (3d Cir. 1993); *Abdallah v. Pileggi*, No. 97-1581, 1998 WL 180491, at *3 (Fed. Cir. 1998).

After acknowledging that “neither the Supreme Court in *Dastar* nor the Federal Circuit in *Baden Sports* considered the use of the word ‘patented,’” the district court should have considered the plain meaning of the term, direct evidence, including consumer reviews, and the parties’ respective survey evidence, which Dawgs submitted via a motion to supplement its opposition papers.

Appx14. For example, one survey participant wrote, “The material patented [sic]

⁴ The district court also ignored the plain meaning of “patented,” which, by definition, is novel, non-obvious, and exclusive to the patent owner.

could assure more quality.” Appx1662. Another wrote, “Patented means the materials are tested and approved.” Appx1662. Other examples abound. Appx1661-1663; Appx1683-1693; Appx1694-1730. But the district court ignored all of it, and instead decided as a matter of law that “patented” means nothing other than a source of authorship. Appx14. The decision should be reversed.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews a “trial court’s grant of summary judgment *de novo*, with all justifiable factual inferences being drawn in favor of the party opposing the motion.” *Mann v. United States*, 334 F.3d 1048, 1050 (Fed. Cir. 2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). “Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Id.*

Moreover, this Court will “apply the law of the regional circuit on non-patent issues.” *Baden Sports*, 556 F.3d at 1304 (citing *Research Corp. Techs. v. Microsoft Corp.*, 536 F.3d 1247, 1255 (Fed. Cir. 2008)). The Tenth Circuit “review[s] a district court’s grant of summary judgment *de novo*, applying the same legal standard used by the district court, drawing all reasonable inferences in favor of the nonmoving party[.]” *Hull v. IRS*, 656 F.3d 1174, 1177 (10th Cir. Aug. 31, 2011).

II. CROCS' FALSE ADVERTISING IS ACTIONABLE UNDER THE LANHAM ACT

The advertising in this case is actionable under the Lanham Act because Crocs misrepresented the nature, qualities, and characteristics of the material (Croslite™) in its footwear. The false advertising lent credibility to Crocs' product attribute claims and led consumers to believe that Crocs' material was unique, superior to competitors, and had qualities that, given the exclusive nature of a "patent," no other competitor could provide. That is what it means to claim something is patented. Accordingly, the district court erred in granting Crocs' motion for summary judgment.

A. *Dastar* and Its Progeny Are Limited to Misrepresentations About the Authorship or Intellectual Origin of a Product or Service; They Do Not Address False Patent Claims.

None of *Dastar*, *Baden Sports*, or *Kehoe Component Sales* is on point to the instant dispute because these cases only concern misrepresentations about authorship.

Dastar was effectively a "plagiarism" case. *Dastar*, 539 U.S. at 39. The defendant (*Dastar*) purchased tapes of an original TV series (which were in the public domain), made some minor modifications to them, including a new opening sequence, credit pages, and final closing, and sold those slightly revised tapes under its own name without any attribution to the original series creator. *Id.* at 24. The issue before the Supreme Court was whether *Dastar* had made a "false

designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion . . . as to the origin . . . of his or her goods” under Section 43(a)(1)(A) of the Lanham Act. *Id.* at 31.

Framed more precisely, there was no dispute that Dastar itself actually manufactured, produced, and sold the physical copies of the modified version of the TV series; the question was whether the word “origin” in the statute refers only to the manufacturer, or whether it also covers misrepresentations about the *intellectual* creator of the underlying work that Dastar copied. *Id.* (“If ‘origin’ refers only to the manufacturer or producer of the physical ‘goods’ that are made available to the public (in this case the videotapes), Dastar was the origin. If, however, ‘origin’ includes the creator of the underlying work that Dastar copied, then someone else (perhaps Fox) was the origin of Dastar’s product.”).

The Supreme Court held that the “phrase ‘origin of goods’ is incapable of connoting the person or entity that originated the ideas or communications that ‘goods’ embody or contain. Such an extension would not only stretch the text, but it would be out of accord with the history and purpose of the Lanham Act and inconsistent with precedent.” *Id.* at 32. The Court reasoned that for some products, including “communicative product[s],” such as the TV series at issue, consumer concern may be more focused on the identity of the creator of the story it conveys. *Id.* at 33. For instance, the “purchaser of a novel is interested . . . in the

identity of the creator of the story [the author]” more so than the identity of the producer of the physical book. But, construing the Lanham Act to cover intellectual misrepresentations about the identity of an author would conflict with copyright laws, which address the right to copy without attribution. *Id.* at 33-34.

The Court was clear, however, that its holding was limited solely to misrepresentations of intellectual content. *Id.* at 36. Specifically, the Court explained that if “the producer of a video that substantially copied the [original] series were, in advertising or promotion, to give purchasers the impression that the video was quite different from that series, then one or more 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.*

Baden Sports was based on fundamentally the same “plagiarism” facts as *Dastar*. Like *Dastar*, the *Baden Sports* decision focused *solely* on advertising relating to the creative origin of the falsely advertised product. *Baden Sports*, 556 F.3d at 1307-08. Indeed, this court explicitly limited its ruling and analysis to advertising related to “authorship” of a product idea, which it held was “not a nature, characteristic, or quality” under Section 1125(a)(1)(B) of the Lanham Act. *Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d 1300, 1307 (Fed. Cir. 2009). *Id.*

Plaintiff Baden Sports and Defendant Molten USA, Inc., were competitors in the high-end basketball business. *Baden*, 556 F.3d at 1302. In the underlying district court action, Baden accused Molten of patent infringement and false advertising for its use of Baden technology, which Molten advertised as “innovative,” “proprietary,” and “exclusive.” *Id.* at 1303. The district court granted Molten’s motion for summary judgment as it concerned “proprietary” and “exclusive,” holding that those terms, *in the context of the advertising at issue*, were directed to authorship and creative origins, and thus precluded by *Dastar*.⁵ *Id.* The district court allowed Baden to pursue its claim with respect to advertising of the word “innovative,” which the district court held could be related to the “nature, characteristics, or qualities of the basketballs themselves.” *Id.* Baden was successful at trial and was awarded more than \$8 million for Molten’s false advertising. *Id.* at 1304.

Addressing just the “innovative” advertising, the Federal Circuit reversed, citing *Dastar*, and held that in actual effect Baden’s arguments on appeal and at trial were simply that Molten misrepresented authorship and intellectual origin of

⁵ The “proprietary” and “exclusive” advertising was not before the Federal Circuit on appeal, and there is no indication that Molten used those terms in the manner that Crocs did, *i.e.*, to differentiate the qualities and characteristics of the products. *See Baden*, 556 F.3d at 1303, 1306-07.

the technology, and that this was not a “nature, characteristic or quality” of the product. *Id.* at 1307. The facts and history of the case factored heavily into the Court’s holding. Specifically, “throughout the trial, Baden steadfastly argued that Molten’s advertisements were false precisely because Molten was not the *source* of the innovation.” *Id.* (emphasis added). The Court confirmed this with Baden’s counsel during oral argument:

The Court: “So the only thing you’re really saying they offended is by saying, ‘We, Molten, made these innovations’?”

Counsel for Baden: “*That’s correct.* What we’re saying is Baden developed this technology.”

Id. at 1308 (emphasis in original). Further, Baden “waived any [] argument about novelty or newness, as Baden [] limited its arguments to Molten’s claims to be the innovator of dual-cushion technology.” *Id.* at 1307.

In other words, unlike the case at bar, there was no dispute about *whether* the advertised basketballs were, in fact, innovative; the dispute was just about *who* innovated them. *See id.* at 1306-08. Given the limited scope of Baden’s arguments and the advertising at issue, the Court concluded that “to allow Baden to proceed with a false advertising claim that is fundamentally about the *origin of an*

idea, is contrary to the Ninth Circuit’s interpretation of *Dastar*.” *Id.* at 1308 (emphasis added).⁶

The district court here also relied on *Kehoe Component Sales Inc. v. Best Lighting Prods., Inc.*, but that case was no different than *Dastar* or *Baden Sports*, and again just addressed misrepresentations of the intellectual origins of a product. 796 F.3d 576 (6th Cir. 2015). More specifically, it was undisputed in *Kehoe Component Sales* that the false advertising was that defendant in the case (Pace) manufactured the physical products at issue. *Id.* at 587. The *Kehoe Component Sales* court simply held, as in *Dastar*, that the origin of the “initial ideas” for the products was irrelevant and not covered by the letter of the Lanham Act. *Id.* at 587-88.

To Dawgs’ knowledge, the district court’s summary judgment ruling in favor of Crocs stands alone—no other court has ever expanded the logic of *Dastar* and *Baden Sports* to false claims about a product being “patented,” particularly in the circumstances here, where the advertising at issue explicitly linked the term “patented” to unique product attributes. Appx3; Appx13-14. To the contrary, several other courts have recognized the distinction between the type of advertising

⁶ The court further explained that it was not addressing any claim about “novelty or newness” of the falsely advertised product—Baden had waived that argument on appeal. *Id.* at 1307.

at issue in *Dastar* and *Baden Sports* and advertising going to the nature, characteristics, or qualities of a product, as is the case here.

For example, in *Zobmondo Entertainment LLC v. Imagination Int'l Corp.*, the court denied a motion to dismiss where the defendant was accused of falsely and deceptively advertising its board game as the “first, and original, board game based on the ‘would you rather concept.’” No. CV-09-02235-ABC, 2009 WL 8714439, at *3 (C.D. Cal. June 23, 2009). The court held that *Dastar* was “not directly on-point” because the plaintiff’s claim was based on Section 1125(a)(1)(B) concerning the “nature, characteristics, [and] qualities” of the product, and the defendant’s advertising (arguably) conveyed that its own game was the first to be made. *Id.* at *3-4.

Similarly, in *Blue Spike, LLC v. Texas Instruments, Inc.*, the court denied the plaintiff’s motion to dismiss the defendant’s Lanham Act counterclaims, which alleged that the plaintiff made false and misleading statements that it was “the ‘first to create’ content ‘fingerprinting’ technology.” *See* No. 6:12-cv-499, 2014 WL 11848751, at *4 (E.D. Tex. July 25, 2014). The court distinguished *Baden Sports* on the grounds that it “involved an idea and authorship, issues not involved here.” *Id.* Rather, the court held that plaintiff’s advertising (i) “connote[s] to the public who was the first to use the technology in a product,” (ii) concerned

the “nature, characteristics, [and] qualities” of the product, and (iii) therefore fell outside of *Baden Sports*. *Id.*

The court in *Nippon Steel v. Sumitomo Metal Corp.* also rejected a very similar argument to the one Crocs is now making. No. 12-2429 (DMC)(MF), 2013 WL 3285206, at *1 (D.N.J. June 27, 2013). Nippon alleged that defendant POSCO’s statements about its own products were “false or misleading because POSCO represent[ed] to customers that because of POSCO’s own innovation, POSCO’s GOES products have uniquely superior characteristics and qualities, such as ‘excellent performance and high energy efficiency,’ ‘superior electric and magnetic property,’ and ‘consistent quality improvement’ such that ‘customers prefer products made by POSCO.’” *Id.* at *3. The court denied POSCO’s motion to dismiss and rejected its argument based on *Dastar* and *Baden Sports*. *Id.* at *4. The court reasoned that “Nippon’s allegations go further than simply claiming that POSCO ‘substantially copied’ Nippon’s technology, as was the case in *Dastar*, 539 U.S. at 38. Nippon also alleges that POSCO falsely promoted its products as the customer choice based on false statements of uniquely superior characteristics and qualities.” *Id.* The court also distinguished *Baden Sports* on the grounds that the allegations in that case were directed to “false designation of authorship. In contrast, Nippon alleged that POSCO has made false statements pertaining to the physical or functional attributes of its products.” *Id.*

The Lanham Act provides a remedy where a company misrepresents the “nature, characteristics, [or] qualities . . . of his or her or another person's goods, services, or commercial activities.” 15 U.S.C. § 1125(a)(1)(B). *Dastar* and *Baden Sports* hold that misrepresentations about authorship—effectively “plagiarism”—are not actionable under either subsections (A) or (B) of the statute. *Dastar*, 539 U.S. at 36. But that is *all* they hold. They do not, and cannot, given the statutory language, immunize other advertising that misrepresents to consumers the nature, characteristics, or qualities of a product. That includes, as other district courts have found, misrepresentations that a party was “first” to introduce a new product. And it certainly includes misrepresentations that a product is “patented,” when, in fact, it is not. In that regard, the district court’s decision stands alone, without statutory or precedential support.

B. The Advertising at Issue Is Not About Authorship as Was the Case in *Dastar* and *Baden Sports* and Instead Falls Squarely Within the Language of Section 1125(a)(1)(B).

The district court ignored evidence demonstrating that the advertising at issue misled consumers about the nature, qualities, and characteristics of Crocs’ shoe material, Croslite™. Appx13. Indeed, the district court found that “Crocs admits that its advertisements have ‘linked’ such terms as ‘patented,’ ‘proprietary,’ and ‘exclusive’ to features, characteristics, and qualities of the product material, and that Crocs’ goal in Croslite™ messaging was to imply that its products have

‘superior characteristics, qualities, and features.’” Appx3. This undoubtedly should have ended any question about whether the advertising affected the “nature, characteristics, and qualities” of Crocs’ shoes and alone should have precluded summary judgment.

To be clear, and as set out above, the evidence was overwhelming that “patented” means more than just authorship to consumers, particularly in the context of Crocs’ false advertising. Dawgs presented evidence to the district court that Crocs tied product benefits to the purported “patented” nature of Croslite™. For example, a 2013 Crocs press release, attached to Dawgs’ counterclaim and referenced in its summary judgment opposition, states: “The Crocs @ Work collection is built with the patented Croslite material to provide all-day, on-the-job comfort . . . These work shoes are also odor-resistant and easy to clean” Appx494 (citing Appx603); Appx1410. Other advertisements presented to the district court in summary judgment briefing included:

- “The special Patented Closed Cell Resin (PCCR) warms and softens with your body heat and molds to your feet.” Appx1449.
- “We’ve discussed our Proven comfort from our patented Croslite™ material to certifications with the U.S. Ergonomics Council, American Podiatric Medical Associations, and others.” Appx1451.
- “The reason the shoes are so comfortable is that they are made of a patented ‘closed cell’ resin. This resin has many positive aspects including the fact that bacteria and fungus can’t stick to the material so they won’t get that bad ‘boat shoe’ smell.” Appx1457.

Crocs' false advertising was intentional; its stated goal was to "link Croslite to the brand and position it as a superior product/material" Appx1437. Crocs wanted consumers to believe that Croslite was technologically advanced, like GORE-TEX and Lycra. Appx1441 (email comparing CROSLITE to GORE-TEX and LYCRA and stating, "Most people still do not yet know what EVA foam is. They could learn Croslite instead of EVA . . . It is up to us . . ."). Another Crocs executive told the media, "If I took Croslite away to lower the price, I don't have a reason to exist." Appx1490.

Consumers bit on Crocs' advertising. An Amazon customer asked, "Are these shoes made of the patented Croslite for which Crocs is known"? Another customer asked and another responded: "Are fake crocs as good as real crocs? . . . No. Fake Crocs are not as good as the real brand. There are many cheap brands knocking off the look of the original Crocs beach clog, but they are not made from the same durable odor reducing and comfortable patented Croslite material." Appx1461. An Amazon reviewer wrote: "I prefer Crocs to their \$1 to \$7 knock-offs. The patented Croslite material of Crocs conform to your feet after a day or two, and is much more durable than the material used in inexpensive knock-offs." Appx1465; see also Appx1478 (Crocs' shoes are "made from the instantly recognizable Croslite foam material that put Crocs on the map a dozen years ago.").

The district court ignored all of this. Even though Dawgs cited all of it in its summary judgment opposition, the district court never so much as mentioned one piece of this evidence. *See generally* Appx1-22.

As if this wasn't enough, *both* parties conducted surveys demonstrating that the term "patented" affects consumers' views of the nature, qualities, and characteristics of the products. Appx1661-1663. For example, Dawgs' expert, Dr. Lynne Weber, asked participants to consider the following phrase in the context of a potential Crocs' footwear purchase: "Patented material which softens as it warms to better conform to your feet." Appx1661; *see* Appx1684-1693. Dr. Weber then asked, "What advantages or disadvantages, if any, do you perceive because the material is 'patented'?" Appx1661. The answers were telling. Numerous consumers thought it had improved comfort and softness properties, with better fit and feel. Appx1662. Others thought it was unique and special, or superior to other brands. Appx1662. Still, others thought it would last longer and was more durable, or was tested and trustworthy, presumably given the government stamp of approval. Appx1662.

Crocs' survey expert uncovered similar results. Appx1663; *see* Appx1695-1730. Responses to her questions included comments that "Patented Croslite™ material" meant: (i) "lightweight and indestructible"; (ii) "high quality"; (iii) "speak quality"; (iv) "high quality"; (v) "comfort, which is important"; and (vi)

“This material makes the crocs lightweight, ergonomic, and odor resistant!”

Appx1663. The results included many other similar examples. Appx1663.

Nonetheless, the district court refused to consider this evidence, holding that Dawgs submitted it too late, notwithstanding the fact that the surveys were all conducted after summary judgment briefing was complete and Dawgs could not have predicted any of the results (or even that Crocs was planning to conduct its own survey). Appx15-17.

Given the evidence, there can be little doubt that Crocs’ “patented” advertising was directed to the “nature, characteristics, [and] qualities” of its footwear, and falls squarely within the four corners of the Lanham Act. A product that is “patented” is, by definition, new and non-obvious, and gives the patent owner the right to exclude others (including competitors) from making, using, or selling the same invention. 35 U.S.C. § 101 et seq. This is far different than a mere misrepresentation of authorship. Croslite™ is not patented to *anyone*; it is not new, non-obvious, or even unique. Nor does Crocs have the exclusive right to sell the ethyl-vinyl acetate (EVA) material that is the foundation of Croslite™. Other competitors, including Dawgs, can offer a material with the same or better softness, odor-resistant, durability and other properties.

At least one prominent commentator agrees that the district court misapplied the law and should have denied Crocs’ summary judgment motion. Harvard

Professor Rebecca Tushnet wrote on her blog⁷ with respect to the district court’s decision:

The court found that *Dastar* barred the §43(a)(1)(B) claims as well as the §43(a)(1)(A) claims. I think this is wrong—the patented/proprietary/exclusive language here is not the same as claiming authorship; it’s claiming uniqueness as a reason for consumers to believe that Crocs possess superior product characteristics to those of competitors’ products. To the extent that the claims lead consumers to believe that Crocs are “made of a material ‘different than any other footwear,’” a difference made credible to consumers by reference to patents and/or proprietary knowledge, that is a claim about the physical nature of specific product components, not about authorship. When the Supreme Court left 43(a)(1)(B) claims open in *Dastar*, this is the kind of thing that fits well.

Rebecca Tushnet, *Falsely Advertising “Proprietary” and “Exclusive” Material*

Isn’t Actionable Under Dastar, Rebecca Tushnet’s 43(B)log (Sept. 28, 2021, 12:09 PM), <https://tushnet.com/2021/09/28/falsely-advertising-proprietary-and->

⁷ Professor Tushnet is a former clerk for Justice Souter and focuses her research and teaching on copyright, trademark, First Amendment, and false advertising law. *About Rebecca Tushnet*, Rebecca Tushnet, <https://tushnet.com/about/> (last visited Feb. 26, 2023). Her blog, *Rebecca Tushnet’s 43(B)log*, has been inducted into the ABA hall of fame. Sarah Mui, Molly McDonough & Lee Rawles, *Blawg 100 Hall of Fame* (2018), https://www.abajournal.com/magazine/article/blawg_hall_of_fame (last visited Feb 26, 2023). Her articles on copyright and Lanham Act issues have been cited by numerous courts of appeals. *See, e.g., Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc.*, 653 F.3d 241, 252 (3d Cir. 2011); *GI Sportz Inc. v. APX Gear LLC*, 692 Fed. App’x 839, 840 (9th Cir. 2017); *In re Jackson*, 972 F.3d 25, 35 (2d Cir. 2020); *Blanch v. Koons*, 467 F.3d 244, 252, n. 3 (2d Cir. 2006); *Cambridge University Press v. Patton*, 769 F.3d 1232, 1270, n. 28 (11th Cir. 2014).

exclusive-material-isnt-actionable-under-dastar/. Professor Tushnet further agreed that *Baden* is not applicable, commenting that:

Baden’s claim was different than Dawgs’ claim here: Baden claimed it was falsely losing credit which really does sound like *Dastar*. Dawgs’ claim is that Crocs falsely claimed to have a unique material, which it does not in fact use. It’s not about credit or source of the idea at all.

Id. Professor Tushnet is correct. Crocs’ advertising is nothing like what was at issue in *Baden Sports* or *Dastar*.

The district court erred in granting summary judgment in view of the mounds of evidence showing that (i) Crocs falsely advertised its products as “exclusive,” “proprietary,” and “patented”; (ii) Crocs intentionally linked the false advertising to the nature, qualities and characteristics of its shoe material; and (iii) consumers were misled about the qualities and characteristics of Crocs’ footwear vis-à-vis competitors, as evidenced both by the parties’ surveys, and by direct evidence from consumer reviews and the like.

Accordingly, the district court erred as a matter of law and its decision should be reversed.

C. The District Court Erred in Construing the Advertising as if It Was a Question of Law, and Refusing to Consider Overwhelming Evidence Showing that “Patented” Means Unique Product Superiority to Consumers.

The district court also erred as a matter of law in construing the false advertising as if it was a matter of law, like it might be with respect to a question of

contract interpretation or patent claim construction. Specifically, the district court held that “Dawgs has alleged nothing more than a false designation of authorship, i.e., that Crocs falsely claimed it created Croslite when, in fact, Croslite is ‘merely the common ethyl vinyl acetate used by many footwear companies around the world.’” Appx14. The Court also rejected Dawgs’ argument that Crocs’ advertising amounts to a superiority claim on the grounds that it does not concern the nature, characteristics, or qualities of Crocs’ footwear and is also puffery. Appx15.

Implicit in the district court’s holding and reasoning is the assumption that “patented,” in the context of the advertising at issue, simply means “created,” as if all that Crocs was saying was that it was the one who “created” common ethyl vinyl acetate (EVA) when, in fact, someone else had. Appx14. This interpretation is inconsistent with the plain meaning of “patented” (and proprietary and exclusive) and is also inconsistent with the factual evidence. “Patented” means that a product is new and non-obvious (35 U.S.C. §§ 102, 103) and gives a patent owner the right to exclude others. 35 U.S.C. § 271. “Patented,” and even

“proprietary” and “exclusive” mean far more than just “created” and are, of course, not puffery.⁸

Regardless, the question of the meaning of advertising is one of fact and the district court erred in simply applying its own interpretation to the false advertising at issue, in conflict with the plain meaning of the false terms and without consideration of actual consumer evidence. *Bell v. Publix Super Mkts., Inc.*, 982 F.3d at 479 (“It is not for the judge to determine, based solely upon his or her own intuitive reaction, whether the advertisement is deceptive.’ . . . Rather, the question is ‘what does the person to whom the advertisement is addressed find to be the message? That is, what does the public perceive the message to be?’”) (internal citations omitted); *see also Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc.*, 653 F.3d at 254-255; *Berner Intern. Corp. v. Mars Sales Co.*, 987 F.2d at 982-84 (legal error for the district court not to “determine what the term ‘air door’ means to [the relevant] consumers”); *Abdallah v. Pileggi*, 1998 WL 180491, at *3 (stating that “[defendant’s] subjective belief is largely irrelevant to the meaning of the word ‘patented’ means to the relevant consumer” . . . and moreover if the Court applied

⁸ They are statements of fact that are verifiably false (and Crocs has admitted that there is no patent on Croslite). *Intermountain Stroke Ctr., Inc. v. Intermountain Health Care, Inc.*, 638 Fed. App’x 778, 786-87 (10th Cir. 2016) (“Puffery is a term of art used to characterize those vague generalities that no reasonable person would rely on as assertions of particular facts.”) (internal citations omitted).

the “legal definition” as “the *only* basis for concluding that the challenged statements were literally false we would be cautious.”) (emphases added).

To this end, Dawgs submitted numerous documents in its summary judgment opposition brief showing that, as Crocs intended, consumers interpret “patented” much differently than just “created” or “invented,” including both parties’ survey evidence (which the district court refused to consider, as set out above). *See also* Appx1465; Appx1457 (in response to direct email from a customer stating “they are the most comfortable versatile shoe I have[,]” Crocs executive responds “[t]he reason the shoes are so comfortable is that they are made of a patented ‘closed-cell’ resin.”). Indeed, the district court’s interpretation of “patented” is inconsistent with its own factual finding that its advertisements have “linked” such terms as “patented,” “proprietary,” and “exclusive” to features, characteristics, and qualities of the product material. Appx3, Appx14.

Further, and even if Dawgs had not cited direct evidence of consumer understanding, because Crocs’ advertising was willfully false, and designed to create a false impression of superiority, the district court should have presumed that consumers were misled about Croslite™ qualities. *William H Morris Co. v. Group W, Inc.*, 66 F.3d 255, 258 (9th Cir. 1995) (“If Omicron intentionally misled consumers, we would presume consumers were in fact deceived and [defendant] Omicron would have the burden of demonstrating otherwise.”) (citations omitted);

see also Merck Eprova AG v. Gnosis S.p.A., 760 F.3d 247, 256 (2d Cir. 2014); Appx1437 (“Our hope is to link Croslite to the brand and position it as a superior product/material . . .”).

D. The District Court’s Statements About the Sufficiency of Dawgs Pleadings and Citations in Its Opposition Brief Are Incorrect and Cannot Justify Summary Judgment in Crocs’ Favor

Part of the district court’s errors stems from its misapprehension of Dawgs’ pleadings, which it held precluded Dawgs’ opposition arguments. The district court acknowledged Dawgs’ arguments in response to summary judgment, but effectively dismissed them, and apparently all of the supporting evidence, on the grounds that Dawgs:

did not make these arguments in its claim or counterclaim. In its claim and counterclaim, Dawgs argued that Croslite is merely a variation of ethyl vinyl acetate used by many footwear companies around the world and that, by Crocs claiming to have invented Croslite, Crocs has implied that Dawgs’ footwear is inferior. Dawgs did not mention anything about Croslite being soft, comfortable, lightweight, odor-resistant, or non-marking.

Appx12.

The district court was wrong, even aside from the fact that re-interpretation of a pleading should not be the basis for summary judgment in view of overwhelming evidence and disputed facts concerning issues the parties had been litigating for years. Fed. R. Civ. P. 15(a); *see also Foman v. Davis*, 371 U.S. 178, 181-82 (1962) (“The Federal Rules reject the approach that pleading is a game of

skill in which one misstep by counsel may be decisive to the outcome . . . the purpose of pleading is to facilitate a proper decision on the merits,” and courts cannot avoid decisions on the merits “on the basis of [] mere technicalities”).

For example, Dawgs specifically alleged in its counterclaim that “Crocs actively misled its own customers to believe that Croslite was patented *and therefore contained some unique or special properties*, when it did not.” Appx493 (emphasis added). In connection with this allegation, Dawgs’ counterclaim incorporated by reference a Crocs email where “Crocs’ entire senior staff, including all executives, shared a false newspaper article touting that Croslite was patented.” *Id*; *see also* Appx595-597. In connection with this shared newspaper article, Crocs’ senior team celebrated that “[t]he journalist captures the buzz of CROCS and does an excellent job of differentiating between the material used in knock-offs vs. CROCS.” Appx595-597.

It is clear from this paragraph in the counterclaim and the exhibit thereto, all of which are incorporated into Dawgs’ Lanham Act claim (Appx493), that Dawgs is not simply complaining about misrepresentations of intellectual origin or authorship, as was the case in *Baden Sports*. The essence of Dawgs’ claim is that Crocs falsely advertised its products in order to build credibility for its product quality and differentiation claims; the term “patented” in this context implies that

its product features—its odor and bacteria-free properties—are better than those in competitor shoes and lend credibility to the same.

Dawgs’ counterclaim provides more detail and cites additional examples, all of which the district court overlooked in its summary judgment Order. For example, in paragraph 7 of Dawgs’ counterclaim, Dawgs alleged that Crocs:

claimed Croslite had unique characteristics that its competitors could not offer. As late as June 2016, Crocs’ promotional materials touted Croslite was unique enough to be “patented”, but in truth Crocs never sought a patent. Nor was Croslite “proprietary” or “exclusive” – as Crocs had claimed – when Crocs just copied it from FinProject N.A. Crocs perpetuated this decade-old fraud against its own consumers to drive brand loyalty, increase sales, and in turn denigrate the foam materials its competitors used, thereby depriving them of sales.

Appx481.

This, alone, should have been enough to avoid summary judgment on the grounds of a purported pleading failure by the non-moving party.

Additionally, in paragraph 49 of Dawgs’ counterclaim, Dawgs alleged that Crocs made false claims in its promotional material including: “Complete with our proprietary Croslite material foot bed, these lightweight shoes keep up with you whether you’re running around the restaurant or standing for long periods of time.”

Appx494. Dawgs further alleged that “Crocs advertises that its Croslite™ material is superior to the materials competitors use because competitors’ molded clogs are made of harmful material which cause various infections and also they produce heat to feet, which effects your foot skin and which Crocs won’t.” Appx494.

Dawgs also incorporated by reference numerous additional exhibits, including Exhibits 20-23 to the counterclaim, which specifically recite the *exact* advertising that the Court held was missing from Dawgs' counterclaim. Appx598-608. For example, Exhibit 21 is a 2013 Crocs press release stating that “[t]he Crocs @ Work™ collection is built with the patented Croslite™ material to provide all-day, on-the-job comfort.” Appx603-604. This is not a misrepresentation about the intellectual origin of Croslite™; it is a false statement that ties the term “patented” to the stated benefits. The term “patented” enhances consumer views and lends credibility to the comfort claim. As another example, Exhibit 23, which is a 2013 Crocs webpage, states that “[a]ll Crocs shoes feature Croslite material, a proprietary, revolutionary technology that *gives* each pair of shoes the soft, comfortable, lightweight, non-marking and odor resistant qualities that Crocs fans know and love.” Appx608.

Again, these are the exact product attributes and characteristics at issue that the Court held were missing from Dawgs' allegations. And, the various paragraphs articulate the theory that Dawgs was pursuing—that Crocs' lied about the fact that Croslite™ was patented, intentionally tied that lie to various product

attributes, and that this caused consumers to believe that Crocs' material was unique and superior to competitors' material in various ways.⁹

Even assuming that Dawgs' initial allegations were not enough, the district court erred in ruling against Dawgs on the grounds that "Dawgs did not make these arguments in its claim or counterclaim." Appx12. A party need not (and probably should not) make "arguments" in a claim or counterclaim. A complaint serves a notice function and is supposed to set out the facts (and not theories or arguments) upon which the party may be entitled to relief. Fed. R. Civ. P. 8(a)(2) (requiring only a "short and plain statement of the claim showing that the pleader is entitled to relief."). The federal pleading standard only requires that a complaint "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. *Id.*; see also *Zokari v. Gates*, 561 F.3d 1076 (10th Cir. 2009) (without deciding the issue, recognizing "that most

⁹ On reconsideration, the district court walked through some of Dawgs' counterclaims, but still found that Dawgs did not state a claim under the Lanham Act.

of our sister circuits have stated the general rule that a complaint need not set forth the plaintiff's legal theories.”).

Accordingly, the district court was both factually and legally wrong in granting summary judgment based on the perceived lack of “arguments” that Dawgs made in its counterclaim. The court overlooked paragraphs and incorporated documents alleging *exactly* what the court said was missing, and further erred as a matter of law in holding Dawgs to an “argument” standard when the facts pled support the claim that Dawgs was making under Fed. R. Civ. P. 8(a).

Separately, the district court also faulted Dawgs for a court-specific procedural requirement, holding that Dawgs’ summary judgment response failed to identify the particular paragraphs from its counterclaim setting out its “arguments” with specificity, and that this perceived failure justified granting Crocs’ summary judgment motion. The district court doubled down on that assertion in its Order denying reconsideration, adding yet another procedural hurdle (this one not found in any rules or practice standards), reasoning that Dawgs’ summary judgment response “did not connect these allegations [in its counterclaim] to any Lanham Act argument on summary judgment.” Appx1973. Even assuming that the

Court's particular procedural citation preferences could justify summary judgment,¹⁰ the district court was, again, simply wrong.

Crocs' opening brief cited paragraphs 46, 47, 49 and 50 of its counterclaims in its statement of undisputed material facts as reflecting Dawgs' allegations in its counterclaim. Appx1394. Dawgs responded by *admitting* that its allegations were in these paragraphs (as cited by Crocs). Appx1411. This complied with the court's individual practices, which require either an admission or denial of purported material facts. Further, these paragraphs collectively include a plethora of alleged facts, and incorporated by reference documents (including specific false advertisements), spelling out Dawgs' position, as set out above. Appx1411-1415.

¹⁰ "A dismissal for violation of a local rule is a severe sanction reserved for the extreme case, and is only appropriate where a lesser sanction would not serve the ends of justice." *Cooper v. Saffle*, 30 F. App'x 865, 865 (10th Cir. 2002) (internal alterations and citations omitted) (reviewing Oklahoma local rule). "Accordingly, this court requires district courts to analyze three factors before dismissing a complaint for failure to comply with the local court rules." *Id.* "The court must consider '(1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; and (3) the culpability of the litigant.'" *Id.* (quoting *Hancock v. City of Okla. City*, 857 F.2d 1394, 1936 (10th Cir. 1988)) (internal alteration omitted). "**The complaint should be dismissed with prejudice only when these aggravating factors outweighed the judicial system's strong predisposition to resolve cases on their merits.**" *Id.* (internal quotation marks omitted) (emphasis added). The court in *Cooper* held that the district court "abused its discretion when it dismissed Cooper's complaint" for failing to follow a local rule. *Id.* at 867.

If that was not enough, Dawgs further responded in its summary judgment opposition brief that its allegations were contained in its counterclaim generally, none of which should be ignored, and specifically described the allegations in paragraph 7 of the counterclaim, which, as noted above, articulate more than sufficient facts and “arguments,” standing alone, to support Dawgs’ position.

Appx1412-1414. Specifically, Dawgs wrote, referencing its counterclaim:

Dawgs also alleged, for example, “[Crocs] claimed Croslite had unique characteristics that its competitors could not offer. As late as June 2016, Crocs’ promotional materials touted that Croslite was unique enough to be ‘patented’ . . . Crocs perpetuated this decade-old fraud against its own consumers to drive brand loyalty, increase sales, and in turn denigrate the foam materials its competitors used, thereby depriving them of sales.” Dkt. No. 487, ¶ 7 (on p. 13).

Appx1411-12. Dawgs did not need to regurgitate its entire counterclaim. Its opposition brief summarized its positions, referenced the false claim at issue, and explained how its allegations touched on false impressions of “unique[ness]” and how Crocs “denigrate[d] the foam materials [of] its competitors.” Appx1411-1412. The district court was not entitled to simply disregard Dawgs’ counterclaim, or the paragraphs it specifically cited in its opposition brief, and grant summary judgment without consideration of the actual evidence.

The district court levied one final procedural hurdle on Dawgs, noting in a footnote that certain documents cited in Dawgs’ response are inadmissible.

Appx13. The district court did not explain the reasons for this statement, but

possibly agreed with Crocs that certain documents, namely, Exhibits B, C, D, K, L, M, N, O, and P (the “Exhibits”) to Dawgs’ summary judgment opposition, are unauthenticated and double hearsay. *Id.*; see Appx1411-1412; Appx1430-1435, Appx1458-1475. This is wrong for a few reasons.

First, evidence submitted in connection with summary judgment does not have to be presented in an admissible form and the trial court may consider the evidence on summary judgment provided the submitting party demonstrates that it would be possible to present the evidence in admissible form at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Thomas v. Int’l Bus. Machs.*, 48 F.3d 478, 485 (10th Cir. 1995) (“[T]he nonmoving party need not produce evidence ‘in a form that would be admissible at trial’ . . . [only] the content or substance of the evidence must be admissible.”) (emphasis added); *Law Co., Inc. v Mohawk Const. & Supply Co., Inc.*, 577 F.3d 1164, 1170-71 (10th Cir. 2009). This was in error. *See id.*

Second, the documents are not hearsay—obviously, Dawgs was offering them to show consumer state of mind, and not for the *truth* of the matter (that Crocs *actually* have superior qualities because they are patented).

Third, the documents were authenticated. Documents can be authenticated based on their distinctive characteristics, such as “appearance, contents, substance, [or] patterns” considered together with all the circumstances. Fed. R. Evid.

901(b)(4); *Law Co.*, 577 F.3d at 1170 (10th Cir. 2009). Distinctive characteristics can include “identifiable content, logos and titles.” *Matrai v. DirecTV, LLC*, 168 F. Supp. 3d 1347, n.1 (D. Kan. 2016). The nine Exhibits, each of them being Crocs-consumer reviews that were publicly available online, contained circumstantial indicia of authenticity through their distinct characteristics, including as follows:

- **Exhibit K** contained an Amazon.com URL, Amazon’s logo and distinct interface, and “Deliver to Steven” (the would-be authenticating witness) in the top left corner. Appx1459.
- **Exhibits C and M** contained Amazon.com URLs, print dates, and distinct and identifiable interface of Amazon.com review pages. Appx1433, Appx1465.
- **Exhibit B** contained no URL, but per its appearance and contents (including a date), and the fact that Exhibits K, C, and M contained the same distinct and identifiable features as the Exhibits with the Amazon.com URL, it was clearly a customer review from Amazon.com. Appx1431.
- **Exhibits D, L, and P**, per their distinct and identifiable contents were public reviews on Yelp.com (*e.g.*, red star review system, city and state of reviewer, Yelp.com’s “Elite” icon), Quora.com (*e.g.*, overarching question in black, bold and large font at the top, “Related Questions” on the right panel, indication of total number of answers), and TripAdvisor.com (*e.g.*, green “Level 6 Contributor” distinction, icons for number of posts, reviews and votes, heart icon for “Save” feature), respectively. Appx1435, Appx1461-1463, Appx1475.

The district court erred here because “[r]ather than considering each document to determine whether it was authenticated, the district court summarily disregarded these exhibits” with no explanation or apparent consideration of their distinct characteristics under these circumstances (*i.e.*, a claim involving customer

confusion). *See Law Co.*, 577 F.3d at 1170-71; *see Evanston Ins. Co. v. Desert State Life Mgmt.*, 434 F. Supp. 3d 1051, 1060, n.6 (D.N.M. Jan. 16, 2020), *aff'd in part, rev'd on other grounds*, 56 F.4th 899 (10th Cir. 2022) (“[A]uthentication ‘is not a high threshold,’ at the summary judgment stage especially where the party objecting to the evidence’s authenticity ‘gives the Court no evidence to question’ the evidence’s ‘genuineness.’ . . . Reviewing the[se] records online reveals no difference between the records attached as an exhibit . . . and the records that are publicly available online.”) (internal citations omitted).

In any event, the district court’s procedural criticism is irrelevant to the issue at hand. Crocs objected to just a subset of Dawgs’ evidence. Appx1516. Dawgs submitted other similar documents, without objection from Crocs, including, for example, one article (Appx1481-Appx1484) quoting Crocs’ then general counsel as stating, “The unique Croslite material is one of many key differentiations that enable Crocs to successfully market its footwear products to a broad range of consumers worldwide and set itself apart from imitators.” Appx1483. Further, Dawgs identified numerous Crocs advertisements that are from Crocs’ own production, that were not the subject of the Court’s evidentiary criticism, and that outline the exact false advertising that Dawgs accuses. Appx1457; Appx1449; Appx1429.

CONCLUSION

The district court erred in granting Crocs' summary judgment motion. The false advertising at issue in this case is nothing like the advertising in *Dastar* or *Baden Sports*. As Professor Tushnet wrote on her blog:

Baden's claim was different than Dawgs' claim here: Baden claimed it was falsely losing credit which really does sound like *Dastar*. Dawgs' claim is that Crocs falsely claimed to have a unique material, which it does not in fact use. It's not about credit or source of the idea at all.

The Lanham Act explicitly provides a remedy to Dawgs for Crocs' years of intentional false advertising to differentiate its otherwise undifferentiated products. Accordingly, this Court should reverse.

Dated: March 1, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing filing complies with the type-volume limitations of the Federal Rules of Appellate Procedure and Federal Circuit Rules. The brief contains 12,980 words (as calculated using Microsoft Word's Word Count feature), excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally-spaced typeface using Microsoft Word for Office 365 in Times New Roman 14-point type.

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ADDENDUM

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Philip A. Brimmer

Civil Action No. 06-cv-00605-PAB-KMT
(Consolidated with Civil Action No. 16-cv-02004-PAB-KMT)

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

CROCS, INC.,

Plaintiff,

v.

EFFERVESCENT, INC., et al.,

Defendants.

Civil Action No. 16-cv-02004-PAB-KMT

U.S.A. DAWGS, INC., et al.,

Plaintiffs,

v.

RONALD SNYDER, et al.,

Defendants.

ORDER

This matter is before the Court on (1) the Motion for Summary Judgment of Lanham Act Claim [Docket No. 909] filed by Crocs, Inc. ("Crocs") and the Individual Defendants;¹ (2) the motions to dismiss filed by U.S.A. Dawgs, Inc. and Double

¹ The "Individual Defendants" include Ronald Snyder, Lyndon Hanson, Daniel Hart, Sara Hoverstock, Jeffrey Lasher, Donald Lococo, Michael Margolis, John P. McCarvel, and Erik Rebich (together with Crocs, "Crocs").

Diamond Distribution Ltd. (individually and/or collectively, with Mojave Desert Holdings, LLC, referred herein as “Dawgs”) pursuant to Federal Rule of Civil Procedure 41(a)(2) [Docket Nos. 997, 1019];² and (3) Dawgs’s Motion for Leave to File Supplemental Opposition to Crocs, Inc.’s Motion for Summary Judgment in View of New Survey Evidence from Both Parties [Docket No. 1002]. The Court first considers Crocs’s motion for summary judgment, then Dawgs’s motion to file a supplemental summary judgment response, and finally Dawgs’s motions to dismiss.

I. CROCS’S MOTION FOR SUMMARY JUDGMENT

A. Background³

In its Lanham Act counterclaim against Crocs, Dawgs alleges, among other things, that Crocs falsely marketed its shoes in violation of the Lanham Act by advertising Croslite, the foam material that Crocs shoes are made from, as “patented,” “proprietary,” and “exclusive.” Docket No. 909 at 2, ¶ 1 (citing Docket No. 487 at 107–08, ¶¶ 341–47). Dawgs also asserts that the Individual Defendants are liable under the Lanham Act for, among other things, causing Crocs to make statements that Croslite is patented, proprietary, and exclusive. *Id.*, ¶ 2 (citing Docket No. 487 at 105–06, ¶¶ 255–62). When asked in an interrogatory why Dawgs lost sales due to Crocs’s advertising, Dawgs stated that it “received numerous inquiries from its

² The Court also considers Dawgs’s Unopposed Motion for Leave to File Amended Reply in Support of its Motion to Dismiss [Docket No. 1018].

³ All facts are undisputed unless otherwise noted. The Court assumes familiarity with this fifteen-year-long dispute and will not detail the procedural history or background facts beyond what is necessary to resolve this motion for summary judgment. Additional background can be found in previous orders and recommendations. See, e.g., Docket Nos. 673, 897.

customers and potential customers regarding Dawgs'[s] foam material in comparison with Croslite" and that these inquiries "have consistently revealed a concern that Croslite is superior *because it is held out as patented, exclusive[,] or proprietary* such that[,] in the mind of the customer, Crocs is *perceived to have invented* a superior [ethyl vinyl acetate ("EVA")] material that no other manufacturer can match." *Id.* at 2–3, ¶ 3.

Crocs admits that its advertisements have "linked" such terms as "patented," "proprietary," and "exclusive" to features, characteristics, and qualities of the product material, Docket No. 913 at 4, ¶ 1,⁴ and that Crocs's goal in its Croslite messaging was to imply that its products have "superior characteristics, qualities, and features." *Id.* at 5, ¶ 2.⁵

⁴ The parties dispute the effect of these advertising terms. Dawgs states that the terms were "leveraged . . . in order to drive a price premium and an image of product superiority." *Id.* Crocs disagrees with the implication that the terms "drove a 'price premium' or 'image of product superiority.'" Docket No. 916 at 2, ¶ 1. Dawgs also insists that customers have been misled into believing that Crocs's shoe material is better than competitors', Docket No. 913 at 5–6, ¶ 3, which Crocs disputes. Docket No. 916 at 3, ¶ 3.

⁵ Dawgs states that its false-advertising theory is found in its second amended complaint and counterclaim as well as in its response to Crocs's interrogatories. *Id.* at 6, ¶ 5. This statement is not a disputed fact that could preclude summary judgment, but rather appears to be legal argument that is not permitted in this section. See Practice Standards (Civil cases), Chief Judge Philip A. Brimmer § III.F.3.b.vii. Even if this were a fact, however, Dawgs fails to support it with a specific reference to the material in the record. See *id.* at § III.F.3.b.v ("Each separately numbered and paragraphed fact shall be accompanied by a **specific reference** to material in the record which establishes the fact or at least demonstrates that it is disputed."). Dawgs cites to its entire 112-page second amended complaint and counterclaim and its fourteen-page supplemental interrogatory response. See Docket No. 913 at 6, ¶ 5. The Court's practice standards state that "[g]eneral references to pleadings, depositions, or documents are insufficient if the document is over one page in length." See Practice Standards (Civil cases), Chief Judge Philip A. Brimmer § III.F.3.b.ii; see also D.C.COLO.LCivR 56.1(c).

B. Legal Standard

Summary judgment is warranted under Federal Rule of Civil Procedure 56 when the “movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986). A disputed fact is “material” if, under the relevant substantive law, it is essential to proper disposition of the claim. *Wright v. Abbott Labs., Inc.*, 259 F.3d 1226, 1231-32 (10th Cir. 2001). Only disputes over material facts can create a genuine issue for trial and preclude summary judgment. *Faustin v. City & Cnty. of Denver*, 423 F.3d 1192, 1198 (10th Cir. 2005). An issue is “genuine” if the evidence is such that it might lead a reasonable jury to return a verdict for the nonmoving party. *Allen v. Muskogee*, 119 F.3d 837, 839 (10th Cir. 1997).

Where “the moving party does not bear the ultimate burden of persuasion at trial, it may satisfy its burden at the summary judgment stage by identifying a lack of evidence for the nonmovant on an essential element of the nonmovant’s claim.” *Bausman v. Interstate Brands Corp.*, 252 F.3d 1111, 1115 (10th Cir. 2001) (quotations omitted). “Once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter.” *Concrete Works of Colo., Inc. v. City & Cnty. of Denver*, 36 F.3d 1513, 1518 (10th Cir. 1994). The nonmoving party may not rest solely on the allegations in the pleadings, but instead must designate “specific facts showing that there is a genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quotations

omitted). “To avoid summary judgment, the nonmovant must establish, at a minimum, an inference of the presence of each element essential to the case.” *Bausman*, 252 F.3d at 1115. When reviewing a motion for summary judgment, a court must view the evidence in the light most favorable to the non-moving party. *Id.*

C. Analysis⁶

The Lanham Act provides, in relevant part:

[a]ny person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which –

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

⁶ The Federal Circuit has exclusive original appellate jurisdiction over patent cases pursuant to 28 U.S.C. § 1295(a)(1). See *Larson v. Correct Craft, Inc.*, 569 F.3d 1319, 1323 (Fed. Cir. 2009). In deciding whether to apply its own law or the law of the circuit from where a case arises, the Federal Circuit consults a “courtesy rule” under which it applies the law of the regional circuit on certain procedural matters and non-patent issues. *Viam Corp. v. Iowa Export-Import Trading Co.*, 84 F.3d 424, 428 (Fed. Cir. 1996). However, the Federal Circuit applies “[its] own law to both substantive and procedural issues intimately involved in the substance of enforcement of the patent right.” *Amana Refrigeration, Inc. v. Quadlux, Inc.*, 172 F.3d 852, 856 (Fed. Cir. 1999) (internal quotation marks omitted); see also *Alcohol Monitoring Sys., Inc. v. Actsoft, Inc.*, 682 F. Supp. 2d 1237, 1241 (D. Colo. 2010). As a result, in considering the Lanham Act claims, the Court applies the law of the Tenth Circuit. See *Research Corp. Techs. v. Microsoft Corp.*, 536 F.3d 1247, 1255 (Fed. Cir. 2008) (citations omitted).

15 U.S.C. § 1125(a)(1). Thus, the Lanham Act “creates two distinct bases of liability; false association, § 1125(a)(1)(A), and false advertising, § 1125(a)(1)(B).” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 122 (2014).

To succeed on a false advertising claim, a plaintiff must show: “(1) that defendant made material false or misleading representations of fact in connection with the commercial advertising or promotion of its product; (2) in commerce; (3) that are either likely to cause confusion or mistake as to [] the origin, association or approval of the product with or by another . . . ; and (4) injure the plaintiff.” *Digital Ally, Inc. v. Util. Assocs., Inc.*, 882 F.3d 974, 978 (10th Cir. 2018). False association claims are similar, except that in a false association claim, a plaintiff “alleges the misuse of a trademark, i.e., a symbol or device such as a visual likeness, vocal imitation, or other uniquely distinguishing characteristic, which is likely to confuse consumers as to the plaintiff’s sponsorship or approval of the product.” *See Amazon Inc. v. Cannondale Inc.*, No. 99-cv-00571-EWN-PAC, 2000 WL 1800639, at *7 (D. Colo. July 24, 2000). At issue here is whether Crocs’s advertisements about Croslite were statements of authorship and inventorship, not covered by the Lanham Act’s false advertising provisions, or statements of origin and thus within the Lanham Act’s scope.

Dawgs’s Lanham Act claim against the Individual Defendants is that the Individual Defendants have misled “the public and consumers by claiming that Crocs footwear is made of an exclusive and proprietary closed-cell resin that they call ‘Croslite,’ when, in fact, ‘Croslite’ is merely the common ethyl vinyl acetate used by many footwear companies around the world.” Docket No. 273-1 at 106, ¶ 256. Dawgs

argues that these statements, referring to Croslite as “exclusive,” “proprietary,” or “patented,” are false and misleading, are prohibited by the Lanham Act, and have induced customers into believing that Crocs’s footwear is made of a material “different than any other footwear” and that Crocs “owns the rights to such material.” *Id.*, ¶¶ 257, 259. Similarly, Dawgs’s Lanham Act claim against Crocs is that Crocs has made the same statements and that its false advertising “explicitly and implicitly attempts to, and does, deceive consumers and potential consumers into believing that all other molded footwear, including molded footwear sold by [Dawgs], is made of inferior material compared to Crocs’[s] molded footwear.” Docket No. 487 at 108, ¶ 345.

Crocs seeks summary judgment on Dawgs’s Lanham Act counterclaim against Crocs as well as Dawgs’s Lanham Act claim against the Individual Defendants. See *generally* Docket No. 909. Crocs argues the terms “patented,” “proprietary,” and “exclusive” say “nothing about the *material* itself, but instead refer to *authorship* or *inventorship*,” which “are not within the scope of the false advertising provision of the Lanham Act.” *Id.* at 1–2. Crocs argues that neither § 1125(a)(1)(A) nor § 1125(a)(1)(B) is implicated by its advertising. *Id.*

As to § 1125(a)(1)(A), which concerns false statements regarding the “origin, sponsorship, or approval” of goods, Crocs relies on *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003). In *Dastar*, the producer and several distributors of a television series about General Eisenhower’s military campaign in Europe during World War II, that is now in the public domain, alleged that Dastar violated § 1125(a)(1)(A) when it sold, as its own product and without attribution to the creator, a

lightly edited version of the television series. 539 U.S. at 26–28. The respondent argued that, in marketing and selling the new series as its own without acknowledging the nearly “wholesale reliance” on the earlier series, petitioner made a “false designation of origin, false or misleading description of fact, or false or misleading representation of fact.” *Id.* at 31. The Court held that application of the term “origin” of goods in the Lanham Act is not limitless. *Id.* at 29. “Origin” is “incapable of connoting the person or entity that originated the ideas or communications that ‘goods’ embody or contain.” *Id.* at 31–32. That is, the term “origin of goods” does not refer to the producer of the earlier television series. The Court concluded that “the phrase [origin of goods] refers 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.” *Id.* at 37. The Court determined that, because there was no dispute as to the origin of the tangible goods, i.e., the newer series that was offered into the market by Dastar, there was no Lanham Act violation. Even if Dastar’s representation of itself as the “producer” of its videos “amounted to a representation that it originated the creative work conveyed by the videos, allowing a cause of action under [the Lanham Act] for that representation would create a species of mutant copyright law.” *Id.* at 34 (internal citation and quotation omitted). Crocs argues that because there is no dispute that it is the producer of the tangible item, Crocs’s shoes, there is no § 1125(a)(1)(A) violation under *Dastar*. Docket No. 909 at 6.

The Court finds that there are no genuine issues of material fact as to the § 1125(a)(1)(A) issues because there is no dispute regarding the origin of the tangible

goods, i.e., Crocs shoes, that are offered for sale, and *Dastar* holds that the Lanham Act does not provide a cause of action for claims concerning authorship. See *Dastar*, 539 U.S. at 37. That is, there is no dispute that Crocs produced Croslite and the shoes, just as there was no dispute that Dastar produced the video series. See also *Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d 1300, 1306 (Fed. Cir. 2009) (holding that because Baden had not argued that someone other than Molten produced the allegedly infringing basketballs, and nothing in the record indicated as such, Baden’s claims were not actionable under § 1125(a)(1)(A) because they do not “cause confusion . . . as to the origin” of the basketballs). Dawgs appears to concede this and focuses its argument on § 1125(a)(1)(B). See Docket No. 913 at 10 (arguing that Crocs’s conduct “goes to the heart of the Lanham Act’s prohibition on false advertising regarding the ‘nature, characteristics, or qualities’ of a product” (citing § 1125(a)(1)(B))). Thus, the Court finds that, as held in *Dastar*, § 1125(a)(1)(A) of the Lanham Act does not prohibit the conduct complained of here. See *MDM Grp. Assocs., Inc. v. ResortQuest Int’l, Inc.*, No. 06-cv-01518-PSF-KLM, 2007 WL 2909408, at *6 (D. Colo. Oct. 1, 2007).⁷

As to § 1125(a)(1)(B), which concerns false statements about the “nature, characteristics, qualities, or geographic origin” of goods, Crocs relies on *Baden Sports*. In *Baden Sports*, Baden, a basketball manufacturer, argued that Molten had engaged in false advertising when Molten claimed that its basketballs were “innovative,” “exclusive,”

⁷ Because the Court has found no genuine dispute of material fact as to Dawgs’s false designation of origin claim, any issue about whether the statements caused consumer confusion under § 1125(a)(1)(A) is immaterial. In other words, because there is no dispute about the origin of Crocs’s shoes or Croslite, there can be no confusion on that issue.

and “proprietary” when its “innovative” layer of padding beneath the cover was invented by Baden, not Molten. 556 F.3d at 1303. The district court granted Molten’s motion for summary judgment, finding that “exclusive” and “proprietary” were terms that conveyed that Molten invented and owned the basketball technology, and held that those terms were excluded from Lanham Act liability under *Dastar*. *Id.* However, the court denied summary judgment on Molten’s use of the word “innovative” because, the district court held, that term does not necessarily connote inventorship, but rather could describe the “nature, characteristics, or qualities of the basketballs themselves.” *Id.* (internal citation omitted).

The Federal Circuit reversed, holding that § 1125(a)(1)(B) did not bar the statements because “[n]o physical or functional attributes of the basketballs [were] implied by Molten’s advertisements.” *Id.* at 1307. Rather, the court held that use of the terms “innovative,” “exclusive,” and “proprietary” involves a “false designation of authorship,” but “authorship, like licensing status, is not a nature, characteristic, or quality as those terms are used in [§ 1125(a)(1)(B)].” *Id.* Similarly, the Sixth Circuit in *Kehoe Component Sales, Inc. v. Best Lighting Prods., Inc.*, applied *Dastar* and granted summary judgment, holding that “a misrepresentation about the source of the ideas embodied in a tangible object . . . is not a misrepresentation about the nature, characteristics, or qualities of the object” for the purposes of § 1125(a)(1)(B). 796 F.3d 576, 590 (6th Cir. 2015).

Crocs argues that Dawgs’s claims are about “misrepresentations of inventorship” or the “source of the ideas” (Croslite) “embodied in a tangible object” (Crocs shoes), which are not actionable under the Lanham Act, rather than the origin or nature,

characteristics, or qualities of Crocs's shoes, which are actionable. Docket No. 909 at 5–6 (citing *Kehoe*, 796 F.3d at 590). In characterizing Dawgs's arguments, Crocs cites Dawgs's Lanham Act claim and counterclaim. See, e.g., Docket No. 487 at 13, ¶ 7 (Crocs's "promotional materials touted Croslite was unique enough to be 'patented,' but in truth Crocs never sought a patent. Nor was Croslite 'proprietary' or 'exclusive' – as Crocs has claimed – when Crocs just copied it."); *id.* at 25, ¶ 46 ("After copying [the] formula Crocs named its knock-off material 'Croslite' and outrageously began touting that Croslite was 'patented,' 'exclusive' and/or 'proprietary,' when it was none of those things."); Docket No. 273-1 at 105–06, ¶ 256 (Crocs and the Individual Defendants "have been misleading the public and consumers by claiming that their footwear is made of an exclusive and proprietary closed-cell resin that they call 'Croslite' when, in fact, 'Croslite' is merely the common ethyl vinyl acetate used by many footwear companies around the world.").

Dawgs argues that Crocs has misunderstood or misconstrued Dawgs's false advertising arguments. Docket No. 913 at 1. Dawgs asserts that Crocs has falsely advertised Croslite as patented, proprietary, and exclusive in order to create a false impression regarding specific qualities and characteristics of its shoe material, including that its shoes are superior to competitors', that they are soft, comfortable, lightweight, odor-resistant, and non-marking, which goes to the nature, characteristics, or qualities of the products. *Id.* at 1–2. Dawgs asserts that this has influenced customers and their purchasing decisions, thus meeting the elements of § 1125(a)(1)(B) liability. *Id.* at 2. Dawgs also argues that Crocs advertised that, "as a result of the material being patented, proprietary, and/or exclusive, its shoe material has superior qualities and

features, and implied [that] other competitors . . . used inferior materials,” which goes to the heart of the Lanham Act’s “prohibition against false advertising regarding the ‘nature, characteristics, or qualities’ of a product.” *Id.* at 10 (quoting § 1125(a)(1)(B)). But while this may be Dawgs’s argument today, Dawgs did not make these arguments in its claim or counterclaim. In its claim and counterclaim, Dawgs argued that Croslite is merely a variation of ethyl vinyl acetate used by many footwear companies around the world and that, by Crocs claiming to have invented Croslite, Crocs has implied that Dawgs’s footwear is inferior. See Docket No. 487 at 107–08, ¶¶ 341, 345 (claim); Docket No. 273-1 at 105–07, ¶¶ 256, 260 (counterclaim). Dawgs did not mention anything about Croslite being soft, comfortable, lightweight, odor-resistant, or non-marking.

Moreover, Dawgs argues that none of the cases that Crocs relies on is relevant to Dawgs’s false advertising claims because the cases only hold that “false designations of authorship, and misrepresentations about the intellectual origin of a product, are not, by themselves, within the literal scope of the Lanham Act.” Docket No. 913 at 3. Dawgs states that it “has alleged that Crocs used false claims that its shoe material was patented, proprietary, and/or exclusive, to differentiate the qualities, properties, and characteristics of the material in the eyes of the consumer.” *Id.* at 7.

More specifically, Dawgs seeks to distinguish *Dastar* because, Dawgs argues, in *Dastar*, the issue was whether the company had made a false designation of origin likely to cause confusion about the origin of the videotapes, while here the issue is whether Crocs’s use of terms like “patented” misrepresented the nature, characteristics,

or qualities of the shoes under § 1125(a)(1)(B). *Id.* at 8 (citing *Dastar*, 539 U.S. at 38). Similarly, Dawgs argues that *Baden Sports* was focused “solely on advertising directed to the creative origin of the falsely advertised product,” which the court held was “not a nature, characteristic, or quality” under § 1125(a)(1)(B). *Id.* (citing *Baden Sports*, 556 F.3d at 1307). Additionally, Dawgs seeks to distinguish *Baden Sports* because the Federal Circuit applied the law of the Ninth Circuit regarding the Lanham Act claim, which, Dawgs argues, makes the case less relevant. *Id.* (citing *Baden Sports*, 556 F.3d at 1304).

The parties dispute whether consumers have been misled into believing that Crocs’s shoe material, Croslite, is better than competitors’ material because the consumers believe that Crocs shoes are made from superior, patented, proprietary material that no other consumer can use. Docket No. 913 at 5, ¶ 3. The parties also dispute whether this disagreement is material to the Lanham Act claims. See Docket No. 916 at 3, ¶ 3 (“Nor is customer confusion material under *Dastar*.”)⁸

While *Baden Sports* is not binding on the Court because the Federal Circuit applied the law of the Ninth Circuit, the Court finds persuasive its reasoning that claims of authorship do not concern the nature, characteristics, or qualities of a product as those terms are used in § 1125(a)(1)(B). See *Baden Sports*, 556 F.3d at 1307. Moreover, though neither the Supreme Court in *Dastar* nor the Federal Circuit in *Baden*

⁸ Crocs also argues that Dawgs’s purported evidence of consumer confusion, unauthenticated screenshots from online reviews of Crocs shoes, are inadmissible double hearsay. *Id.* The Court agrees that the screenshots, as presented by Dawgs, are not admissible evidence and, as such, cannot create a genuine issue of material fact to overcome summary judgment. See Fed. R. Civ. P. 56(c)(2).

Sports considered the use of the word “patented,” the Court in *Dastar* held that the Lanham Act must be limited to its text and “common-law foundations” in order to avoid creating a “cause of action for, in effect, plagiarism,” see 539 U.S. at 37, since the Lanham Act is not to be read as co-extensive with patent or copyright laws. See *id.* at 33–34. Further, the court in *Baden Sports* considered terms that the court likened to claims of inventorship. 556 F.3d at 1303. Falsely claiming to have “patented” something is akin to claiming to have “invented” it, see *id.* at 1307, and to plagiarizing or reverse passing off,⁹ which *Dastar* held not to be covered by the Lanham Act’s false advertising prohibition.

As in *Baden Sports*, Dawgs is attempting to “avoid the holding in *Dastar* by framing a claim based on false attribution of authorship” – that Croslite was not patented, proprietary, or exclusive, just as Baden claimed that Molten’s basketballs were not innovative – “as a misrepresentation of the nature, characteristics, and qualities of a good.” See 556 F.3d at 1307. But, as in *Baden Sports*, Dawgs has alleged nothing more than a false designation of authorship, i.e., that Crocs falsely claimed it created Croslite, when, in fact, Croslite is “merely the common ethyl vinyl acetate used by many footwear companies around the world.” Docket No. 273-1 at 106, ¶ 256. The Court also finds persuasive the reasoning in *Kehoe*, where the Sixth Circuit applied *Dastar* to grant summary judgment, holding that “a misrepresentation

⁹ “Passing off (or palming off, as it is sometimes called) occurs when a producer misrepresents his own goods or services as someone else’s.” *Dastar*, 539 U.S. at 27 n.1 (citing *O. & W. Thum Co. v. Dickinson*, 245 F. 609, 621 (6th Cir. 1917)). “‘Reverse passing off,’ as its name implies, is the opposite: The producer misrepresents someone else’s goods or services as his own.” *Id.* (citing *Williams v. Curtiss-Wright Corp.*, 691 F.2d 168, 172 (3rd Cir. 1982)).

about the source of the ideas embodied in a tangible object . . . is not a misrepresentation about the nature, characteristics, or qualities of the object.” 796 F.3d at 590. Here, even assuming that Crocs misrepresented the source of the ethyl vinyl acetate as a proprietary and exclusive foam, Croslite, *Kehoe* explains that is not enough for a Lanham Act false advertising claim under § 1125(a)(1)(B).

Dawgs argues that Crocs’s advertising of its shoes as superior is indistinguishable from Crocs’s advertising that Croslite is “exclusive” or “proprietary.” Neither statement concerns the nature, characteristics, or qualities of the product for the reasons discussed above. Moreover, a claim of superiority is puffery, which is not actionable under the Lanham Act. See *Intermountain Stroke Ctr., Inc. v. Intermountain Health Care, Inc.*, 638 F. App’x 778, 788–89 (10th Cir. 2016) (unpublished) (affirming dismissal of Lanham Act challenge to hospital’s claim that it had “best” or “high[est] quality” care). Therefore, the Court finds Crocs is entitled to summary judgment on Dawgs’s Lanham Act claim and counterclaim.¹⁰

II. DAWGS’S MOTION FOR LEAVE TO SUPPLEMENT SUMMARY JUDGMENT RESPONSE

¹⁰ Because the Court has found no genuine dispute of material fact as to Dawgs’s false designation of origin, the Court need not consider whether Crocs’s statements caused consumer confusion. Moreover, because the Court has found that Dawgs has failed to establish a genuine issue of material fact that Crocs made a “false or misleading representation[] . . . in connection with the commercial advertising or promotion of its product,” the Court need not consider the issue of consumer confusion. See *Digital Ally*, 882 F.3d at 978 (listing elements of a false advertising claim under § 1125(a)(1)(A): “(1) that defendant made material false or misleading representations of fact in connection with the commercial advertising or promotion of its product; (2) in commerce; (3) that are either likely to cause confusion or mistake as to [] the origin, association or approval of the product with or by another . . . ; and (4) injure the plaintiff”).

Although Dawgs did not file a motion under Federal Rule of Civil Procedure 56(d) to conduct discovery before responding to the summary judgment motion, it now claims that its declaration in response to Crocs's motion invoked Rule 56(d). Docket No. 1002 at 8. Rule 56(d) permits the Court to, among other things, deny a premature summary judgment motion, delay ruling on such a motion, or allow additional time to take discovery or obtain information. To succeed on a Rule 56(d) motion, "the movant must submit an affidavit (1) identifying the probable facts that are unavailable, (2) stating why these facts cannot be presented without additional time, (3) identifying past steps to obtain evidence of these facts, and (4) stating how additional time would allow for rebuttal of the adversary's argument for summary judgment." See *Cerveney v. Aventis, Inc.*, 855 F.3d 1091, 1110 (10th Cir. 2017) (citation omitted); *Comm. for First Amendment v. Campbell*, 962 F.2d 1517, 1522 (10th Cir. 1992). "Summary judgment should be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Id.* (alterations omitted) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986)). However, "relief under Rule 56(d) is not automatic," *id.* (citation omitted), and is an alternative relief that is waived where a party responds to a motion for summary judgment. *Pasternak v. Lear Petroleum Expl., Inc.*, 790 F.2d 828, 833 (10th Cir. 1986) ("The protection afforded by [Rule 56(d)] is an alternative to a response in opposition to summary judgment under [56(c)] and is designed to safeguard against a premature or improvident grant of summary judgment."); *Villa v. Bd. of Cnty. Comm'rs of Cnty. of Arapahoe*, 931 F.2d 900 (Table), 1991 WL 70714, at *4 (10th Cir. 1991) ("[Rule 56(d)] may be used only as an alternative

to the filing of a brief and answer under [Rule 56(c)]. And when, as here, a party has responded to a summary judgment motion under [Rule 56(c)], that party waives any option it may have had to proceed under [Rule 56(d)].”).

Because Dawgs responded to Crocs’s motion for summary judgment, on December 16, 2020, it waived its ability to retroactively seek relief under Rule 56(d) six months later, on June 30, 2021. See *Pasternak*, 790 F.2d at 833; *Villa*, 1991 WL 70714, at *4. Nevertheless, even if Dawgs had not waived its Rule 56(d) argument, the Court would find that Dawgs failed to satisfy the requirements under *Cerveney*. In its motion for leave, Dawgs relies on three paragraphs from a declaration provided with its response to Crocs’s summary judgment motion. See Docket No. 1002 (citing Docket No. 913-1 at 6, ¶¶ 23–25). The declaration states that there are likely numerous instances of Croslite, the foam material that Crocs uses to make its shoes, being falsely promoted as proprietary or patented and having superior qualities, that discovery was ongoing, that Dawgs’s counsel and Crocs’s counsel had not been able to meet and confer before Dawgs’s deadline to respond to Crocs’s summary judgment motion, that depositions were being scheduled, and that Dawgs expected to develop additional evidence. Docket No. 913-1 at 6, ¶¶ 23–25. This is not sufficient to raise a Rule 56(d) argument. Even if the affidavit were sufficient to meet first three requirements in *Cerveney*, the affidavit does not show how the information would be sufficient to create a genuine issue of material fact to defeat summary judgment. See *Cerveney*, 855 F.3d at 1110; *Campbell*, 962 F.2d at 1522. The Court will therefore deny Dawgs’s motion for leave to file a supplemental response to Crocs’s summary judgment motion.

III. DAWGS'S MOTIONS TO DISMISS

The Court finally considers Dawgs's motions to dismiss four of the Individual Defendants – Jeffrey Lasher, Erik Rebich, Daniel Hart, and Sara Hoverstock – pursuant to Rule 41(a)(2). See Docket Nos. 997, 1019. Rule 41(a)(2) provides that a case may be “dismissed at the plaintiff’s request only by court order, on terms that the court considers proper.” Rule 41(a)(2) is designed to prevent voluntary dismissals that adversely affect the opposing party. *Brown v. Baeke*, 413 F.3d 1121, 1123 (10th Cir. 2005). Dawgs seeks dismissal of its counterclaims against Lasher, Rebich, Hart, and Hoverstock without prejudice or conditions. Docket No. 997 at 2; Docket No. 1019 at 2. However, Dawgs states that it would agree to dismiss the counterclaims with prejudice if the Court granted the Individual Defendants’ summary judgment motion. Docket No. 997 at 3; Docket No. 1019 at 3. In response, Lasher, Rebich, Hart, and Hoverstock argue that the dismissal should be with prejudice and that Dawgs be ordered to pay the costs incurred by them or by Crocs. Docket No. 1007 at 5; Docket No. 1035 at 6. However, they ask the Court to defer ruling on the issue of attorney’s fees so that issue may be addressed by separate motion. Docket No. 1007 at 5; Docket No. 1035 at 6. Because the Court will grant the summary judgment motion for the reasons discussed in Part I and will dismiss with prejudice the Lanham Act claims and counterclaims, which are the only remaining claims against Lasher, Rebich, Hart, and Hoverstock, the issue of prejudice is resolved.

The questions of costs and attorney’s fees remain. “The issue of costs is somewhat different and somewhat more complicated than the granting of a motion to

dismiss with prejudice or without and the awarding of attorney's fees." *Williams v. Proud*, No. 09-cv-00157-PAB-MJW, 2009 WL 10685274, at *2 (D. Colo. Oct. 29, 2009). This is because, rather than relying solely on the "terms and conditions" clause of Rule 41(a)(2), a defendant typically is entitled to its costs as "a prevailing party under Rule 54 when, in circumstances not involving settlement, the plaintiff dismisses its case against the defendant, whether the dismissal is with or without prejudice." *Cantrell v. Int'l Bhd. of Elec. Workers*, 69 F.3d 456, 456 (10th Cir. 1995). This rule also applies even if the party did not prevail on every issue. *Id.* at 458 (citing *Roberts v. Madigan*, 921 F.2d 1047, 1058 (10th Cir. 1990); *Howell Petroleum Corp. v. Samson Resources Co.*, 903 F.2d 778, 783 (10th Cir.1990). Here, Dawgs has moved to dismiss its case against the individual defendants, and there is no indication that the dismissal involves a settlement. Lasher, Rebich, Hart, and Hoverstock are, therefore, prevailing parties.

Indeed, Rule 54(d)(1) creates "a presumption that the district court will award costs to the prevailing party." *Id.* at 458–59. Therefore, only where a district court can provide a "valid reason" for not awarding costs to a prevailing party will such a decision be upheld. *Id.* at 459. According to the Tenth Circuit, valid reasons for which a district court may deny costs to a prevailing party include: where a party was only partially successful; where prevailing parties were obstructive and acted in bad faith during the course of the litigation; where the damages awarded were nominal or recovery is otherwise insignificant; where the non-prevailing party was indigent; where the costs are unreasonably high or unnecessary; or where the issues are close and difficult. *Id.*

Furthermore, it is the non-prevailing party's burden to establish that a valid

reason exists for a denial of costs. See *Rodriguez v. Whiting Farms, Inc.*, 360 F.3d 1180, 1190 (10th Cir. 2004). In deciding whether the burden has been met, a court must keep in mind that “the denial of costs is in the nature of a severe penalty, and there must be some apparent reason to penalize the prevailing party if costs are to be denied.” *Id.* at 1190 (internal quotation marks omitted). Dawgs, therefore, may avoid the payment of costs only if it can establish an exception to this general rule. See *id.* As to Lasher, Rebich, and Hart, Dawgs relies on the exception mentioned in *Cantrell* that it is not an abuse of discretion for a district court to decline to award costs to a party that was only partially successful or only had nominal damages. Docket No. 1016 at 4 (citing *Cantrell*, 69 F.3d at 459). Dawgs insists that Lasher, Rebich, and Hart “did not actually *do* anything” and so should not be awarded costs. Docket No. 1016 at 4.¹¹ The Court disagrees. Dawgs has not overcome the presumption in Rule 54(d) for the Court to award costs, and Lasher, Rebich, Hart, and Hoverstock should not face the “severe penalty” of having costs withheld. See *Rodriguez*, 360 F.3d at 1190. Lasher, Rebich, Hart, and Hoverstock have been defendants in this matter for many years, see, e.g., Docket No. 487, and, now that Dawgs has made the strategic decision to dismiss them from the lawsuit rather than risk losing at trial, they are entitled to the costs that they have incurred. The Court will therefore award costs to Lasher, Rebich, Hart, and Hoverstock.

As to the issue of attorney’s fees, Lasher, Rebich, Hart, and Hoverstock request

¹¹ Dawgs does not address the issues of costs with respect to Hoverstock except to note that she “barely participated as a defendant” and to ask that each side bear their own costs. See Docket No. 1060 at 1, 4.

that the Court defer ruling on this issue so that they may file a separate motion or bring an action for malicious prosecution. Docket No. 1007 at 5; Docket No. 1035 at 6. A request for attorney's fees must be made by separate motion both under the Local Rules and Federal Rule of Civil Procedure 54(d)(2)(A). See D.C.COLO.LCivR 7.1(d) ("A motion shall not be included in a response or reply to the original motion. A motion shall be made in a separate paper."); see *also* Fed. R. Civ. P. 54(d)(2)(A) ("A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages."). The Court therefore grants their request to defer ruling on attorney's fees until after they have filed a separate motion.

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED that Crocs and the Individual Defendants' Motion for Summary Judgment of Lanham Act Claim [Docket No. 909] is **GRANTED**. It is further

ORDERED that Dawgs's seventh claim and fifteenth counterclaim are **DISMISSED with prejudice**. It is further

ORDERED that Counterclaim Plaintiffs' Motion to Dismiss [Docket No. 997] is **GRANTED in part** and **DENIED in part**. It is further

ORDERED that all claims against defendants Jeffrey Lasher, Erik Rebich, and Daniel Hart are **DISMISSED with prejudice**. It is further

ORDERED that Counterclaim Plaintiffs' Motion to Dismiss Defendant Sara Hoverstock [Docket No. 1019] is **GRANTED in part** and **DENIED in part**. It is further

ORDERED that all claims against defendant Sara Hoverstock are **DISMISSED with prejudice**. It is further


ORDERED that Jeffrey Lasher, Erik Rebich, Daniel Hart, and Sara Hoverstock are awarded their costs, to be taxed by the Clerk of Court, pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1. It is further

ORDERED that Counterclaim Plaintiffs' Unopposed Motion for Leave to File Amended Reply in Support of its Motion to Dismiss [Docket No. 1018] is **GRANTED**.¹² It is further

ORDERED that Dawgs's Motion for Leave to File Supplemental Opposition to Crocs, Inc.'s Motion for Summary Judgment in View of New Survey Evidence from Both Parties [Docket No. 1002] is **DENIED**.

DATED September 14, 2021.

BY THE COURT:



PHILIP A. BRIMMER
Chief United States District Judge

¹² The Court considered Dawgs's amended reply in ruling on its motion to dismiss.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

CROCS, INC.,

Plaintiff,

v.

DOUBLE DIAMOND DISTRIBUTION, LTD., and
U.S.A. DAWGS, INC.,

Defendants.

JUDGMENT PURSUANT TO FED. R. CIV. P. 68

Pursuant to the offers of judgment served by defendants on plaintiff on June 26, 2022 and the notices of acceptance of the offers of judgment filed on July 9, 2022, and in accordance with Federal Rule of Civil Procedure 68, it is

ORDERED that judgment shall enter in favor of plaintiff Crocs, Inc. and against defendant Double Diamond Distribution, Ltd. in the amount of \$55,000.00, inclusive of all interest, costs, and attorneys' fees otherwise recoverable and in full and complete satisfaction of all of plaintiff's claims against Double Diamond Distribution, Ltd. in this action. It is further

ORDERED that judgment shall enter in favor of plaintiff Crocs, Inc. and against defendant U.S.A. Dawgs, Inc. in the amount of \$6,000,000.00, inclusive of all interest, costs, and attorneys' fees otherwise recoverable and in full and complete satisfaction of all of plaintiff's claims against U.S.A. Dawgs, Inc. in this action. It is further

ORDERED that this case is closed.

DATED July 12, 2022.

FOR THE COURT:

Jeffrey P. Colwell, Clerk

By s/ S. Grimm
Deputy Clerk

CERTIFICATE OF SERVICE

I certify that on March 1, 2023, I electronically filed the Appellants' Opening Brief for U.S.A. Dawgs, Inc., Double Diamond Distribution, Ltd., and Mojave Desert Holdings, LLC with the Clerk of the Federal Circuit using the CM/ECF System, thereby serving it on all counsel of record via the CM/ECF system.

Dated: March 1, 2023

/s/ Matthew G. Berkowitz

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