

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In the Matter of

CERTAIN FOAM FOOTWEAR

Investigation No. 337-TA-567

ORDER

The Commission instituted this investigation on May 11, 2006, based on a complaint, as amended, filed by Crocs, Inc. (“Crocs”) of Niwot, Colorado. 71 *Fed. Reg.* 27514 (2006). The amended complaint alleges violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain foam footwear, by reason of infringement of claims 1-2 of U.S. Patent No. 6,993,858 (“the ‘858 patent”); U.S. Patent No. D517,789 (“the ‘789 patent”); and the Crocs trade dress (the image and overall appearance of Crocs-brand footwear). The complaint further alleged that an industry in the United States exists as required by subsection (a)(2) of section 337. The complaint requested that the Commission issue a permanent general exclusion order and permanent cease and desist orders. The complaint, as amended, identified several respondents, and a number of them have been terminated from the investigation and appellate litigation by settlement, consent order, or Commission non-infringement determination. The remaining respondents include: (1) Double Diamond Distribution Ltd. of Saskatoon, Saskatchewan; (2) Effervescent Inc. of Fitchburg, Massachusetts; and (3) Holey Soles Holding Ltd. of Vancouver, British Columbia.

On April 11, 2008, the presiding administrative law judge (“ALJ”) issued his final initial determination (“ID”) finding no violation of section 337 by the remaining respondents by reason of invalidity of the ‘858 patent and non-infringement/non-satisfaction of the technical prong of

the domestic industry requirement concerning the '789 patent. Although the issue was raised, the ALJ made no findings regarding the enforceability of the '858 and '789 patents. On July 25, 2008, after review, the Commission affirmed the final ID with certain modifications and clarifications, and terminated the investigation with a finding of no violation of section 337. 73 *Fed. Reg.* 45073-74 (Aug. 1, 2008). The Commission took no position regarding the issue of enforceability of the '858 and '789 patents. *See* Final ID at 77, 118; 19 U.S.C. §1337(a)(1)(B)(i); *Beloit Corp. v. Valmet Oy*, 742 F.2d 1421, 1423 (Fed. Cir. 1984).

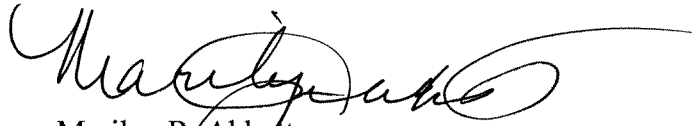
Crocs appealed the Commission's final determination to the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit"). On February 24, 2010, the Federal Circuit issued its judgment overturning the Commission's findings regarding invalidity of the '858 patent, non-infringement/non-satisfaction of the technical prong of the domestic industry requirement concerning the '789 patent, and remanding the investigation for a determination of infringement and any appropriate remedies. *Crocs, Inc. v. United States Int'l Trade Comm'n*, 598 F.3d 1294 (Fed. Cir. 2010).

Upon consideration of this matter, it is hereby ORDERED that:

(1) The investigation is remanded to the chief administrative law judge, Judge Paul J. Luckern, for assignment to a presiding ALJ and proceedings consistent with the February 24, 2010 judgment of the U.S. Court of Appeals for the Federal Circuit in *Crocs, Inc. v. United States Int'l Trade Comm'n*, 598 F.3d 1294 (Fed. Cir. 2010), including a determination regarding the outstanding issue of enforceability of the '858 and '789 patents and issuance of a final initial determination. The final initial determination will be processed in accordance with Commission rules 210.42(a) and 210.43-.46. The assigned ALJ may otherwise conduct the remand proceedings as he deems appropriate, including reopening the record.

(2) The Secretary to the Commission shall serve a copy of this Order upon each party to the investigation and upon the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and the U.S. Bureau of Customs and Border Protection.

By order of the Commission.

A handwritten signature in black ink, appearing to read "Marilyn R. Abbott", with a long, sweeping horizontal flourish extending to the right.

Marilyn R. Abbott
Secretary to the Commission

Issued: July 6, 2010

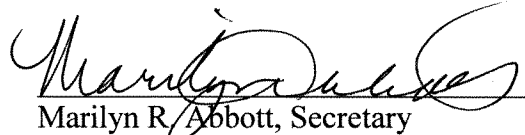
CERTAIN FOAM FOOTWEAR

**337-TA-567
(Remand)**

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **ORDER** has been served by hand upon the Commission Investigative Attorney, Clint Gerdine, Esq., and the following parties as indicated, on

JUL 07 2010


Marilyn R. Abbott, Secretary
U.S. International Trade Commission
500 E Street, SW
Washington, DC 20436

On Behalf of Complainant Crocs, Inc.:

James C. Otteson, Esq.
WILSON SONSINI GOODRICH & ROSATI
650 Page Mill Road
Palo Alto, California 94304

Via Hand Delivery
 Via Overnight Mail
 Via First Class Mail
 Other: _____

On Behalf of Respondents Effervescent, Inc. and Holey Soles Holding, Ltd.:

Smith R. Brittingham, IV, Esq.
**FINNEGAN, HENDERSON, FARABOW, GARRETT
& DUNNER, LLP**
901 New York Ave., NW
Washington, DC 20001

Via Hand Delivery
 Via Overnight Mail
 Via First Class Mail
 Other: _____

On Behalf of Respondent Double Diamond Distribution:

Carrie A. Shufflebarger, Esq.
GREENBAUM DOLL & MCDONALD
2800 Chemed Center
255 East Fifth Street
Cincinnati, OH 45202

Via Hand Delivery
 Via Overnight Mail
 Via First Class Mail
 Other: _____

GOVERNMENT AGENCIES:

Edward T. Hand, Chief
Foreign Commerce Section
Antitrust Division
U.S. Department of Justice
450 5th Street NW – Room 11000
Washington, DC 20530
P-202-514-2464

- Via Hand Delivery
- Via Overnight Mail
- Via First Class Mail
- Other: _____

U.S. Bureau of Customs and Border Protection
Intellectual Property Rights Branch
Mint Annex Building
799 9th Street, NW -7th floor
Washington, DC 20229-1177
202-325-0100

- Via Hand Delivery
- Via Overnight Mail
- Via First Class Mail
- Other: _____

Elizabeth Kraus, Deputy Director
International Antitrust, Office of
International Affairs
Federal Trade Commission
600 Pennsylvania Avenue, Room 498
Washington, DC 20580
P-202-326-2649

- Via Hand Delivery
- Via Overnight Mail
- Via First Class Mail
- Other: _____

Richard Lambert, Esq.
Office of Technology Development Services
Dept. of Health & Human Services
National Institutes of Health
6610 Rockledge Drive - Room 2800
MSC 6606
Bethesda, MD 20892
P-301-496-2644

- Via Hand Delivery
- Via Overnight Mail
- Via First Class Mail
- Other: _____