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No. 2008-1596

**United States Court of Appeals
FOR THE FEDERAL CIRCUIT**

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

APR 08 2009

JAN HUBBALS
CLERK

CROCS, INC.,

Appellant,

v.

INTERNATIONAL TRADE COMMISSION,

Appellee,

and

GEN-X SPORTS, INC.,

Intervenor,

and

DOUBLE DIAMOND DISTRIBUTION, LTD.

Intervenor,

and

**COLLECTIVE LICENSING INTERNATIONAL, LLC, HOLEY
SOLES HOLDINGS, LTD. and EFFERVESCENT, INC.,**

Intervenors.

On appeal from the United States International Trade
Commission in
Investigation No. 337-TA-567

CORRECTED BRIEF OF INTERVENOR GEN-X SPORTS, INC.

(NONCONFIDENTIAL)

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STATEMENT OF RELATED CASES

Gen-X agrees with the Statement of Related Cases provided by Crocs. No other appeal in or from the International Trade Commission has been before this or any other appellate court, and the only case that might be affected by the decision in the present appeal is *Crocs Inc, v. Acme, Inc.* , No. 06-cv-0605 (D. Col.)

I. ISSUES PRESENTED FOR REVIEW

Gen-X will address only Issues 1-2. Issue 4 is moot as to Gen-X, as Crocs has not appealed the finding that Gen-X did not infringe the '858 utility patent. Gen-X defers to the Commission and other Intervenors to address Issue 3.

II. STATEMENT OF THE CASE

Gen-X disagrees with the footnote in Appellant's Statement of Case that the ALJ correctly found the point of novelty test was satisfied in all of the accused shoes. Whether this finding was correct or not is moot, however, in view of the ensuing *Egyptian Goddess* opinion.

Left out of Appellant's statement is that the ALJ announced his claim construction in Order No. 32 as part of the Partial Summary Determination in which the ALJ found that the Respondents did not infringe the '789 patent. The Commission vacated the Summary Determination and remanded to the ALJ for further findings of fact. (A00172-174.) The Commission did not, however, disturb the ALJ's claim construction. (*Id.*) Following remand from the Commission, the ALJ stated he would not change the claim construction because he had dismissed a party based

upon that construction, and Crocs did not object to the dismissal. (A00108-109.)

III. STATEMENT OF FACTS

Gen-X only imports and sells a Komodo shoe with a washer between the strap and base. It stopped importing and selling the Komodo without a washer prior to the issue date of the '858 patent.

The United States Patent and Trademark Office granted a design patent, D529,263, to Michael Wolf, an employee of Gen-X's trading agent. That patent claims the ornamental design for the accused Gen-X Komodo shoe. (RX-159; RX-158 at Q.9 and Q.15). The application for the patent disclosed the Crocs Beach Shoe as prior art. (A21283; Tr. 1504:25-1505:22.)

IV. SUMMARY OF ARGUMENT

The Commission's claim construction of the '789 design patent is not grounds for reversal. Crocs' contention that the Commission committed reversible error by construing the '789 design misconstrues this Court's *en banc* opinion in *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665 (Fed. Cir. 2008). *Egyptian Goddess* did not prohibit a verbal construction of the design. The opinion recognized that a trial court should construe design claims, citing

Elmer v. ICC Fabricating, Inc., 67 F.3d 1571, 1577 (Fed. Cir. 1995).
Egyptian Goddess, Inc., 543 F.3d at 679-680. However, *Egyptian Goddess* made clear that the trial court has broad discretion over the manner and the detail by which it verbally describes the design.
Id.

By committing the manner and detail of claim construction to the discretion of the trial court, *Egyptian Goddess* changed the standard of review for claim construction in a design infringement analysis from the *de novo* standard applied to utility patents to the “abuse of discretion” standard. In the context of this case, an error in claim construction is not an abuse of discretion under 5 U.S.C. §760(2)(A), or reversible error, absent a showing of prejudice.
Egyptian Goddess, Inc., 543 F.3d at 680.

Crocs was not prejudiced by the claim construction. Much of the claim construction was adopted from an even more detailed proposal by Crocs. Crocs had argued for a sweeping construction that would capture every one of the multitude of foam shoes from the Respondents and third parties, regardless of visual differences distinguishing these shoes from each other and from the patented design.

Crocs' proposed construction did not, however, identify differences over the relevant prior art. Although adopting much of Crocs' proposed construction, the ALJ used the claim construction to describe the differences between the claimed design and the relevant prior art. Specifically, the clog portion of the '789 design has trapezoid-shaped holes evenly spaced around the sidewalls, including its front aspect. The prior art Aqua Clog is essentially identical except for having a pronounced gap between the trapezoid-shaped holes in the region of the big toe. Similarly, the '789 patent's strap differs from the strap of the prior art Aguerre '249 patent by having a uniform width, extending to the rear of the sole, and having a wrench-like tab at each end to support the connector rivets.

Croc's argument that the '789 patent does not claim these features fails under the substantial evidence test. Figure 4 of the '789 patent is substantial evidence to support the finding that the patent claims a shoe having trapezoid-shaped holes evenly spaced around the sidewalls, including its front aspect. Figures 2 and 3 are substantial evidence to support the finding that the '789 patent claims shoe design with a strap that has a uniform width, extends

to the rear of the sole, and has wrench-like tab at each end to support the connector rivets.

Rather than causing undue prejudice to Crocs, identifying differences between the patented design and the prior art through claim construction assisted the Commission to conduct the ordinary observer test just as *Egyptian Goddess* now compels - through the perspective of an ordinary observer who, “comparing the claimed and accused designs in light of the prior art, will attach importance to differences between the claimed design and the prior art depending on the overall effect of those differences on the design”. *Egyptian Goddess, Inc.*, 543 F.3d at 677.

Crocs’ contention that the claim construction should be reversed because it “improperly focused on individual aspects of the claimed design” (meaning those differences over the prior art) is therefore wrong. Under *Egyptian Goddess*, it is not reversible error for a claim construction to be detailed, and claim construction can be effectively used to identify differences over the prior art.

The Commission’s comparison of the ‘789 design to the Respondents’ shoes with a focus on the prior art is particularly proper for cases in which the claimed design is a minor change over

the prior art. The fact pattern here closely follows that of *Smith v. Whitman Saddle Co.*, 148 U.S. 674 (1893), cited extensively in *Egyptian Goddess* as a proper application of the ordinary observer test where the design consists of combining two pieces of prior art. *Egyptian Goddess, Inc.*, 543 F.3d at 672-674.

Substantial evidence supports the finding that the ordinary observer would notice the difference between a shoe with trapezoid-shaped vents spaced evenly around the front aspect and a shoe having a pronounced gap between the trapezoid-shaped holes in the region of the big toe. Crocs' expert, Mr. Whatley, admitted under cross-examination that the ordinary purchaser would try on the shoes and examine them for fit and comfort and appearance. He admitted that she would look at the shoes from different angles, including straight down at her toes and from the sides in a mirror. This evidence is sufficient for a reasonable person to accept as adequate to support the inference that she, being already familiar with the prior Aqua Clog and Aguerre shoe, would notice these differences and therefore not be confused into buying one shoe while believing it to be the other.

The ordinary observer test is not whether an accused product more resembles the patented design than it does the prior art. That test was proposed by amici in *Egyptian Goddess* and was not adopted. *Egyptian Goddess, Inc.*, 543 F.3d at 672. Depending upon the particular facts of a case, an ordinary observer familiar with the prior art may notice differences even when the accused product more resembles the patented design than it does the prior art.

The expert testimony Crocs cites as explaining the “dominant” design features was introduced as evidence regarding the point of novelty. That issue is moot in view of *Egyptian Goddess*.¹ The expert did not address how an ordinary observer familiar with the Aqua Clog and Aguerre shoe would regard the differences between the prior art and the claimed design. Crocs’ argument that the Commission should have given more credit to Croc’s evidence fails under the substantial evidence standard. The determination of no infringement is supported by substantial evidence.

¹ The Commission’s point of novelty determination is harmless error because the Commission’s finding of no infringement is based solely on the ordinary observer test.

V. ARGUMENT

A. Standard of Review

This Court can not review the claim construction made by the Commission under a *de novo* standard because no particular form of claim construction is required in a design infringement determination. *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 679-80 (Fed. Cir. 2008). Trial courts may conduct claim construction in design patent cases, but there is no particular form that the claim construction must take. The decision to make a verbal description of the claimed design, and the level of detail used in making that description, are matters entirely within the discretion of the trial court. *Id.* Therefore, the Commission’s claim construction of the ‘789 design patent must be reviewed under the statutory standard of “abuse of discretion” under 5 USC §760(2)(A), not the *de novo* review that is applied to claim construction of utility patents.

Under the abuse of discretion standard of review, an error in claim construction of a design patent is not reversible error absent a showing of prejudice. *Egyptian Goddess, Inc.*, 543 F.3d at 680.

The substantial evidence standard does not allow an appellate court to conduct a *de novo* investigation of the evidence and reach an independent conclusion; rather, an appellate court's review is limited to deciding whether there is sufficient evidence in the record considered as a whole to support an agency's findings. The mere fact that a reasonable person might reach some other conclusion is insufficient to overturn an agency's conclusion. *Akzo N.V. v. U.S. Int'l Trade Comm'n*, 808 F.2d 1471, 1479 (Fed. Cir. 1986).

In determining infringement of a design patent, the comparison of the accused product to the claimed design under the ordinary observer test is a question of fact. *OddzOn Prods. Inc. v. Just Toys, Inc.*, 122 F.3d 1396, 1405 (Fed. Cir. 1997). Thus, this Court is bound to accept the Commission's factual finding of no infringement if it is supported by substantial evidence.

B. The Commission's Claim Construction of the '789 Design Patent is Not Grounds for Reversal.

- 1. Following *Egyptian Goddess*, the trial court has discretion as to how much detail to use in claim construction.**

Cros' contention that the Commission committed reversible error by construing the '789 design misconstrues this Court's *en*

banc opinion in *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665 (Fed. Cir. 2008.). *Egyptian Goddess* did not prohibit or discourage a verbal construction of the design. To the contrary, the opinion recognized that a trial court should construe design claims to some extent, citing *Elmer v. ICC Fabricating, Inc.*, 67 F.3d 1571, 1577 (Fed. Cir. 1995). *Egyptian Goddess, Inc.*, 543 F.3d at 679-680. However, *Egyptian Goddess* made clear that the trial court has broad discretion over the manner and the detail to which it verbally describes the design. *Id.*

By committing the manner and detail of claim construction to the discretion of the trial court, *Egyptian Goddess* necessarily changed the standard of review for claim construction in a design patent infringement analysis, from the *de novo* standard applied to utility patents to the “abuse of discretion” standard. In the context of this case, an error in claim construction is not an abuse of discretion under 5 U.S.C. §760(2)(A), or reversible error, absent a showing of prejudice. *Egyptian Goddess, Inc.*, 543 F.3d at 680.

Crocs argues that the claim construction should be reversed because it improperly focuses on individual aspects of the claimed design. (App. Br. at pp. 15-17.) The issue, however, is not whether

the construction identifies too many of the claimed design elements, but whether it caused the Commission to err when applying the ordinary observer test.

2. **The Commission's claim construction is far less detailed than Croc's proposed claim construction.**

Crocs argued for a sweeping construction that would capture every one of the multiple variety of foam shoes by the Respondents and numerous third parties, regardless of the visual differences distinguishing these shoes from each other and from the patented design. To accomplish that end, Crocs proposed a detailed construction that lumped together all of the vent holes, regardless of being round or trapezoidal or being in any particular placement pattern, as merely being "generally systematic", and described a multitude of other details intended to snare all of the accused shoes. Crocs' proposed construction reads in relevant part:

[T]he '789 Patent is directed to a shoe that [. . .] has a sloped **opening for a foot** that is angled upward from the heel to approximately the middle of the shoe. [. . .]

As depicted particularly in Figures 1,2 and 3, the roof formed by **the upper includes a group of holes of sufficient diameter** that the thickness of the upper can be seen. **This group of holes extends across a majority of the side to side distance of the roof** formed by the upper. **This group of holes also extends through at**

least a third of the toe to throatline length of the roof formed by the upper. **There is a generally systematic** (i.e., non-random) **shaping of these holes**. **The sidewall of the upper**, which runs from the sole to the roof formed by the top surface of the upper, **includes a series of holes** of sufficient diameter that the thickness of the upper can be seen. **Several holes are visible on the lateral aspect, and several holes are visible on the medial aspect of the sidewall of the upper**. **There is a generally systematic** (i.e., non-random) **shaping of the holes and spacing between the holes on each aspect of the sidewall** of the upper.

The sole of the body of the shoe, when viewed from the side and bottom, has a front portion and a rear portion, with **two scalloped indentations between them, one on the medial and one on the lateral aspect of the sole**. The edge of a scalloped indentation, when viewed from the side, forms **an upwardly curved bridge** between the front and rear portions of the sole. When viewed from the bottom, **the scalloped indentations curve toward each other in the middle portion of the sole**.

The bottom of the sole may or may not contain tread patterns. [. . .]

When viewed from the side, **the sole in the heel curves upwardly towards the back of the shoe**. **The sole in the forefoot curves upwardly towards the front of the shoe.** [. . .]

The strap may or may not include any patterning. The edges of the strap are rounded off. **The strap is attached to the body of the shoe by two connectors.** [. . .] **The strap is visible all the way around the visible portion of the connector creating a wrench-like appearance**, which forms an aesthetic point of emphasis and focus for the shoe.

[. . .]

(A00616-618 (emphasis added).)

Much of the claim construction adopted by the ALJ and the Commission was a abbreviation of Crocs' lengthy proposal, modified to identify differences between the claimed design and the prior art.

The claim construction adopted by the ALJ reads:

[F]ootwear having a foot opening with a strap that may or may not include any patterning, is attached to the body of the footwear by two round connectors, is of uniform width between the two round connectors, has a wrench-head like shape at the point of attachment, and extends to the heel of the shoe; with round holes on the roof of the upper placed in a systematic pattern; with trapezoid-shaped holes evenly spaced around the sidewall of the upper including the front portion; with a relatively flat sole (except for upward curvature in the toe and heel) that may or may not contain tread on the upper and lower portions of the sole, but if tread exists, does not cover the entire sole, and scalloped indentations that extend from the side of the sole in the middle portion that curve toward each other.

(A00210-211 (emphasis added).) One can see from the emphasized portions that the ALJ's claim construction closely tracks that proposed by Crocs in many, if not most, respects. It is difficult to comprehend how the almost-wholesale adoption of a party's proposed claim construction can operate to prejudice that party, or

that an abbreviated version of the party's construction can be considered to focus on too many individual elements. The difficulty is compounded when that party's expert admits that the adopted construction is consistent with that proposed by the party.²

3. The claim construction is properly based upon the patent drawings and the prior art.

Although adopting much of Crocs' proposed construction, the ALJ used the claim construction to identify such differences between the claimed design and the relevant prior art. Crocs' proposed construction did not point out differences of the design over the relevant prior art.

Specifically, the ALJ determined that shoe of claimed design has trapezoid-shaped holes evenly spaced around the sidewalls, including its front aspect. The prior art Aqua Clog is essentially identical except for having a pronounced gap between the trapezoid-shaped holes in the region of the big toe.

Similarly, the claim construction identifies that the '789 patent's claimed strap has a uniform width, extends to the rear of

² Mr. Whatley testified that the ALJ's claim construction was entirely consistent with that proposed by Crocs. (A16503-04; *see also* Tr. 271:15-272:25.)

the sole, and has a wrench-like tab at each end to support the connector rivets. These are the differences over the strap in the Aguerre '249 patent.

This Court held in *Egyptian Goddess* that the “ordinary observer” test is the sole test for determining infringement of a design patent, eliminating the prior requirement to satisfy a separate and additional “point of novelty” test. *Egyptian Goddess, Inc.*, 543 F.3d at 676. In explaining its rejection of the point of novelty requirement, however, *Egyptian Goddess* described the ordinary observer test’s historical evolution in light of cases involving close prior art that led to the application of a point of novelty analysis, and determined that the beneficial purpose of the point of novelty test could be better served by consideration of the prior art in applying the ordinary observer test. *Egyptian Goddess, Inc.*, 543 F.3d at 672-677.

In *Gorham v. White*, 81 U.S. 51 (1872) evidence regarding the distinctiveness of Gorham’s design had been provided by expert witness testimonies that Gorham’s style was so distinctive that they would easily recognize it. *Gorham v. White*, 81 U.S. 511, 530 (1871). *Gorham* established that the operative question is whether

a purchaser of “ordinary acuteness” would be misled into purchasing the accused silverware, believing it to be designed by Gorham. *Id.* at 528. The *Gorham* opinion did not, however, consider what would result when the patent term of Gorham’s design expired, leaving others free to mimic its distinctive style in their own creations.

The Supreme Court addressed this issue, and its impact upon the ordinary observer test, in *Smith v. Whitman Saddle Co.*, 148 U.S. 674 (1893). In *Whitman Saddle*, the patented saddle design incorporated the front and rear sections of two prior art saddles, adding only a minor feature not found in either prior art saddle. *Id.* at 679. The Court found that when the accused design is viewed in light of the similarities it derived from the prior art saddles, an ordinary observer would find that the accused design did not incorporate the feature that was claimed to distinguish the patented design from the prior art. Therefore, the Court reasoned, an ordinary observer would not have mistaken the accused saddle for the patented design. *Id.* at 682.

Egyptian Goddess noted that this principle, first articulated in *Whitman Saddle*, has been applied over the ensuing years to

establish that the perspective of the hypothetical ordinary observer must be informed by a knowledge of the relevant prior art during her comparison of the accused product to the patented design.

[I]n a case such as *Whitman Saddle*, differences between the claimed and accused designs that might not be noticeable in the abstract can become significant to the hypothetical ordinary observer who is conversant with the prior art.

Egyptian Goddess, Inc., 543 F.3d at 678.

The Appellant and several of the amici in *Egyptian Goddess* contended that the ordinary observer test can fulfill the purposes for which the point of novelty test was designed, as long as the ordinary observer test focuses on the appearance that distinguishes the patented design from the prior art, because the attention of an ordinary observer familiar with prior art designs will naturally be drawn to the features of the claimed and accused designs that render them distinct from the prior art. *Id.* at 672.

Egyptian Goddess approved this approach, finding that the purpose of the point of novelty test “can be equally well served, however, by applying the ordinary observer test through the eyes of an observer familiar with the prior art”. *Id.* at 677.

Therefore, the Commission properly describes the claim of the '789 patent in a manner that identifies not only which features are claimed by solid lines of the drawings, but also identifies those features which depart from the prior art.

If the Commission had not described that the solid lines of Figure 4 show that the '789 patent claims a shoe in which the clog portion has trapezoid-shaped holes evenly spaced around the sidewalls, including its front aspect, it would have failed to identify the most striking difference between the clog portion of the 789 design and the prior art Aqua Clog. Had the Commission not described that the solid lines of Figures 2 and 3 show that the '789 Patent claims a strap having a uniform width, extending to the rear of the sole, and having wrench-like tab at each end to support the connector rivets, it would have failed to identify the differences between the claimed strap and the strap in the prior Aguerre '249 patent.

Consequently, Crocs was not prejudiced by the claim construction. If the ALJ had the benefit of *Egyptian Goddess* at the time of his claim construction, he would have identified the same differences between the claimed design and the prior art when he

applied the ordinary observer test, and he could have announced those differences in a claim construction to whatever degree he considered appropriate to assist the parties in preparing their evidence.

Crocs' prejudice argument boils down to complaining that the ALJ declined to adopt Crocs' proposed construction (which ignored the prior art), and conducted the ordinary observer test with an eye to the prior art. That argument is directly refuted by *Egyptian Goddess* - the ordinary observer test should be applied through the eyes of an observer familiar with the prior art. *Egyptian Goddess, Inc.*, 543 F.3d at 677-78.

C. The Finding of No Infringement of the '789 Design Patent is Consistent With *Egyptian Goddess*, and Closely Parallels Cases Discussed in *Egyptian Goddess* Where the Design is a Minor Change Over Prior Art.

- 1. The comparison of the '789 design to the Respondents' shoes in the context of the prior art is the proper analysis under *Egyptian Goddess*.**

Although neither the ALJ or the Commission had the explicit guidance of *Egyptian Goddess* at the time, they were fully aware that the claimed design is but a minor change over the prior art Aqua Clog. Except for the differences identified in the claim

construction, the '789 design is nothing more than an addition of the strap shown in Aguerre '249 to the Aqua Clog.

The factual determination of no infringement by the Commission is fully consistent with the prior cases cited in *Egyptian Goddess* where the design was a minor improvement over the prior art, often having only a single novel feature. It is squarely on point with *Whitman Saddle*. The patented design in *Whitman Saddle* incorporated the front and rear sections of two prior art saddles, adding only a minor feature not found in either saddle. *Id.* at 679. In this case, the '789 Patent incorporated the ankle strap of the Aguerre '249 patent onto the prior Aqua Clog, adding only a few features not found in either prior art shoe.

The Supreme Court in *Whitman Saddle* found that when the accused design was viewed in light of the similarities it derived from the prior art saddles, an ordinary observer would find that the accused design did not incorporate the feature that was claimed to distinguish the patented design from the prior art. Therefore, the Court reasoned, an ordinary observer would not have mistaken the accused saddle for the patented design. *Whitman Saddle*, 148 U.S. at 682. In this case, the Commission determined that when the

Respondents' shoes were viewed in light of the similarities they derived from the prior art, an ordinary observer would notice that the shoes did not incorporate the features that distinguish the '789 patent and therefore would not have mistaken the accused shoes for the patented design.

There is no relevant distinction between the facts and finding of *Whitman Saddle* and the factual determination in this case. Here, as in *Whitman Saddle*, the differences between the '789 claimed design and accused Respondents' shoes might not be readily noticed in the abstract, but become significant to an ordinary observer who is conversant with the prior art.

This case is also consistent with *Zidell v. Dexter*, 262 F. 145, 146 (9th Cir. 1920), cited in *Egyptian Goddess, Inc.*, 543 F.3d at 674. The Ninth Circuit reasoned that because the prior art was very similar in appearance to the patented design, an ordinary observer would be more acutely aware of minor differences between the patented and accused designs. *Zidell*, 262 F. at 147. Therefore, the closer the prior art is to the patented design, the more significance will attach to differences between the patented and accused designs. *Id.*

Likewise, the Sixth Circuit adopted the rule that a patented design should be viewed by an ordinary observer in light of the prior art, explaining that the ordinary observer is one who has a reasonable familiarity with the designs at issue, and is capable of assessing their similarity or difference in light of similar designs in the prior art. *Applied Arts Corp. v. Grand Rapids Metalcraft Corp.*, 67 F.2d 428, 430 (6th Cir. 1933). The *Applied Arts* opinion further explained that differences between the patented and accused designs that might otherwise seem slight can instead become significant when viewed in light of the prior art.³ *Id.*

In *Egyptian Goddess*, this Court approved the reasoning of *Whitman Saddle, Zidell* and *Applied Arts Corp.*, stating that “[W]hen the claimed design is close to the prior art designs, small differences between the accused design and the claimed design are likely to be important to the eye of the hypothetical ordinary observer.” *Egyptian Goddess, Inc.*, 543 F.3d at 676.

In this case, the ALJ concluded that an ordinary observer would not have confused the accused shoes with the patented

³ This logic was echoed by the *Egyptian Goddess* court. *Egyptian Goddess, Inc.*, 543 F.3d at 679.

design, because the observer would have noticed the differences between them. “[A]n ordinary observer would be able to discern design differences and therefore not be confused into purchasing any model of the accused footwear, supposing it to be a shoe reflecting the ‘789 patent design.” (A00113-114) The ALJ further noted that although similarities exist between the accused shoes and the ‘789 patent, most of those similarities also existed in the prior art. (A00113 n. 362.)

The ALJ noted that the majority of the similarities between the accused shoes and the ‘789 patent found in the prior art Aqua Clog, from which the ‘789 shoe was derived. *Id.* The Respondents produced evidence that features of the strap and its connectors not found in the Aqua Clog are found in other prior art, particularly the Aguerre patent. (Tr. at 334:5-339:15.) The ALJ found that while the accused shoes and the ‘789 design both have a strap, there are “significant differences” between them, namely, the length and width of the strap. (A00113-114.)

As the Commission explained, the ALJ adequately considered all of the similarities between the accused designs and the ‘789 patent. (A00010-11, *citing* A00110 n. 362.) The Commission noted,

however, that the differences between the accused designs and the '789 patent supported the ALJ's finding of no infringement. The Commission confirmed that the accused designs lack a strap extending to the heel of the shoe as shown in the '789 patent, and that the straps used in the accused designs are not of uniform width, as shown in the '789 patent. (A00011.) The Commission also confirmed that none of the accused shoes have an even spacing of ventilator holes around the front portion of the shoe as called for by the '789 patent. *Id.* Because of these differences, viewed in light of the prior art, the Commission correctly affirmed the ALJ's finding that an ordinary observer would not have been deceived into purchasing the accused shoes, supposing them to be the design reflected in the '789 patent. (A00012.)

Contrary to Crocs' argument, the ordinary observer test is not determined by whether an accused product more resembles the patented design than it does the prior art. That test was proposed in several *amicus curiae* briefs in *Egyptian Goddess* and not adopted. An ordinary observer familiar with the prior art might notice such differences even when the accused product more resembles the patented design than it does the prior art. In

Egyptian Goddess, the accused Swisa buffer more resembles the '389 patent than it does the prior art Nalco patent and Falley buffer block, yet this Court concluded that no reasonable fact-finder could find that an ordinary observer would believe the Swisa buffer to be the same as the '389 design. *Egyptian Goddess, Inc.*, 543 F.3d at 682.

2. **The Point of Novelty Finding Was Harmless Error Because It Did Not Impact the Determination on Infringement.**

An error by an agency is harmless if correcting it could not possibly result in a different outcome. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 515 F.3d 1372, 1383 (Fed. Cir. 2008).

The determination that the accused shoes incorporated the point of novelty found in the '789 design (A00124) had no effect on the finding of no infringement. (A00113-14.) The finding of no infringement was based solely on the ordinary observer test. (A00010-12; A00113-114; A00131-132.) Because the Commission's finding was based on the proper application of the ordinary observer test, the point of novelty analysis was harmless error.

3. **The Findings on the Ordinary Observer Test are supported by substantial evidence. An ordinary observer familiar with the prior art would notice the differences between the Gen-X Shoes and the '789 Design.**

The Commission's factual findings under the ordinary observer test must be upheld if they are supported by substantial evidence. *Alloc, Inc. v. Int'l Trade Comm'n*, 342 F.3d 1361, 1368 (Fed. Cir. 2003). As demonstrated below, the Commission did indeed have such evidence.

Substantial evidence supports the finding that an ordinary observer who is aware of the Aqua Clog and Aguerre shoes would be sensitive to differences between the accused shoes and the '789 design. A reasonable person looking at the evidence in light of this knowledge of the prior art could reach the same conclusion.

Figure 4 is substantial evidence to support a finding that the '789 patent claims a shoe base having trapezoid-shaped holes that are evenly spaced around the sidewalls, including its front aspect. (A10396.) It is undisputed that none of the Respondents shoes have the trapezoid-shaped holes spaced evenly in the front aspect – each has a pronounced larger space between the holes in the area of the big toe. (A00011; A17196-97; A17199-17207; A17226-

17227; A17229-17232; A21431-21436; A21439; A21441-21444;
A21446; A21451.)

Substantial evidence supports the finding that the ordinary observer would notice the difference between a shoe with the trapezoid-shaped vents spaced evenly around the front aspect and a shoe having a pronounced gap between the trapezoid-shaped holes in the region of the big toe. Mr. Whatley admitted under cross-examination that the purchaser would try on the shoes and examine them for fit and comfort and appearance. (Tr. at pp. 321:1-322:1.) He admitted that she would look at the shoes from different angles, including straight down at her toes and from the sides in a mirror. (Tr. at pp. 322:21-327:11; 328:15-329:10.) This evidence is sufficient for a reasonable person to accept as adequate to support the inference that the ordinary observer would notice the difference of a pronounced gap between the trapezoid-shaped holes in the region of the big toe, and not be confused into buying one shoe while believing it to be the other.

There is substantial evidence to support the determination that the strap in the claimed design is of uniform width. Cross points to Figure 1 as purportedly showing a strap of non-uniform

width, but ignores the clear side views of Figures 2 and 3 that show unmistakably a strap of uniform width. (A10395.) Figures 2 and 3 are substantial evidence to support a finding that the '789 patent claims a strap of uniform width. It is undisputed that none of the Respondents shoes have a strap of uniform width – each has a thicker portion around the middle to provide more support and comfort. There is substantial evidence to support the determination that the ordinary observer would be drawn to notice the width and length of the strap by how much comfort and support it provided. (Tr. at pp. 321:1-331:8.)

The strap of the '789 patent has a purely ornamental wrench head configuration where the strap connects to the rivet. (A00210; A10395; Tr. at pp. 341:2-342:16.) There is substantial evidence that Gen-X's Komodo shoe has a different look — employing instead a functional rounded barbell design that evenly encircles each rivet. (A21285.)

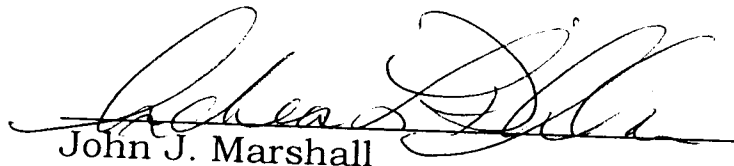
In addition, the Patent Office granted a design patent for the design of Gen-X's Komodo shoe ("the Wolf Patent"). That design patent application disclosed the Croc's shoe as prior art. (A21283; Tr. at pp. 1504:25-1505:22.) During the hearing Gen-X presented

testimony that the Komodo shoe is the design shown in the Wolf Patent. (A21281; Tr. at pp. 1379:14-1380:25.) The fact that the Patent Office issued the Wolf Patent is additional substantial evidence supporting the determination that there are significant differences between the '789 design the Gen-X shoe.

VI. CONCLUSION

The Commissions' determination that the foam footwear of Gen-X and the other Respondents does not infringe the '789 design patent is based upon substantial evidence and was not the result of undue prejudice from the claim construction. The ITC determination should be affirmed.

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