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

**In the Matter of**

**CERTAIN FOAM FOOTWEAR**

**Investigation No. 337-TA-567  
(Advisory Opinion Proceeding 3)**

**ADVISORY OPINION**

On November 17, 2021, non-respondent, Triple T Trading Ltd. (“Triple T”) of Marysville, Washington filed a request for an expedited advisory opinion proceeding pursuant to Commission Rule 210.79, 19 C.F.R. § 210.79. The Commission instituted the requested advisory opinion proceeding on December 17, 2021. 86 Fed. Reg. 72992 (Dec. 23, 2021). Triple T seeks an opinion concerning whether two models of its footwear, *i.e.*, its fleece-lined shoes and its shoes with plastic washers, fall within the scope of the general exclusion order (“GEO”) that was issued at the conclusion of the above-captioned investigation.<sup>1</sup> For the reasons discussed below, the Commission has determined that Triple T’s Northside Classic Fur Lined Clog with permanent fleece lining and its Northside Clog with permanent plastic washers do not infringe claims 1 or 2 of U.S. Patent No. 6,993,858 (“the ’858 patent”), and thus do not fall within the scope of the GEO.

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<sup>1</sup> Request of Triple T Trading Ltd for an Advisory Opinion that Certain Foam Footwear are Outside the Scope of the General Exclusion Order Issued in Investigation No. 337-TA-567 (Nov. 17, 2021) (“Triple T’s Req.”).

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### I. BACKGROUND

The Commission instituted the underlying investigation on May 11, 2006, based on an amended complaint filed by Crocs, Inc. (“Crocs”) of Niwot, Colorado. 71 Fed. Reg. 27514–15 (May 11, 2006). The complaint alleged, *inter alia*, 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 and 2 of the ’858 patent and U.S. Design Patent No. D517,789 (“the ’789 design patent”). Triple T was not named as a respondent in the underlying investigation.

On July 25, 2008, the Commission issued its final determination finding no violation of section 337. 73 Fed. Reg. 45073–74 (Aug. 1, 2008). On July 15, 2011, after an appeal to the U.S. Court of Appeals for the Federal Circuit and subsequent remand vacating the Commission’s previous finding, the Commission found a violation of section 337 based on infringement of the asserted claims of the patents and issued, *inter alia*, a GEO. 76 Fed. Reg. 43723–24 (July 21, 2011). The GEO covered foam footwear that infringes one or more of claims 1 and 2 of the ’858 patent and the ’789 design patent. The ’789 design patent has since expired. As such, the GEO now only covers foam footwear that infringes one or more of claims 1 and 2 of the ’858 patent.

On November 17, 2021, non-respondent, Triple T, filed the present request for an expedited advisory opinion proceeding to determine whether its fleece-lined shoes and its shoes with plastic washers fall within the scope of the GEO. On November 29, 2021, Crocs filed a

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response in opposition to Triple T's request.<sup>2</sup> On December 9, 2021, Triple T moved for leave to file a reply to Crocs' opposition.<sup>3</sup>

On December 23, 2021, the Commission instituted an advisory proceeding under Commission Rule 210.79, 19 C.F.R. § 210.79. 86 Fed. Reg. 72992 (Dec. 23, 2021) ("notice of investigation"). Triple T and Crocs were named as parties to the proceeding. In the notice of investigation, the Commission granted Triple T's motion for leave to reply.

The Commission also requested additional briefing and information from Triple T in an Order issued concurrently with the notice of investigation. Comm'n Order (Dec. 17, 2021). On January 4, 2022, Triple T submitted its response to the Commission Order along with a single sample of its Triple T's Northside Classic Fur Lined Clog and a single sample of its Northside Clog with plastic washers.<sup>4</sup> Crocs did not submit any further response.

## II. DISCUSSION

### A. Applicable Law

Commission Rule 210.79 states, in relevant part:

*(a) Advisory opinions.* Upon request of any person, the Commission may, upon such investigation as it deems necessary, issue an advisory opinion as to whether any person's proposed course of action or conduct would violate a Commission exclusion order, cease and desist order, or consent order.

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<sup>2</sup> Complainant Crocs, Inc.'s Response to Request of Triple T Trading Ltd. for an Advisory Opinion that Certain Foam Footwear are Outside the Scope of the General Exclusion Order Issued in Investigation No. 337-TA-567 (Nov. 29, 2021) ("Crocs' Resp.").

<sup>3</sup> Requestor Triple T Trading Ltd. Motion for Leave to File a Reply to Complainant Crocs, Inc.'s Response to Request for an Advisory Opinion (Dec. 9, 2021).

<sup>4</sup> Requestor Triple T Trading Ltd.'s Response to Order: Institution of Advisory Proceeding (Jan. 4, 2022) ("Triple T's Sub.").

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19 C.F.R. § 210.79(a). It further states that:

The Commission will consider whether the issuance of such an advisory opinion would facilitate the enforcement of section 337 of the Tariff Act of 1930, would be in the public interest, and would benefit consumers and competitive conditions in the United States, and whether the person has a compelling business need for the advice and has framed his request as fully and accurately as possible.

*Id.* A requestor seeking an advisory opinion for a new or redesigned product that it alleges falls outside the scope of an exclusion order bears the burden of demonstrating that such product does not infringe the patent(s) at issue. *See Certain Sleep-Disordered Breathing Treatment Sys. and Components Thereof*, Inv. No. 337-TA-879, Adv. Op. at 5 (Aug. 11, 2014) (“The Commission places the burden of proof in AOPs on the party requesting an advisory opinion.”).

### **B. Claim Construction**

Triple T asks the Commission to determine whether its Northside Classic Fur Lined Clog and/or its Northside Clog with plastic washers infringe claims 1 or 2 of the '858 patent and thus whether they would be excluded pursuant to the GEO.<sup>5</sup> Claim 1 of the '858 patent recites, in

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<sup>5</sup> Pursuant to Rule 210.79(a), the Commission found that Triple T has a compelling business need for the advice requested, because Triple T has represented that: (1) its Northside Classic Fur Lined Clog has been previously excluded by U.S. Customs and Border Protection (“CBP”); and (2) it plans on importing into the United States its Northside Clog with plastic washers. Notice of Investigation; 19 C.F.R. § 210.79(a); Triple T’s Req. at 1, 4. Providing clarity to Triple T, as well as CBP, about the scope of the GEO benefits Triple T, consumers, competitive conditions in the United States, and the public interest. Indeed, the current, as well as any future, interruption to Triple T’s ability to import its shoes harms Triple T’s business operations and potentially has negative implications for its consumers. Further, an advisory opinion would provide certainty to avoid future litigation with the patent owner and would reduce the impacts on legitimate, non-infringing trade. Triple T’s Req. at 4, 13–14. The Commission found that Triple T has framed its request as fully and accurately as possible. Croc’s assertion that the Triple T shoes potentially infringe other intellectual property owned by Crocs is irrelevant to this proceeding. *See Crocs Resp.* at 6. For these reasons, the Commission found at institution that the request meets the requirements of Commission Rule 210.79(a). In the course of this

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relevant part, that “the strap section is in *direct contact* with the moldable material of the base section and pivots relative to the base section at the connectors; . . .” *See* Ex. 2 of Triple T’s Req. (the ’858 patent) at claim 1 (emphasis added). Claim 2 likewise recites “the strap section is in *direct contact* with the base section and pivots relative to the base section . . .” *Id.* at claim 2 (emphasis added). During the initial investigation, the administrative law judge (“ALJ”) construed “direct contact” to mean: “there must be *some* contact directly between the strap section and base section that occurs somewhere in the area where the base and strap sections are connected,” but there is no requirement that there be contact at “any and all points around the connectors.” *Certain Foam Footwear*, Inv. No. 337-TA-567, Initial Determination at 39-41 (Apr. 11, 2008) (emphasis added). Neither party disputes this construction at this stage, therefore the Commission adopts the ALJ’s construction for purposes of this advisory proceeding. Accordingly, both claims subject to the GEO require *some* contact between the strap of the shoe and the base of the shoe at the point of connection in order to meet the “direct contact” limitation.

### C. Sufficiency of the Record

Crocs objected to Triple T’s petition as originally filed on the grounds that Triple T did not provide the Commission with any samples of the shoes at issue and did not present sufficient details or product information to identify the shoe depicted in the photographs. Crocs’ Resp. at 3–6. Crocs further asserted that, for any model of Triple T’s fleece-lined shoes or shoes with

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advisory opinion proceeding, Triple T supplemented its materials to address an issue raised by Crocs.

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plastic washers that it seeks to import, Triple T must provide specific model names and numbers, SKUs, and model samples that identify these shoes for an advisory opinion. *Id.* at 4.

In light of Crocs' objections, the Commission ordered Triple T to provide one sample of each type of fleece-lined shoe and one sample of each type of shoe with plastic washers that Triple T seeks to import, but indicated that Triple T did not need to provide different colors or sizes for each type. Comm'n Order at 2–3. The Commission also directed Triple T to provide any model names, SKUs, and/or model numbers that identify the models Triple T seeks to import. *Id.*

In response, Triple T provided a single sample pair of its Northside Classic Fur Lined Clog (Women's Size 9) and a single sample pair of its Northside Clog with plastic washers (Men's Size 9). Triple T's Sub. at Exs. A, B. Photos of the submitted samples are shown below:

### **Northside Classic Fur Lined Clog**



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*Id.* at Exh. A.

**Northside Clog with plastic washers**



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*Id.* at Ex. B. Triple T also provided the Commission with photos showing examples of these and other models of its Northside Classic Fur Lined Clog and Northside Clog it seeks to import. *See id.* at Exs. A, B.

Triple T further provided the Commission with a list (Exhibit C to Triple T’s submission) of each of the models of its Northside Classic Fur Lined Clog and Northside Clog with plastic washers Triple T seeks to import, which identifies the model number and name for each shoe included in its request.<sup>6</sup> Triple T certifies that “the sample shoes pictured in the attached exhibits and sent to the Commission and Crocs are representative of all model numbers and all

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<sup>6</sup> The model name for the fleece-lined shoes is identified as “HARVEY” for the male gender shoes, and as “SERENA” for the female gender shoes. *See* Triple T’s Sub. at Second Decl. of Thayer (Triple T’s Co-President) (¶ 11). The model name for the shoes with plastic washers is identified as “HAVEN” or “CAIMAN” for all gender shoes. *Id.*



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model names of our fleece-lined shoes and our shoes with plastic washers.” Triple T’s Sub. at Second Thayer Decl., ¶ 10.

In addition, Mr. Bob Thayer, Triple T’s Co-President, states in his declaration that “[f]or each sample of the fleece-lined shoes (and for all fleece-lined shoes we seek to import), the fleece lining is permanently affixed . . . [and] [f]or each sample of the shoes with plastic washers (and for all shoes with plastic washers we seek to import), the plastic washer is permanently affixed.” *Id.* at Second Thayer Decl., ¶¶ 5, 8. He also states that “the fleece lining of our fleece-lined shoes is between the strap and the body of the shoe, such that there is no direct contact at any point between the strap and the body. . . . [and] the plastic washer of our shoes with plastic washers is between the strap and the body of the shoe, such that there is no direct contact at any point between the strap and the body.” *Id.* at ¶¶ 6, 9).

Crocs submitted no reply to Triple T’s submission.

### **D. “Direct Contact” Between the Strap and Base**

The fundamental issue on which infringement of the relevant claims of the ’858 patent hinges is undisputed: if the strap has any contact with the base of the shoe at the point of connection, it infringes; if the strap has no contact with the base of the shoe, it does not. Triple T contends that the fleece lining or the plastic washers on its shoes are designed and sized in such a way that they prevent direct contact between the strap and the base. Triple T’s Sub. at 1–2, Second Thayer Decl., ¶¶ 6, 9.

The submitted sample of Triple T’s Northside Classic Fur Lined Clog (Color White, Women’s Size 9) has a fleece lining that extends from the inside of the shoe to cover approximately 1.5 inches of the exterior of the shoe around the foot opening. Notably, the

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fleece lining extends below the points at which the strap connects to the shoe, preventing all contact between the straps and the base of the shoes. Likewise, the submitted sample of Triple T's Northside Clog (Color Blue, Men's Size 9) has plastic washers that are positioned in between the straps and the base at the points of connection, sized such that they prevent all direct contact between the straps and the base of the shoes. Triple T also certifies that, for its fleece-lined shoes and its shoes with plastic washers that it seeks to import, "there is no direct contact at any point between the strap and the body." *Id.* at Second Thayer Decl., ¶¶ 6, 9. Triple T further contends that the fleece-lining and the plastic washer for each shoe it seeks to import "is permanently affixed." *Id.* at (¶¶ 5, 8).

The record demonstrates that the fleece lining and the plastic washers of the shoes at issue prevent all contact between the strap and the base of the shoes, and are permanently affixed. Accordingly, the Commission finds that Triple T's Northside Classic Fur Lined Clog and Northside Clog at issue in this proceeding do not infringe claims 1 or 2 of the '858 patent.<sup>7</sup> The Commission also finds that there is no infringement of these claims under the doctrine of equivalents because the required "direct contact" between the strap and the body for these shoes is completely missing with no equivalent substitute. *See, e.g., Zygo Corp. v. Wyko Corp.*, 79 F.3d 1563, 1568 (Fed. Cir. 1996); *London v. Carson Pirie Scott & Co.*, 946 F.2d 1534, 1539

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<sup>7</sup> Previously, Double Diamond Distribution, Ltd., a respondent in the underlying investigation, filed a request for an expedited advisory opinion to determine whether its new Original Beach DAWGS™ shoes with plastic washers fall within the scope of the GEO. *See* Comm'n Advisory Opinion at 1 (Apr. 13, 2021). In that advisory opinion proceeding and consistent with the Commission findings here, the Commission found, *inter alia*, that the shoes "include permanent plastic washers designed, affixed, and sized to prevent 'direct contact' between the straps and base of the shoe at the point of connection, such that they do not infringe claims 1 or 2 of the '858 patent. . . . As a result, [these shoes] do not fall within the scope of the GEO[.]" *Id.* at 14.

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(Fed. Cir. 1991) (“It is . . . well settled that each element of a claim is material and essential.”)  
(internal quotation omitted).

### III. CONCLUSION

Based on the foregoing, the Commission determines that Triple T’s Northside Classic Fur Lined Clog and Northside Clog, as depicted in the physical samples provided to the Commission, include permanent fleece lining or plastic washers, respectively, that are designed, affixed, and sized to prevent “direct contact” between the straps and base of the shoe at the point of connection, such that they do not infringe claims 1 or 2 of the ’858 patent. As a result, Triple T’s shoes listed in Exhibit C do not fall within the scope of the GEO. Shoes imported by Triple T that do not have permanently-attached fleece lining or plastic washers that prevent all “direct contact” between the strap and the base of the shoe at the point of connection are not subject to this advisory opinion. U.S. Customs and Border Protection may, at its discretion and pursuant to procedures that it establishes, require Triple T to furnish such records, samples, and analyses as are necessary to ensure that the shoes it seeks to import comply with the Commission’s findings herein.

By order of the Commission.



Lisa R. Barton  
Secretary to the Commission

Issued: March 28, 2022

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **COMMISSION OPINION** has been served by electronic service upon the following parties as indicated, on **3/29/22**.



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