PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of **CERTAIN CASUAL FOOTWEAR AND PACKAGING THEREOF**	**Investigation No. 337-TA-1270**

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COMMISSION OPINION

I. INTRODUCTION

On April 5, 2023, the Commission determined to review in part the final initial determination ("ID") issued by the presiding administrative law judge ("ALJ") on January 9, 2023. 88 Fed. Reg. 21712, 21713-14 (Apr. 11, 2023). On review, the Commission has determined that there has been no violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 ("section 337"), by the participating respondents with respect to U.S. Trademark Registration Nos. 5,149,328 ("the '328 Mark"), 5,273,875 ("the '875 Mark") (both collectively, the "3D Marks"), and 3,836,415 ("the '415 Registration," or "Word Mark") (all collectively, the "Asserted Marks") because the complainant, Crocs, Inc., failed to prove likelihood of confusion, infringement, false designation of origin, or dilution by either tarnishment or dilution as to the participating respondents. The Commission takes no position as to Orly's alleged first sale, the presumption of validity, secondary meaning, fair use, injury, or the technical or economic prongs of domestic industry. *See* at ID 92-126, 128-148.

The Commission has determined to issue a limited exclusion order ("LEO") against the respondents previously found in default and cease and desist orders ("CDO") against certain of the respondents found in default. The Commission finds that the public interest factors do not preclude entry of such relief. The Commission has also determined to set a bond in the amount of one hundred (100) percent of the entered value of infringing goods imported during the period of Presidential review. *See* 19 U.S.C. § 1337(j).

This Opinion sets forth the Commission's reasoning in support of its determination.[1]

[1] Commissioner Kearns joins Parts I, II, III, IV, and V.A. of this Opinion but otherwise respectfully dissents from the Commission's decision and has filed a separate opinion explaining his views.

II. BACKGROUND

A. Procedural History

The Commission instituted this investigation on July 9, 2021, based on a complaint, as supplemented, filed by Crocs, Inc. of Broomfield, Colorado ("Crocs"). 86 Fed. Reg. 36303-304 (July 9, 2021). Crocs accused respondents of violating section 337(a)(1)(A) (19 U.S.C. § 1337(a)(1)(A)) by diluting its Asserted Marks and falsely designating the origin of their accused footwear, the threat or effect of which is to destroy or substantially injure an industry in the United States. *Id*. Crocs also accused respondents of violating section 337(a)(1)(C) of the Tariff Act of 1930, as amended (19 U.S.C. § 1337(a)(1)(C)), by importing into the United States, selling for importation, or selling in the United States after importation certain casual footwear and packaging thereof that infringe one or more of Crocs's Asserted Marks. *Id.* Crocs's complaint seeks a general exclusion order ("GEO") (or, in the alternative, an LEO) and CDOs against respondents found in violation. *Id.*

Crocs's original complaint and notice of investigation named numerous respondents, including Hobby Lobby Stores, Inc. of Oklahoma City, Oklahoma ("Hobby Lobby"); Quanzhou ZhengDe Network Corp. d/b/a Amoji of Quanzhou, Fujian Province, China ("Amoji"); La Modish Boutique of West Covina, California ("La Modish"); and Star Bay Group Inc. of Hackensack, New Jersey ("Star Bay"). *Id*. at 36304. The Office of Unfair Import Investigations ("OUII") also participated as a party. *Id.*

On November 17, 2021, the Commission amended the complaint to add new respondents, including Orly Shoe Corp. of New York, New York ("Orly"); Huizhou Xinshunzu Shoes Co., Ltd. of Huizhou City, China ("Huizhou"); and Jinjiang Anao Footwear Co., Ltd. ("Anao"). *See* 86 Fed. Reg. 66337-38 (Nov. 22, 2021).

On June 10, 2022, the Commission found La Modish, Star Bay, Huizhou, and Anao ("Defaulting Respondents") were in default and waived their rights to appear, to be served with documents, and to contest the allegations in this investigation, per 19 C.F.R. §§ 210.16(b). Order No. 58 (May 20, 2022), *unreviewed by* Comm'n notice (June 10, 2022).

The Commission terminated the other respondents due to settlement agreements and withdrawal of the complaint, so that Orly, Hobby Lobby, and Amoji (collectively, "Respondents") remain as the only respondents actively participating in this investigation.

On September 13-16, 2022, the ALJ held an evidentiary hearing.

On January 9, 2023, the ALJ issued the subject ID finding no violation of section 337 because: (1) Crocs failed to prove that any of Respondents infringes the 3D Marks; (2) Crocs failed to prove that Orly or Hobby Lobby infringes the Word Mark; (3) Crocs failed to prove that any of Respondents falsely designated the source of their accused products or caused unfair competition; (4) Crocs failed to prove that any of the Respondents diluted any of the Asserted Marks by blurring or tarnishment; (5) the 3D Marks are invalid for lack of secondary meaning; and (6) Crocs waived its infringement contentions against Defaulting Respondents. ID at 71-72, 83-86, 148-49. The ID also finds that Respondents failed to prove that the 3D Marks are invalid as functional or the Word Mark is invalid as generic. *Id*. at 128-29. The ID takes no position on Respondents' "fair use" defense. *Id.* The ID finds that Crocs has satisfied both the technical and economic prongs of the domestic industry requirement, but it takes no position on Crocs's injury or threat of injury. *Id.* at 130.

On January 23, 2023, Crocs filed a petition for review of certain findings in the ID.[2] On the same date, Orly and Hobby Lobby ("Orly Respondents") filed a contingent petition for review of the ID.[3] Amoji did not join Orly Respondents' petition for review or file its own.

On January 31, 2023, Orly, Hobby Lobby, and Amoji filed a joint response to Crocs's petition for review,[4] and Crocs filed its response to Orly Respondents' contingent petition for review.[5] On the same date, OUII filed its response to both petitions for review.[6]

On April 5, 2023, the Commission determined to review the ID in part. Comm'n Notice at 3-4 (Apr. 5, 2023); 88 Fed. Reg. 21712, 21713-714 (April 11, 2023). Specifically, the Commission reviewed the ID's findings that: (1) the Commission has subject matter jurisdiction; (2) Crocs waived its infringement contentions against the lined version of Orly's Gators; (3) Crocs waived its infringement contentions against Defaulting Respondents; (4) Crocs failed to prove that consumers were likely to confuse the accused products with the Asserted Marks ("likelihood of confusion"); (5) Crocs failed to prove that Respondents falsely designated the origin, or source, of the accused products ("false designation of origin"); (6) Crocs failed to prove that Respondents improperly diluted the Asserted Marks, either by blurring or tarnishment

[2] *See* Complainant Crocs, Inc.'s Petition for Review of Initial Determination ("Crocs's Pet.") (Jan. 23, 2023).

[3] *See* Respondents Orly and Hobby Lobby's Contingent Petition for Commission Review (Jan. 23, 2023).

[4] *See* Respondents' Response to Crocs, Inc.'s Petition for Commission Review of Initial Determination (Jan. 31, 2023) ("Resps's Resp.").

[5] *See* Complainant Crocs, Inc.'s Response to Respondents' Contingent Petition for Review of Initial Determination (Jan. 31, 2023).

[6] *See* Response of the Office of Unfair Import Investigations to the Private Parties' Petitions for Review of the Initial Determination on Violation of Section 337 (Jan. 31, 2023) ("OUII's Reply").

("dilution"); (7) the 3D Marks are not entitled to the presumption of validity and are invalid for lack of secondary meaning; and (8) Crocs satisfied the technical and economic prongs of domestic industry. *Id*.

On April 19, 2023, Crocs, the Orly Respondents, and OUII filed their responses to the Commission's notice of review.[7] On April 26, 2023, the parties filed their respective replies.[8] Amoji did not file its own response or join the submissions filed by the Orly Respondents.

B. The Asserted Trademarks

1. The 3D Marks

The ID finds that the 3D Marks are "expressly limited to a specific combination of articulated design elements" that are capable of distinguishing Crocs's shoes. ID at 5-6. Significantly, the 3D Marks "***do not*** cover the entirety of the shoe or its overall look." *Id.* at 5 (emphasis in ID). The reason is that overall look of a clog is a common or generic design element that is not entitled to trademark protection, as explained below.

[7] *See* Complainant Crocs, Inc.'s Opening Brief on the Commission's Notice to Review-In-Part the Final Initial Determination and Submission on Remedy, Bonding and Public Interest (Apr. 19, 2023) ("Crocs's Resp."); Respondents' Response to the Commission's April 5, 2023 Request for Written Submissions on the Issues Under Review, Remedy, Bonding, and the Public Interest (Apr. 19, 2023) ("Respondents' Resp."); Response of the Office of Unfair Import Investigations to the Commission's Request for Written Submissions on the Issues Under Review and on Remedy, Bonding, and the Public Interest (Apr. 19, 2023) ("OUII's Resp.").

[8] *See* Complainant Crocs, Inc.'s Response Brief Regarding Commission's Notice to Review-In-Part the Final Initial Determination (Apr. 26, 2023) ("Crocs's Reply"); Respondents' Reply to Complainant Crocs, Inc.'s Opening Brief on Commission's Notice to Review-In-Part the Final Initial Determination and Submission on Remedy, Bonding, and Public Interest (Apr. 26, 2023) ("Respondents' Reply"); Reply Brief of the Office of Unfair Import Investigations on the Issues Under Review and on Remedy, Bonding, and Public Interest (Apr. 26, 2023) ("OUII's Reply").

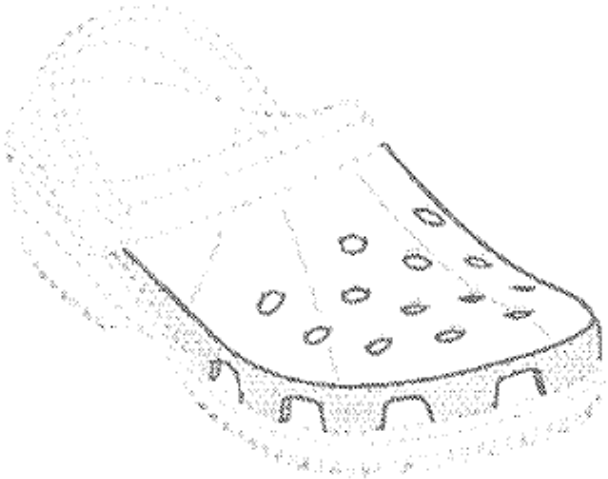
a. The ’328 Mark

The ’328 Mark was first used by Crocs in June 2003 and has a registration date of February 28, 2017. *Id.* at 6-7. During prosecution, the trademark examiner stated the following:

> In the present case, the overall clog shape of the proposed configuration mark and the presence of a defined midsole and a topline collar appear to represent generic elements commonly present in waterproof strap clogs. These features are nondistinctive and do not function as a mark because such elements are so common in the industry for such products and are the same or substantially similar to the designs of competitors’ products such that consumers are accustomed to seeing such elements on similar products. As such, applicant’s request to exclude other shoe manufacturers from employing such ubiquitous design elements cannot be granted. The examining attorney attaches for reference numerous examples of competing but distinguishable waterproof clog configurations illustrating the generic nature of the referenced shape/elements.
>
> The remaining elements of the proposed configuration which appear potentially capable of distinguishing applicant’s goods comprise the specific shape and placement of ventilation/draining holes.

JX-0001 at CROCS_ITC044602-603 (’328 Mark, file history).

The ’328 Mark, as issued, claims a specific pattern of 13 round holes in the horizontal portion of the shoe’s upper and a specific pattern of 7 trapezoidal holes in the vertical portion of the upper. *Id.* The claim elements are delineated by the solid lines, as shown below:

	The mark consists of a three dimensional configuration of the outside design of an upper for a shoe comprising *a pattern of 13 round holes on the horizontal portion of the upper* of the shoe and *a textured strip along the vertical portion of the upper having a pattern of 7 trapezoidal openings*. ID at 6 (quoting JX-0002 at CROCS_ITC045479).

b. The ’875 Mark

The ’875 Mark was first used by Crocs in June 2003 and has a registration date of August 29, 2017. *Id.* During prosecution, the trademark examiner made the following remarks:

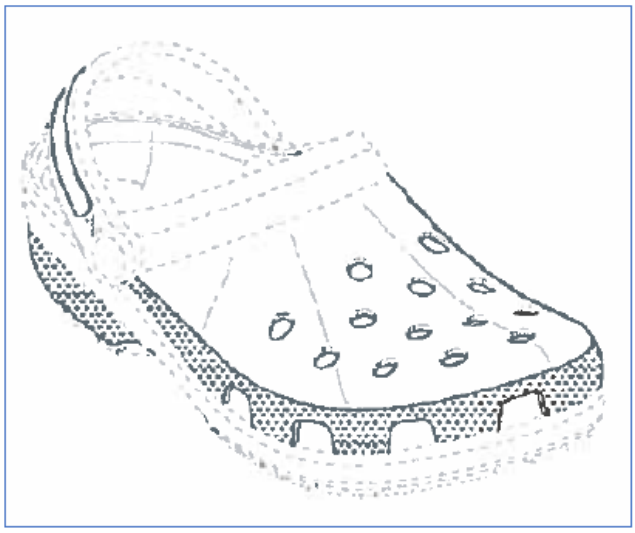
> In the present case, the overall clog shape of the proposed configuration mark and the presence of a defined midsole and a topline collar appear to represent generic elements commonly present in waterproof strap clogs. These features are nondistinctive and do not function as a mark because such elements are so common in the industry for such products and are the same or substantially similar to the designs of competitors’ products such that consumers are accustomed to seeing such elements on similar products. Please note that applicant’s assertion of acquired distinctiveness under Trademark Act Section 2(f) does not avoid this requirement. No amount of purported proof that generic or functional matter has acquired secondary meaning can transform that matter into a registrable trademark or service mark. [cites omitted].

JX-0005 at CROCS_ITC45704 (’875 Mark, file history).

The trademark examiner found certain other proposed elements (*e.g.*, a tread on the sole and circular rivets to enable the strap to be flipped forward) were functional and not entitled to trademark protection. *Id.* The trademark examiner further remarked:

> As such, applicant’s request to exclude other shoe manufacturers from employing such ubiquitous or functional design elements cannot be granted. The remaining elements of the proposed configuration which appear potentially capable of distinguishing applicant’s goods comprise the specific shape and placement of ventilation/drainage holes, a pattern of texturing on the front and heel area of the shoe, and the placement of a decorative band on the strap feature.

Id. The ’875 Mark, as issued, describes and claims the same design elements as the ’328 Mark, with the addition of a textured strip on the heel of the shoe and a decorative band along the length of the heel strap, as shown below:

	The mark consists of a three dimensional configuration of the outside design of an upper for a shoe comprising a *pattern of 13 round holes on the horizontal portion of the upper* of the shoe, *a textured strip along the vertical portion of the upper having a pattern of 7 trapezoidal openings*, a *textured strip on the heel of the shoe and a decorative band along the length of the heel strap*. *Id.* at 7 (citing JX-0006 at CROCS_ITC046838).

2. The Word Mark

The Word Mark was first used by Crocs in November 2002, was federally registered on August 25, 2010, and has reached "incontestable" status. *Id.* at 7-8. The Word Mark protects the mark "CROCS"[9] in "standard characters without any claim to any particular font, style, size, or color." *Id*. at 7 (quoting JX-0004 at CROCS_ITC045683). An example from the registration is shown below:

CROCS

C. The Accused Products

The "Accused Products" are certain "casual footwear with holes in the upper and such footwear's packaging." *Id.* at 8.

[9] The marks as discussed herein are identified by capital letters (*e.g.*, CROC, GATOR, CROCS), while a company or its shoe products are identified by small letters (*e.g.*, Crocs, Gator, Croc).

1. The Accused Orly and Hobby Lobby Products

Crocs accuses the "Orly Gator" and "Orly Redesign," below, of infringing the 3D Marks.

Orly Gator

Orly Redesign

Id. at 8-10 (citing RPX-0019-0020). Orly sells its shoes to Hobby Lobby and other retailers, but it does not sell directly to consumers. *Id.* at 8.

2. The Accused Orly and Hobby Lobby Marks

Crocs accuses Orly's mark "GATOR" and Hobby Lobby's mark "CROC" of infringing its Word Mark "CROCS." *Id.* at 8, 60-61.

3. The Accused Amoji Products

Crocs accuses Amoji's "Garden Clogs" and "Revised Garden Clogs" of infringing the 3D Marks. *Id.* at 10-11. The accused Amoji shoes are shown below:

Amoji Garden Clogs

Amoji Revised Garden Clogs

RD-001 (RX-2289C at ZHENGDE_ITC0001336)

RD-002 (RX-2289C at ZHENGDE_ITC0001342)

RD-003 (RX-2289C at ZHENGDE_ITC0001354)

RD-004 (RX-2289C at ZHENGDE_ITC0001358)

RD-005 (RX-2289C at ZHENGDE_ITC0001361)

Id. at 11-12.

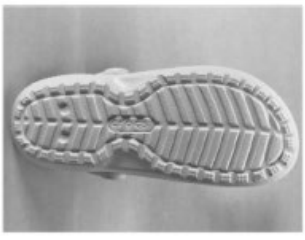
D. Crocs's Domestic Industry Products

Crocs asserts the lined and unlined versions of its Classic Clog include the 3D Marks. *Id.* at 12. The following images compare the lined and unlined versions to the 3D Marks:

'328 Registration	Unlined Classic Clog	Lined Classic Clog
 JX-0002 ('328 Registration)		
'875 Registration		
 JX-0006 ('875 Registration)	 CPX-037	 CPX-038

Id. at 132-33.

The following images show the Classic Clog bearing the Word Mark "CROCS" below:

Unlined Classic Clog	Lined Classic Clog
	
 CPX-037	 CPX-038

Id. at 131.

III. COMMISSION REVIEW OF THE FINAL ID

When the Commission reviews an initial determination, in whole or in part, it reviews the determination *de novo*. *Certain Soft-Edged Trampolines and Components Thereof*, Inv. No. 337-TA-908, Comm'n Op. at 4 (May 1, 2015). Upon review, the "Commission has 'all the powers which it would have in making the initial determination,' except where the issues are limited on notice or by rule." *Certain Flash Memory Circuits & Prods. Containing Same*, Inv. No. 337-TA-382, USITC Pub. No. 3046, Comm'n Op. at 9–10 (July 1997) (quoting *Certain Acid-Washed Denim Garments & Accessories*, Inv. No. 337-TA-324, Comm'n Op. at 5 (Nov. 1992)). With respect to the issues under review, "the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial determination of the administrative law judge." 19 C.F.R. § 210.45(c). The Commission also "may take no position on specific issues or portions of the initial determination," and "may make any findings or conclusions that in its judgment are proper based on the record in the proceeding." *Id.*; *see also Beloit Corp. v. Valmet Oy*, 742 F.2d 1421, 1423 (Fed. Cir. 1984) (the Commission may reach a "no violation" determination on a single dispositive issue and take no position on other, non-dispositive issues or portions of the initial determination).

IV. LEGAL PRINCIPLES

Section 337 prohibits unfair methods of competition and unfair acts in the importation of articles into the United States, the threat or effect of which is to destroy or substantially injure an industry in the United States. 19 U.S.C. § 1337(a)(1)(A). Section 337 also prohibits "[t]he importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that infringe a valid and enforceable United States trademark registered under the Trademark Act of 1946 [15 U.S.C. §§ 1051 *et seq*., the "Lanham Act"]." 19 U.S.C. § 1337(a)(1)(C).

A. Trademark Infringement: Likelihood of Confusion

A complainant alleging infringement of a trademark or trade dress must show: (1) the complainant owns the mark; (2) the respondent's use of an allegedly similar mark to identify goods and services causes a likelihood of consumer confusion; and (3) the asserted mark is valid and legally protectable. *Converse, Inc. v. ITC*, 909 F.3d 1110, 1116 (Fed. Cir. 2018).

The complainant bears the burden of proving that consumers would likely confuse the respondent's mark with the asserted mark. *Swagway, LLC v. ITC*, 934 F.3d 1332, 1338 (Fed. Cir. 2019). To determine whether a likelihood of confusion exists, a court considers the following "*DuPont* factors": (1) the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression; (2) the similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use; (3) the similarity or dissimilarity of established, likely-to-continue trade channels; (4) the conditions under which and buyers to whom sales are made, *i.e.* impulse versus careful, sophisticated purchasing; (5) the fame of the prior mark, including sales, advertising, and length of use; (6) the number and nature of similar marks in use on similar goods; (7) the nature and extent of any actual confusion; (8) the length of time during, and conditions under which there has been concurrent use without evidence of actual confusion; (9) the variety of goods on which a mark is or is not used, *i.e.*, house mark, "family" mark, and product mark; (10) the market interface between applicant and owner of a prior mark; (11) the extent to which the applicant has a right to exclude others from use of its mark on its goods; (12) the extent of potential confusion, *i.e.*, whether de minimis or substantial; and (13) any other established fact probative of the effect of use. *Id*. at 1338-39 (citing *In re DuPont DeNemours & Co.*, 476 F.2d 1357 (CCPA 1973) ("*DuPont*")).

The Commission is required to consider all *DuPont* factors for which evidence has been submitted. *Id*. at 1339. These factors are accorded different weights in different circumstances and should not be reduced to a mere tally of the factors. *Id.* at 1340. Marks that are not substantially similar cannot infringe, for the Lanham Act prohibits passing off goods or services as those of a competitor by employing substantially similar trade dress that is likely to confuse consumers as to the source of the product. *See Converse*, 909 F.3d at 1124 (collecting cases).

B. Dilution

A respondent is liable for dilution of a trademark if the complainant can prove: (1) the complainant owns a mark that is famous and distinctive; (2) a respondent is using a mark in commerce that dilutes the famous mark; (3) the respondent's use of the mark began after the complainant's mark became famous; and (4) the respondent's use of its mark is likely to cause dilution by blurring or tarnishment of the complainant's mark. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1372 (Fed. Cir. 2012).

Dilution requires a showing that the mark is "widely recognized," or famous, among the general consuming public of the United States as a designation of source of the goods or services of the mark's owner. 15 U.S.C. § 1125(c)(2)(A). Fame for purposes of dilution is different than fame for purposes of a likelihood of confusion and requires a more stringent showing. *Coach Servs.*, 668 F.3d at 1373. Fame for dilution either exists or it does not, whereas fame for likelihood of confusion is a matter of degree along a continuum. *Id.*

Dilution may be caused by blurring or tarnishment. Dilution by "blurring" occurs when similarities between a complainant's famous mark and a respondent's brand impair the distinctiveness of the famous mark. 15 U.S.C. § 1125(c)(2)(B). Dilution by "tarnishment" arises when similarities between an accused and famous marks harm the goodwill or reputation of the

famous mark, such as by linking it to accused products of allegedly inferior quality. 15 U.S.C. § 1125(e)(2)(C); *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 31 (1st Cir. 1987).

V. ANALYSIS

The Commission's findings, conclusions, and supporting analysis follow. The Commission takes no position on Orly's alleged first sale, the presumption of validity, secondary meaning, fair use, injury, and the technical and economic prongs of domestic industry. *See* at ID 92-126, 128-148. The Commission affirms and adopts the ID's other findings, conclusions, and supporting analysis that are not inconsistent with this Opinion.

A. "Subject Matter Jurisdiction" and Statutory Authority

The ID finds that the parties do not contest that the Commission has subject matter jurisdiction over this investigation. *See* ID at 12.[10] The Commission determined to review this finding on its own initiative, pursuant to 19 C.F.R. § 210.44. 88 Fed. Reg. at 21713 (issue (4)).

The Commission has previously held, "the concept of 'subject matter jurisdiction' does not apply to administrative agencies." *Certain Silicon Photovoltaic Cells and Modules with Nanostructure, and Products Containing Same*, Inv. No. 337-TA-1271, Notice of Commission Determination to Review in Part and, on Review, to Affirm a Final Initial Determination Finding No Violation at 3 (Feb. 27, 2023) (citing *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 297-98 (2013) ("Because the question – whether framed as an incorrect application of agency authority or an assertion of authority not conferred – is always whether the agency has gone beyond what Congress has permitted it to do, there is no principled basis for carving out some arbitrary subset

[10] Specifically, the ID stated that "Respondents also do not contest subject matter jurisdiction, personal jurisdiction, or *in rem* jurisdiction. RIB at 21-23. However, the parties do dispute jurisdiction with respect to the Amoji Redesigns." ID at 12. In particular, the parties disputed whether the Amoji Redesigns were ripe for adjudication. *Id.* at 13-14. The ID finds, and the Commission agrees, that those Redesigns were properly adjudicated. *Id.* at 14.

of such claims as "jurisdictional.")). The Commission finds instead that this investigation was conducted pursuant to its statutory authority, as set forth in 19 U.S.C. § 1337.

B. Crocs Did Not Waive Its Allegations Against the Lined Versions of the Accused Orly Gators

The ID finds that Crocs's pre-hearing brief limited its infringement contentions against the accused Orly Gators to two, unlined versions – the White Colorway Clog and the Flamingo Colorway. ID at 17. The ID finds that Crocs did not address the lined Orly Gators in its pre-hearing brief, and thus waived its arguments against the lined versions. *Id.* (citing Order No. 63 at 17, Ground Rule 11.2 (June 28, 2022)). Although Crocs's post-hearing brief later included "representative" images of both lined and unlined Orly Gators, the ID finds that Crocs failed to establish that those images are representative of other Gator products. *Id.* The ID thus limited Crocs to the two Gator products it addressed in its prehearing brief. *Id.*

The Commission has determined to reverse the ID's finding of waiver with respect to the lined Orly Gators and finds, instead, that Crocs failed to prove that either the lined or unlined versions infringe the Asserted Marks, for the reasons given below.

The Commission finds that Crocs did not waive its infringement contentions as to the lined version of the Orly Gator. Crocs's pre-hearing brief expressly referenced both the lined and unlined versions of the Orly Gators under the subheading "Respondents Orly's and Hobby Lobby's Accused 'Gator' Products," as well as in its infringement analysis. Crocs's Pre-Hearing Br. at 39-40, 68.[11] Crocs alleged that "Orly considers [the Gators] to be one singular product it sells," even though "there are slight variations from shoe to shoe (some are lined, and some have

[11] Crocs also indicated, however, that "[t]o Complainant's knowledge, Hobby Lobby does not market or sell a lined Gator." Crocs's Pre-Hearing Br. at 68 n.4.

a slightly different decorative band on the heel strap)." *Id.* at 68-69 (citing CX-1308C (Antebi dep. tr.) at 213:25-214:15).

Crocs also alleged that "Orly's and Hobby Lobby's Accused Products," in which it included both the lined and unlined versions "are substantially similar to the Crocs 3D Marks in their overall appearance and arrangement of elements; the elements of the shoe that correspond to the 3D Marks evoke the same overall impression as the 3D Marks"; thus, they are "confusingly similar to the 3D Marks." *Id.* at 69-70. Crocs argued that "each Gator has all of the elements featured in the 3D Marks with slight or no variations," and any differences, such as the number or arrangement of holes "in a negligibly different pattern [from the 3D Marks], is irrelevant." *Id.* at 70.

Crocs included photographs of both the lined and unlined versions of the accused Gators under the subheadings "Orly and Hobby Lobby: Representativeness" and "Orly's and Hobby Lobby's Accused Products Are Confusingly Similar to the 3D Marks." Crocs's Post-Hearing Br. at 14-15, 17. Moreover, Crocs argued that "[e]ven the lined Gators, with no [heel] strap, make a similar overall impression to the 3D Marks (and, at worst, contain all of the elements of the '328 Mark, which has no strap)." *Id.* at 18.

The Commission finds, then, that Crocs provided adequate notice that it was accusing the lined Gators of infringing the 3D Marks for essentially the same reasons as the unlined versions. *See* Crocs's Pre-Hearing Br. at 69-75. Accordingly, the Commission reverses the ID's findings that "Crocs has waived any arguments with respect to the lined version of the Gator." ID at 17. The Commission further finds that Crocs failed to prove that the lined Gators infringe the 3D Marks for the same reasons it failed to prove the unlined versions infringe the 3D Marks. *See id.* at 19-52; *see also infra* at Section V.C.

C. Infringement: Crocs Failed to Show Likelihood of Confusion

The ID finds that Crocs failed to prove that Orly, Hobby Lobby, or Amoji infringe the 3D Marks or Word Mark. ID at 18-59 (analyzing 3D Marks), 60-71 (Word Mark). On review, the Commission affirms the ID's findings that Orly, Hobby Lobby, and Amoji do not infringe the 3D Marks or Word Mark, with additional, supporting reasoning regarding the 3D Marks below.[12]

1. Similarity to the 3D Marks (*DuPont* factor 1)

The Commission adopts the ID's findings that the Orly/Hobby Lobby Gator has a similar overall commercial appearance to the 3D Marks, but the Orly/Hobby Lobby Redesign does not. ID at 19-27, 49. The Commission thus adopts the ID's finding that the similarity to the 3D Marks (*DuPont* factor one) leans in favor of likelihood of confusion for the Orly/Hobby Lobby Gator, but leans against it for the Orly/Hobby Lobby Redesign. *See id.* at 27, 49.

The Commission finds, however, that the Amoji Garden Clog has noticeable differences from the 3D Marks. These include a wide, raised tread on the side and underside of the sole (including the heel) that is visible from the side view, whereas the '875 Registration depicts "a textured strip on the heel of the shoe." *See* ID at 7 (JX-0006 at CROCS_ITC046838), 11. In addition, the Amoji Garden Clog has a set of larger hexagonal holes (as opposed to smaller, round holes in the 3D Marks) on the upper, which are arranged in a somewhat more spread-out pattern. *See id.* at 52-56. The Commission finds these and other differences noted in the ID, individually and collectively, give the Amoji Garden Clog a generally more rugged, heavier appearance than the overall impression of the 3D Marks. The Commission thus modifies the ID

[12] The Word Mark does not raise the same issues of limited scope and proper controls as the 3D Marks. Thus, the Commission finds no infringement of the Word Mark based on the ID's findings. *See* ID at 60-71.

to find that this factor is either neutral or leans only weakly in favor of likelihood of confusion for the Amoji Garden Clog. *Cf. id.* at 56.

2. Similarity and Nature of the Goods (*DuPont* factor 2)

The Commission adopts the ID's finding that this factor favors finding a likelihood of confusion because the Orly Gator, Orly Redesign, Amoji Garden Clog, and Classic Clog are all EVA clogs or molded, clog-type footwear. *Id.* at 27, 49, 56. The Commission declines to "elevate[]" this factor, as Crocs advocates (Crocs's Pet. at 74), and even assigns it lesser weight because the trademark examiner found the clog to be a common feature of generic waterproof strap clogs that is not entitled to trademark protection. *See* JX-0001 at CROCS_ITC044602-603; JX-0005 at CROCS_ITC045703-704.

3. Conditions of Sale (*DuPont* factor 4)

The Commission affirms the ID's finding that this factor weighs against likelihood of confusion because the accused shoes have different tags and different price points than the Crocs Classic Clogs (*e.g.*, retail price of $6-10 for Orly Gators at Hobby Lobby vs. $40 or more for Classic Clogs). *Id.* at 28-32, 50, 57. Even Crocs acknowledges that its Classic Clogs typically retail for about $45.32, or sometimes as low as $35 (but not less than that), whereas Hobby Lobby typically sells the Orly Gators for $10 or less. *See* Crocs's Pet. at 74-75. The Amoji Garden Clogs typically retail for about $26-30, which is about $15-20 less than the typical retail price for the Classic Clog (except when the Classic Clog is on sale). *Id.* This pricing evidence, as well as brands and tags on the respective clogs, indicates that consumers are aware that lower-price alternatives to Classic Clogs are available, which is not likely to lead to confusion. *See* RX-2092C (Wallace) at Q/A 149-54.

4. Fame of the Mark (*DuPont* factor 5)

The Commission adopts the ID's findings that Crocs's evidence of extensive recognition or acclaim for the 3D Marks is weak, as is its showing that the 3D Marks are famous. *Id.* at 32-34, 51, 57. The Commission, however, modifies the ID to find this factor is neutral; it does not weigh against the likelihood of confusion. *See id.*

As for Crocs's complaint that the ID searched for fame of the 3D Marks "separate and apart from the Classic Clog," the Commission notes that the trademark examiner who examined Crocs's trademark applications found the clog itself to be a common design element that is not entitled to trademark protection. *See* JX-0001 at CROCS_ITC044602-603; JX-0005 at CROCS_ITC045703-704. Thus, it is appropriate for the ID to distinguish between evidence of the "fame" of the 3D Marks themselves as opposed to general recognition of the common clog.

Crocs also relies on the consumer survey conducted by its expert, Dr. Pittaoulis, as evidence of "fame." *See* Crocs's Pet. at 87-88. As discussed in more detail below, Crocs does not address a key flaw in Dr. Pittaoulis's survey – that the black mesh slide she used as her "control" image bears little resemblance to the elements of the test stimuli unrelated to the 3D Marks, which rendered her survey results unreliable. *See id.*; ID at 38-42.

Even so, with respect to her "unbranded" control, Dr. Pittaoulis reported that over half (52.2 percent) of her survey respondents believed the black mesh slide was from Crocs, despite its substantial differences from the 3D Marks or from the unprotected elements of the test stimuli, such as the overall clog shape and a heel strap. *See* ID at 39-42. To the extent her survey can be taken into consideration, these results suggest that a large percentage of consumers will associate a wide range of molded shoes, even mesh slides, with Crocs, despite their differences to an actual clog or the 3D Marks. *See* CX-1835 (Pittaoulis) at Q/A 142; *see also* RX-2092 (Wallace) at Q/A 124-25. This evidence tends to undercut Crocs's argument that the

3D Marks themselves are famous; rather, there are apparently other factors, such as the overall clog or the Crocs's name, that may account for a substantial share of its fame.

The Commission has considered Crocs's other arguments and finds they do not lead to a strong showing of fame for the 3D Marks, as opposed to the overall, generic clog. The Commission thus finds this factor is neutral on the overall issue of likelihood of confusion.

5. Confusion (*DuPont* factors 7, 8, 12)

a. Actual confusion

The Commission agrees with the ID's finding that Crocs's alleged evidence of actual confusion is ambiguous and weak, and thus adopts its finding that this factor is neutral. *See* ID at 34-36. Crocs relies on only two social media posts that allegedly show actual confusion, despite the allegedly extensive sales by Respondents. *See id.* at 34-35 (discussing CX-0815; CX-0813); *see also* Crocs's Pet. at 51-52. These two posts refer to purchasing "crocs" at Hobby Lobby, which suggests they were using the term generically, although this is not clear. *See* ID at 34-35; *see also* RX-2092 (Wallace) at Q/A 126-27 (survey shows consumers views "Crocs" more as a descriptor than a source). At a minimum, these posts do not prove the writers were actually confusing the Hobby Lobby "crocs" with the Crocs Classic Clog. Also, the fact that respondents did not prove that the trademark "CROCS" is generic does not resolve the ambiguous nature of these specific posts. *See id.* at 126-28.

The Commission also finds that even if it were to credit the testimony of Orly's former Chief Operating Officer, Mr. Shaikh, as evidence of actual confusion, as Crocs argues, his alleged confusion occurred during a deposition, and he corrected himself after he had a chance to view the images more closely. Moreover, his testimony provides little, if any, evidence of actual consumer confusion in a more real-life setting, as it does not take into account differences in prices, tags, material, or other factors that may affect the likelihood of confusion for a reasonable

consumer. *See* ID at 35-36. Mr. Shaikh's testimony was also directed only to the original Orly Gator, and not the Orly Redesign, Amoji Garden Clog, or any other accused shoe. *See id.* at 35. The Commission finds the ID was correct in assigning Mr. Shaikh's testimony and Crocs's other evidence of alleged actual confusion as "*de minimis*" in view of the volume of sales of the accused products. *See id.*

The ID finds that Crocs produced no evidence of actual confusion regarding the Amoji Garden Clogs. *Id.* at 57-58. The Commission adopts the ID's finding that this factor is neutral regarding the overall issue of likelihood of confusion. *Id.* at 36, 51, 58.

b. Pittaoulis Survey on Consumer Confusion

The Commission adopts the ID's findings that Dr. Pittaoulis's consumer surveys were unreliable and entitled to no weight, with the following additional findings. *See* ID at 37-42, 51. The ID properly finds that the 3D Marks are "expressly limited to a specific combination of articulated design elements" of a shoe (*e.g.*, the number, shape, and pattern of holes on the horizontal and vertical portions of the clog's upper) and thus "***do not*** cover the entirety of the [Classic Clog] or its overall look." *See* ID at 5-7 (describing 3D Marks); *see also* RX-2092C (Wallace) at Q/A 39-53 (describing numerous problems with using the black mesh slide as a control). In addition to the issues raised in the ID, the Commission notes that this distinction between the 3D Marks and the "overall look" of the Classic Clog is important because the strap clog itself is a common feature that is not entitled to trademark protection. *See* JX-0001 at CROCS_ITC044602-603; JX-0005 at CROCS_ITC045703-704. The Commission finds, then, that Crocs has not convincingly tied its evidence of confusion to the 3D Marks themselves, as opposed to the overall shape, functionality, or other unclaimed features of the Classic Clog. *Id.* at 5-6.

The scope of the 3D Marks is of particular importance in evaluating the consumer surveys conducted by Crocs's expert, Dr. Pittaoulis, and Respondents' expert, Mr. Wallace. *See id.* at 37-42 (Pittaoulis), 42-45 (Wallace). As Dr. Pittaoulis explained, a survey testing whether consumers would be confused as to the source of an accused product should include a "control" to filter out noise, confusion, or unwanted influences from the test data, such as the effects of design elements not covered by the 3D Marks (*e.g.*, the overall shape or design of the heel, sole, or upper) as well as guessing, pre-existing impressions, market dominance, question wording effects, and other non-trademark influences. *See* CX-1835 (Pittaoulis) at Q/A 43, 75, 100; RX-2092C (Wallace) at Q/A 71, 72; 6 McCarthy on Trademarks and Unfair Competition § 32:187 (5th ed.) ("McCarthy"). To this end, the control should generally share as many design characteristics as possible with the test subject, except for the characteristics being measured (*e.g.*, the number, shape, and pattern of the holes in the 3D Marks). *See* CX-1835 (Pittaoulis) at Q/A 64-69, 71, 74-76; RX-2092C (Wallace) at Q/A 32; Hr'g Tr. (Pittaoulis) at 358:17-359:9, 359:21-360:8; RX-0006C at Q/A 15; RX-2023 at 0044.

In this case, the ID correctly finds that Dr. Pittaoulis's control shoe did not share many of the non-trademarked design elements of the test shoe, which rendered her survey unreliable and non-probative. ID at 37-42. Dr. Pittaoulis's control and test images are shown below:

Dr. Pittaoulis's control shoes

"Branded Control"	"Unbranded Control"
	

Test image: Orly Gator

Test image: Amoji Garden Clog

ID at 38-39.

For comparison purposes, the 3D Marks and the Classic Clog, which Crocs asserts embodies those Marks, are shown below:

'328 Registration	Unlined Classic Clog
 JX-0002 ('328 Registration)	
'875 Registration	
 JX-0006 ('875 Registration)	 CPX-037

Id. at 132.

As can be seen above, Dr. Pittaoulis's control changed not only the design elements of the 3D Marks but also the very shape, look, feel, and character of the shoe itself. *Id*. at 40-41. For example, Dr. Pittaoulis's control cannot even be characterized as a clog-type shoe, nor does it possess the more rigid construction of a clog, the more defined upper, the thick sole, visible arch, or thick heel of the 3D Marks in the Classic Clog. *See* CX-1835 (Pittaoulis) at Q/A 71, 100. Rather, Dr. Pittaoulis's so-called "control" was a pliable, black mesh water shoe, or "slide," with a number of substantially different features, including: (i) a lower, more squat overall shape; (ii) a mesh upper with far more holes but of no particular pattern; (iii) no definite pattern of enlarged holes located around the vertical portion of the upper (above the sole); (iv) a thin sole of essentially uniform thickness with no visible arch or heel; (v) a dark color; and (vi) a white line running around the front portion between the sole and the upper. *See* RX-2092C (Wallace) at Q/A 40-42; Hr'g Tr. (Pittaoulis) at 363:8-21, 364:11-24, 366:24-367:3, 368:5-369:4 (discussed in ID at 40-41). Any one of these differences, Dr. Pittaoulis testified, might have influenced the responses of survey participants. Hr'g Tr. (Pittoulis) at 369:23-370:10.

Taken as whole, the substantial differences between Dr. Pittaoulis's control and the elements of the test stimuli unrelated to the 3D Marks clouded the reliability of the survey, making it difficult, if not impossible, to determine if survey respondents were reacting to the absence of the 3D Marks (the purpose of the control), or to the absence of the many other, unclaimed features in the control, described above. *See* ID at 41-42; RX-2092C (Wallace) at Q/A 42-44.

These differences likely reduced the "gross" association rates[13] for the control shoes compared to the "gross" association rates for the test shoes. *See id.*; RX-2092C (Wallace rebuttal WS) at Q/A 42-45. This, in turn, likely increased "net" association levels[14] when the association rates of the test images are compared to those of the control images, as shown below:

Test Shoe	Test Result	Control Result	Net Result[20]
Orly's Gator (White) [Unbranded]	73.6%	52.2%	**21.4%**
Orly's Gator (Flamingo) [Unbranded]	65.8%	52.2%	**13.6%**
Orly's Redesign Gator (Green) [Unbranded]	63.0%	52.2%	**10.8%**
Amoji Garden Clog [Branded]	43.3%	34.7%	**8.7%**

Id. at 39 (citing CX-1835 (Pittaoulis) at Q/A 101-04). The Commission concludes that the ID correctly finds Dr. Pittaoulis's surveys to be unreliable and entitled to no weight. ID at 41-42.

The Commission is not persuaded by Crocs's argument that "gross" association rates may suffice to establish likelihood of confusion, or that they should at least be considered alongside "net" association rates. *See* Crocs's Pet. at 55-56, 59-60, 66-67. While acknowledging the importance of controls and net results, Crocs argued that the "extraordinarily highs levels of gross confusion [*e.g.*, of the order of 65-75 percent in the Pittaoulis and Wallace surveys] alone support a finding of a violation," *i.e.*, a likelihood of confusion and infringement. *Id.* at 66-67.

The Commission disagrees. Gross association rates alone, which by definition lack a control to filter out unwanted influences, make it very difficult, if not impossible, to determine

[13] "Gross" association rates refer to the unfiltered, or unadjusted, percentages of survey participants who identified a particular test or control shoe with Crocs. *See* CX-1835 (Pittaoulis) at Q/A 43, 75; RX-2092C (Wallace) at Q/A 43-44.

[14] Net" association rate refers to the difference between the gross results for the test and control subjects. *See* CX-1835 (Pittaoulis) at Q/A 100; 6 McCarthy § 32:187. The net results in this case are supposed to isolate, or identify, the level of confusion due to the trade dress elements in question by removing, or filtering out, other, unwanted stimuli. CX-1835 (Pittaoulis) at Q/A 100; RX-2092C (Wallace) at Q/A 71, 72.

whether or to what extent the survey respondents were making associations due to the design elements covered by the 3D Marks as opposed to other influences not covered by the 3D Marks (such as the overall look and design of the Classic Clog). *See* ID at 42 n.21 (citing RX-0006C at Q/A 15, 22, 30); RX-2092C (Wallace) at Q/A 45-49.

The Commission further notes that over half (52-53 percent) of the survey respondents erroneously associated Dr. Pittaoulis' unbranded black mesh slide with Crocs, despite its many differences from the unprotected elements of the Classic Clog design, such as the overall clog shape and a heel strap, to say nothing of the 3D Marks.[15] ID at 39 (citing CX-1835 at Q/A 101-104). To the extent these results can be relied upon, they indicate there is about a 50/50 chance a consumer may identify almost any molded slide with Crocs, despite their many differences from the Classic Clog (and the 3D Marks). *See* CX-1835 (Pittaoulis) at Q/A 142; *see also* RX-2092 (Wallace) at Q/A 124-25. While such a high association rate may indicate widespread recognition of the Crocs name, the Commission finds that a high margin of error of about 50 percent offers another reason why gross association rates cannot be taken at face value, while underscoring the need for effective, carefully designed controls. *See* 6 McCarthy § 32:187.

The ID thus correctly finds that the Pittaoulis surveys are not reliable or persuasive. The Commission adopts the ID's finding that this evidence leans against finding a likelihood of confusion, or at least does not reliably support it. *See* ID at 45.

c. Wallace Surveys of Consumer Confusion

The Commission also adopts the ID's finding that Mr. Wallace's consumer surveys, unlike those of Dr. Pittaoulis, are reliable because he properly removed the features relevant to

[15] The gross association rate for the Amoji Garden Clog dropped to 34.7 percent when the control image was "branded." ID at 38-39.

the 3D Marks, while keeping other, non-trademarked elements constant. *Id.* at 42-45 (citing RX-2092C (Wallace) at Q/A 59-70; Hr'g Tr. (Wallace) at 962:16-963:4; Hr'g Tr. (Pittaoulis) at 390:4-21). Examples of Mr. Wallace's test and control images are shown below:

Test Stimuli: Orly Gator

Wallace Control Stimuli

See ID at 43-44 (citing RX-2092C (Wallace) at Q/A 90, 73, 74).

Mr. Wallace's survey results are shown below:

Test Shoe	Test Result	Control Result	Net Result	+Source Confusion
Orly Gator (White)	79.5%	79.5%	0%	0.5%
Orly Gator (Flamingo)	75.5%	79.5%	-4%	-4.5%
Orly Redesign	75.5%	73.0%	2.5%	2%

ID at 44.

Crocs's criticisms of Mr. Wallace's surveys are unavailing. In particular, Crocs complained that Mr. Wallace's controls, including the pattern of holes in the horizonal portion of their uppers, were too similar to the test images (with the 3D Marks) to serve as effective controls. Crocs's Pet. at 55, 62-65. The Commission disagrees, finding instead that Mr. Wallace's controls have no holes at all in the vertical portion of the upper (above the sole), which eliminates drainage from the clog and generally gives the control a heavier, more rigid appearance. *See* ID at 42, 45. The Commission also finds the holes on top have a substantially different shape (pill-shaped vs. round), and they are fewer in number, larger, and arranged differently than the "pattern of 13 round holes on the horizontal portion of the upper of the shoe" in the 3D Marks. *Id.* As a result of these and other features, such as the lack of texturing on the side of the sole, the Commission finds the Wallace controls are not confusingly similar to the 3D Marks. *Id.*; RX-2092C (Wallace) at Q/A 71-75, 79-87.

As for Crocs's complaint that a 70 percent gross association rate indicates that the Wallace control is too similar to the 3D Marks to be reliable, the Commission notes that Dr. Pittaoulis's own survey shows that about half of consumers would associate even a black mesh slide with Crocs, despite its significant differences from the Classic Clog. *See* ID at 39; RX-2092 (Wallace) at Q/A 71-75. The mere use of a common generic clog, as opposed to a black mesh slide, may account for a substantial portion of the remaining 20 percent difference between the gross association rates for the Wallace control and the Pittaoulis control (to the extent these results can even be compared). *See* ID at 44.

At any rate, these survey results indicate that the high gross association rates cited by Crocs do not provide reliable evidence of a likelihood of confusion over the 3D Marks, as opposed other potential influences, such as the clog itself. Crocs does not explain how one could

determine whether or not the survey participants' gross association rates (*e.g.*, 73-79.5 percent) between the Accused Products and Crocs were due to similarities to the 3D Marks or to other, non-trademarked influences or design elements, such as the overall look of the Classic Clog. *See id.* at 44; *see also* JX-0001 at CROCS_ITC044602-603; JX-0005 at CROCS_ITC045703-704. As noted above, gross association rates effectively represent the influence of all (trademark and non-trademarked) influences on association and do not filter out any unwanted influences, as a properly designed control is supposed to do. *See* 6 McCarthy § 32:187; CX-1835 (Pittaoulis) at Q/A 43, 75, 100; RX-2092C (Wallace) at Q/A 43-44, 71, 72. As a result, Crocs cannot rely on the Wallace surveys to satisfy its own burden of proving that consumers are likely to confuse the Accused Products with Crocs due to the 3D Marks or to otherwise overcome the deficiencies in the Pittaoulis surveys.

The Commission thus adopts the ID's finding that the Wallace surveys weigh against finding a likelihood of confusion. ID at 45. At a minimum, the Commission finds that neither the Pittaoulis survey nor the Wallace survey provides reliable, affirmative evidence of a likelihood of confusion for the Accused Products. Accordingly, the Commission adopts the ID's finding that *DuPont* factors 7, 8, and 12 weigh against finding a likelihood of confusion between the Accused Products and the 3D Marks. *See id.* at 45, 48-49, 51-52. 57-58.

6. Variety of Goods (*DuPont* factor 9)

The ID finds that *DuPont* factor 9 (variety of goods) weighs against a likelihood of confusion because Crocs does not use its Asserted Marks on any goods other than footwear. ID at 46, 51, 58. Crocs argued in its petition for review that while it may be true that the use of the same mark on a variety of goods may strengthen consumer associations with that mark, there is no reason why the reverse is true – that the use of the mark on one specific good somehow

weakens the mark. Crocs's Pet. at 76-77. Crocs argued that, if anything, this factor should be neutral rather than weigh in favor of likelihood of confusion. *Id.*

The Trademark Trial and Appeal Board ("TTAB") has held that where the subject trademark is not used on a variety of goods or services, the ninth *DuPont* factor should be viewed as neutral on likelihood of confusion. *See StarStruck Entertainment v. The Alexander Trust*, 2022 WL 17370234 at *22 (TTAB Nov. 16, 2022). Since Crocs does not use its Asserted Marks on a variety of goods (beyond footwear), the Commission finds this factor is neutral.

Not even Crocs, however, argues that this factor should weigh in favor of likelihood of confusion. Thus, even when *DuPont* factors 5 and 9 are changed from negative to neutral, and with other modifications made above, this does not change the Commission's finding that the overall weight of the *DuPont* factors leans against finding a likelihood of confusion. The Commission adopts the ID's findings with respect to the other *DuPont* factors and likelihood of confusion, to the extent they are consistent with this Opinion.

In sum, the Commission adopts the ID's finding that Crocs failed to prove likelihood of confusion or infringement of the Asserted Marks. *See, e.g.*, ID at 28-35, 46-49, 50-52, 57-59.

D. Crocs Did Not Waive Its Infringement Contentions Against Defaulting Respondents for Purposes of Relief under Section 337(g)(1)

The ID finds that Crocs waived its violation and remedy arguments against the four Defaulting Respondents (La Modish, Star Bay, Huizhou, and Anao) by not including those arguments in its pre-hearing brief. ID at 71-72. In particular, the ID finds that Crocs failed to mention Defaulting Respondents in its pre-hearing brief, identify the trademarks being asserted against them, analyze their products, or explain why a CDO should issue against them. *Id.*

Crocs challenged the ID's finding of waiver, arguing that the Commission, upon finding a party in default, "shall presume the facts alleged in the complaint to be true" and "shall, upon

request, issue an exclusion from entry or a cease and desist order ["CDO"], or both" against each Defaulting Respondent. Crocs's Pet. at 5 (quoting 19 U.S.C. § 1337(g)(1)(E); 19 C.F.R. § 210.16(c)). There was no need, Crocs argues, to address Defaulting Respondents in its pre-hearing brief because there were no "contested matters" regarding them, and thus no issues to be briefed under the ALJ's ground rules. *Id.* at 6 (citing 19 U.S.C. § 1337(c); Order No. 63, Ground Rule 11.2). Crocs argued that, to the extent there were any "contested matters" regarding Defaulting Respondents, it briefed them in the context of seeking a general exclusion order ("GEO").[16] *Id.* at 7, 20.

Respondents asserted that the ID accurately describes the procedural history of Crocs's contentions, but they took no position on the issue of waiver in response to Crocs's petition for review. *See* Resps.'s Resp. at 4. OUII opposed Crocs's petition, arguing that Crocs is not entitled to presume the allegations of the complaint against the Defaulting Respondents are true, per section 337(g)(1), because Crocs is continuing to seek a GEO, and not "relief limited solely to that person [respondent]." *See* OUII's Reply at 3-6 (discussing 19 U.S.C. § 1337(g)(1)).

Upon review of the ID, the parties' submissions, and the record, the Commission has determined to set aside the ID's findings with respect to waiver as they do not apply to issuance of an LEO or CDO against a party found in default, pursuant to 19 U.S.C. § 1337(g)(1). When the Commission found the Defaulting Respondents in default after their failure to respond to the complaint and notice of investigation and the ALJ's show cause order, the Commission held that the "Non-Participating [or Defaulting] Respondents have therefore waived their right to appear,

[16] Crocs requested a GEO, or in the alternative, an LEO, as well as CDOs against all respondents, including Defaulting Respondents. *See* Crocs's Pre-Hearing Br. at 299, 302; Crocs's Post-Hearing Br. at 194, 196-97.

be served with documents, and to contest the allegations at issue in the investigation." Order No. 58 at 2 (May 20, 2022), *unreviewed by* Comm'n Notice (June 10, 2023).

Section 337(g)(1) states that, once a party is found in default, "the Commission *shall* presume the facts alleged in the complaint to be true and *shall, upon request, issue* an exclusion from entry [*i.e.*, LEO] or a cease and desist order, or both, limited to that person," unless the Commission finds the public interest factors weigh against exclusion. *See* 19 U.S.C. § 1337(g)(1) (emphasis added); *Laerdal Medical Corp. v. ITC*, 910 F.3d 1207, 1212 (Fed. Cir. 2018) ("shall" unambiguously requires the Commission to issue an LEO or CDO, or both, if the statutory requirements are satisfied, subject to public interest concerns). Accordingly, there were no violation issues left to be resolved for the Defaulting Respondents and thus no need to present infringement contentions with respect to those respondents in Crocs's prehearing brief to obtain relief limited to them under section 337(g)(1).

The Commission's determinations on remedy and the public interest are discussed below.

E. Crocs Failed to Show False Designation of Origin

The ID finds that Crocs failed to prove that Respondents' mark is so confusingly similar to the 3D Marks that there is a likelihood of confusion as to the source of the goods. ID at 72-73 (citing *Ross Bicycles, Inc. v. Cycles USA, Inc.*, 765 F.2d 1502, 1503-04 (11th Cir. 1985)). The ID notes that the factors relevant to establishing false designation of origin under section 1125(a) of the Lanham Act (15 U.S.C. § 1125(a)) are identical to the factors for evaluating likelihood of confusion with respect to trademark infringement (15 U.S.C. § 1114). *Id.* (same). The ID finds that Crocs failed to show likelihood of confusion for false designation of origin for the same reasons it failed to prove likelihood of confusion for infringement, as discussed *supra*. *Id.* at 73.

The Commission determined to review the ID's findings on false designation of origin. 88 Fed. Reg. at 21713 (issue (6)). Having affirmed the ID's findings of no likelihood of confusion, *supra*, the Commission affirms the ID's findings of no false designation of origin under 19 U.S.C. § 1337(a)(1)(A) and 15 U.S.C. § 1125(a). *See* ID at 73.

Given that Crocs failed to prove false designation of origin, the Commission, like the ID (at 130), takes no position on whether Crocs demonstrated an injury or threat of injury requirement, as required by 19 U.S.C. § 1337(a)(1)(A). *See Beloit*, 742 F.2d at 1423.

F. Crocs Failed to Show Dilution by Blurring or Tarnishment

The ID finds that Crocs failed to prove that Respondents violated section 337 by diluting Crocs's Asserted Trademarks, either by blurring or tarnishment. ID at 73-86. The "threshold question" for dilution, the ID notes, is whether the mark is "famous," *i.e.*, "widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner." *Id.* at 74 (quoting 15 U.S.C. § 1125(c)(2)(A)). Although "fame" is a factor for both dilution and likelihood of confusion, the ID notes that they are "distinct concepts," for "dilution fame is difficult to prove" and "requires a more stringent showing" than fame for likelihood of confusion. *Id.* at 76 (citing *inter alia Coach Servs.*, 668 F.3d at 1373).

The Commission determined to review the ID's findings on dilution, including fame, in keeping with its determination to review the ID's related findings on likelihood of confusion.

1. The 3D Marks

The ID finds that the 3D Marks are not famous because consumer surveys and other evidence show that consumers identify the overall shape and design of the Classic Clog, but not the 3D Marks, with Crocs. ID at 76-78 (factor 1), 79-82 (factor 3)). The ID thus finds it is not necessary to address blurring or tarnishment any further. *Id.* at 83, 86, 149. The ID also finds Respondents' "fair use" defense to be inapplicable where there is no dilution. *Id.* at 128-29.

The Commission has determined to affirm the ID's findings on review. As noted above, fame for dilution purposes "requires a more stringent showing" than fame for likelihood of confusion. *Id.* at 76. Having affirmed that Crocs failed to prove the relatively less stringent standard of likelihood of confusion for infringement, the Commission affirms that Crocs also has not satisfied the more stringent standard of fame for purposes of dilution. *See id.* at 77-82.

Accordingly, the Commission affirms the ID's findings of no dilution of the 3D Marks by blurring or tarnishment, for the reasons given in the ID. *See id.* at 74, 76, 86.

2. The Word Mark

The ID finds that the Word Mark, in contrast to the 3D Marks, is famous because "CROCS" is used extensively in the company's advertising and social media platforms, it exhibits high degrees of consumer recognition, sales of products bearing the "CROCS" label have been substantial, and the mark is federally registered. *Id.* at 82-83. Nonetheless, the ID finds that neither Orly nor Hobby Lobby is liable for dilution of the Word Mark because there is no compelling evidence of any actual or intended association between the Accused Products and the Word Mark. *Id.* at 84-86. In particular, the ID finds that Orly's use of the accused "GATOR" mark is "unremarkable" and dissimilar from the asserted "CROCS" mark. *Id.*

While the ID finds Hobby Lobby's "CROC" mark to be more similar to "CROCS," the ID concludes, based on consumer surveys, that consumers do not associate "CROC" (or "GATOR," for that matter) with "CROCS." *Id.* at 84-86 (citing, *inter alia*, RX-2092C at Q/A 133-42). The ID finds that Hobby Lobby uses the term "CROC" (or "CROC SLIDES") as part the phrase "SPRING SHOP—WEARABLE ART/FOOTWEAR-CROC SLIDES," which appears in small print on a tab on the back of the Accused Products. *Id.* at 65, 85 (citing, *inter alia*, RX-2092C at Q/A 112). Although the ID finds that "CROC" is similar to "CROCS," Hobby Lobby contends that it used "CROC" more as a product descriptor ("CROC-SLIDES")

than as an identifier of its source. *Id.* at 60. As shown below, the same tag provides Hobby Lobby's website address (www.hobbylobby.com) below the phrase "FOOTWEAR-CROC SLIDES" above, meaning that Hobby Lobby, not Crocs, is the source of the goods.

Front Label

Back Label

RX-2092C at Q/A 112.

Id. at 65.

The Commission further finds that the use of the marks on a very limited range of goods (*DuPont* factor 9) should count as neutral on dilution, not against it, as discussed above in connection with likelihood of confusion. *See StarStruck*, 2022 WL 17370234 at *22. These changes, however, do not place any of these or other factors in favor of dilution. Thus, they do not change the final determination that Crocs failed to prove dilution by blurring or tarnishment.

The Commission adopts the ID's findings to the extent they are not inconsistent with this Opinion. Accordingly, the Commission affirms the ID's findings that Crocs failed to prove Respondents diluted the Word Mark by blurring or tarnishment.

G. Domestic Industry

For the foregoing reasons, the Commission has adopted, with some modifications, the ID's findings that Crocs failed to prove a violation of section 337. Accordingly, the Commission has determined to take no position on the ID's findings on whether Crocs satisfied the technical or economic prongs of the domestic industry requirement, pursuant to *Beloit*, 742 F.2d at 1423.

H. Remedy, Public Interest, and Bonding

1. Remedy

The Commission has "broad discretion in selecting the form, scope, and extent of the remedy." *Viscofan, S.A. v. US. Int'1 Trade Comm'n*, 787 F.2d 544, 548 (Fed. Cir. 1986). In the ALJ's recommended determination ("RD"), the ALJ recommends that if a violation is found, then a GEO should issue as the additional requirements of section 337(d)(2) are met. RD at 150-51. Alternatively, the RD recommends an LEO and CDOs issue directed to the participating respondents. *Id.* at 152-54. The RD recommends no remedy issue against Defaulting Respondents. *Id.* at 155-56.

Crocs may not seek a GEO under section 337(g)(2) because other respondents appeared to contest the investigation and thus the requirements of this provision are not met. *See* 19 U.S.C. § 1337(g)(2). Instead, Crocs must seek relief instead under section 337(d) for a GEO. *See* 19 U.S.C. §§ 1337(d); *see also Certain High-Density Fiber Optic Equipment and Components Thereof*, Inv. No. 337-TA-1194, Comm'n Op. at 85-87 (Aug. 3, 2021) (holding that when a GEO is sought and some respondents participate, the Commission evaluates exclusion against defaulting respondents under section 337(d)(2), not 337(g)(2)); *Certain Vaporizer*

Cartridges and Components Thereof, Inv. No. 337-TA-1211, Comm'n Op. at 13 n.22 (March 1, 2022) (same); *Certain Water Filters and Components Thereof*, Inv. No. 337-TA-1126, Comm'n Op. at 13 n.2 (Nov. 15, 2019) (same). Unlike section 337(g)(1), section 337(d) does not authorize or direct the Commission simply to presume the allegations of the complaint to be true. Here, Crocs has not met its burden to show a violation under section 337(d). Accordingly, the Commission has determined not to issue the requested GEO because none of the participating or default respondents was found to be in violation.

Having determined not to issue a GEO, the Commission has determined to issue an LEO against each of the Defaulting Respondents. As explained earlier, the Commission is required to issue requested remedies limited to parties found in default when the conditions of section 337(g)(1) are met and the Commission finds that the public interest factors (discussed below) do not preclude such a remedy. *See* 19 U.S.C. § 1337(g)(1); *Laerdal*, 910 F.3d at 1212.

The Commission has also determined to issue CDOs against defaulting respondents Star Bay and La Modish pursuant to section 337(g)(1). 19 U.S.C. § 1337(g)(1). The Commission takes no action concerning the issuance of CDOs to defaulting respondents Huizhou and Anao.[17,18,19]

[17] Commissioners Schmidtlein and Karpel would issue CDOs against each of the Defaulting Respondents while Chairman Johanson and Commissioner Stayin would not issue CDOs against respondents Huizhou and Anao. Commissioner Kearns does not reach any remedy issues concerning violation, including whether to issue CDOs against Defaulting Respondents, as explained in his Dissenting Views. Accordingly, as there is no majority vote to issue CDOs against respondents Huizhou and Anao, the Commission takes no action on that issue.

[18] Chairman Johanson and Commissioner Stayin maintain the Commission's policy of issuing a CDO to a foreign defaulting respondent only where the respondent maintains commercially significant inventories in the U.S. or has significant domestic operations. *See, e.g., Certain Water Filters and Components Thereof*, Inv. No. 337-TA-1126, Comm'n Op. at 11 (November 12, 2019) (holding, with respect to foreign defaulting respondents, that "[t]he Commission has generally issued a CDO when, with respect to the imported infringing products, a respondent maintains commercially significant inventories in the U.S. or has significant domestic operations that could undercut the remedy provided by an exclusion order."); *see also, Certain Electric Nicotine Delivery Systems and Components Thereof,* Inv. No. 337-TA-1139, Comm'n Op. at 14–15 (May 5, 2020). This differs from the established practice where a domestic respondent is found in default and "the Commission presumes the presence of commercially significant inventories in the United States to warrant a cease and desist order." *In the Matter of Certain Oil-Vaping Cartridges, Components Thereof, & Prod. Containing the Same,* Inv. No. 337-TA-1286, Comm'n Op. at 20-21 (Aug. 1, 2023).

[19] Commissioners Schmidtlein and Karpel would issue CDOs against all of the Defaulting Respondents. As Commissioners Schmidtlein and Karpel have explained in previous investigations and subject to public interest considerations, section 337(g)(1) directs the Commission, upon request, to issue an exclusion from entry or a cease and desist order, or both, limited to a defaulting respondent when the criteria set forth in section 337(g)(1)(A)-(E) have been met. *See*, *e.g.*, *Certain High-Density Fiber Optic Equipment and Components Thereof*, Inv. No. 337-TA-1194, Comm'n Op. at 87 n.50 (Aug. 23, 2021) (Public Vers.). Here, each of Defaulting Respondents La Modish, Star Bay, Huizhou, and Anao was named in the complaint or amended complaint, and each was served the complaint/amended complaint and notice of investigation. *See* Order No. 55 (Apr. 26, 2022); Order No. 58 (May 20, 2022), *unreviewed by* Comm'n Notice (June 10, 2022). Each Defaulting Respondent failed to show good cause why they should not be held in default for failing to respond to the complaint/amended complaint and notice of investigation. *See id*. These findings satisfy subsections 337(g)(1)(A)-(D). Furthermore, as noted, Crocs renewed its request for an LEO directed to each of the Defaulting Respondents if the Commission did not issue a GEO, as well as its request for CDOs directed to each of the Defaulting Respondents, in its initial submission on remedy, bonding, and

2. The Public Interest

Pursuant section 337(g)(1), the Commission

> shall presume the facts alleged in the complaint to be true and shall, upon request, issue an exclusion from entry or a cease and desist order, or both, limited to that person unless, after considering the effect of such exclusion or order upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, the Commission finds that such exclusion or order should not be issued.

19 U.S.C. § 1337(g)(1)(E).

In their response to the Commission's request for briefing on the public interest, none of the parties present any argument that the issuance of remedial orders against the Defaulting Respondents would be contrary to the public interest. Rather, Crocs contends that the issuance of orders would not impact the public health or welfare, non-infringing substitutes are readily available, Crocs has the production capacity to meet U.S. consumer demand, and there would be no impact on U.S. consumers as Crocs and third parties provide non-infringing alternatives. Crocs's Resp. at 44-49; *accord* OUII's Resp. at 25-28. Respondents provide no discussion concerning the public interest in their submissions. *See* Respondents' Resp.; Respondents' Reply.

Accordingly, the Commission finds that issuance of the requested remedy against the Defaulting Response would not be adverse to the public interest.

3. Bonding

If the Commission enters an exclusion order or a cease and desist order, a respondent may continue to import and sell its products during the 60-day period of Presidential review

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the public interest, thus satisfying subsection 337(g)(1)(E). As each of the requirements under section 337(g)(1) have been satisfied, Commissioners Schmidtlein and Karpel presume the facts in the complaint and amended complaint as to a violation to be true and would issue an LEO and CDOs directed to each of the Defaulting Respondents.

under a bond in an amount determined by the Commission to be "sufficient to protect the complainant from any injury." 19 U.S.C. § 1337(j)(3); *see also* 19 C.F.R. § 210.50(a)(3). When reliable price information is available in the record, the Commission has often set the bond in an amount that would eliminate the price differential between the domestic product and the imported, infringing product. *See Certain Microsphere Adhesives, Processes for Making Same, & Prods. Containing Same, Including Self-stick Repositionable Notes*, Inv. No. 337-TA-366, USITC Pub. No. 2949, Comm'n Op. at 24 (Jan. 16, 1996). The Commission also has used a reasonable royalty rate to set the bond amount where a reasonable royalty rate could be ascertained from the evidence in the record. *See, e.g., Certain Audio Digital-to-Analog Converters & Prods. Containing Same*, Inv. No. 337-TA-499, Comm'n Op. at 25 (Mar. 3, 2005). Where the record establishes that the calculation of a price differential is impractical or there is insufficient evidence in the record to determine a reasonable royalty, the Commission has imposed a 100 percent bond. *See, e.g., Certain Liquid Crystal Display Modules, Prods. Containing Same, & Methods Using the Same*, Inv. No. 337-TA-634, Comm'n Op. at 6-7 (Nov. 24, 2009). The complainant, however, bears the burden of establishing the need for a bond. *Certain Rubber Antidegradants, Components Thereof & Prods. Containing Same*, Inv. No. 337-TA-533, USITC Pub. No. 3975, Comm'n Op. at 40 (July 21, 2006).[20]

The Commission has determined to impose a bond in the amount of 100 percent of the entered value of the covered products imported by the Defaulting Respondents during the 60-day

[20] Commissioner Schmidtlein finds that section 337 does not authorize respondents subject to remedial relief under subsection 337(g)(1) to import infringing products under bond during the Presidential review period for the reasons explained in *Certain Centrifuge Utility Platform and Falling Film Evaporator Systems and Components Thereof*, Inv. No. 337-TA-1311, Comm'n Notice at 5, n.5 (March 23, 2023). She therefore would not permit the Defaulting Respondents to import infringing products under bond during the Presidential review period.

period of Presidential review due to the absence of any reliable price information. *See* ID at 156 (citing *Certain Flash Memory Circuits & Prods. Containing Same*, Inv. No. 337-TA-283, USITC Pub. No. 3046, Comm'n Op. at 26-27 (July 1997) (a 100 percent bond is imposed when price comparisons are not available or reasonable and evidence indicated a reasonable royalty was *de minimis*)).

VI. CONCLUSION

For the reasons set forth herein, the Commission determines that Crocs has not established a violation of section 337 with respect to Orly, Hobby Lobby, and Amoji based on infringement of the Asserted Marks. The Commission takes no position on Orly's alleged first sale, the presumption of validity, secondary meaning, fair use, injury, and the technical and economic prongs of the domestic industry requirement, pursuant to *Beloit*, 742 F.2d at 1423. *See* at ID 92-126, 128-48. The Commission has determined to issue an LEO and CDOs against defaulting respondents Star Bay and La Modish pursuant to section 337(g)(1). Accordingly, this investigation is terminated with a finding of no violation of section 337 as to Orly, Hobby Lobby, and Amoji and the issuance of the specified remedial orders against the Defaulting Respondents.

By order of the Commission.

Lisa R. Barton
Secretary to the Commission

Issued: October 4, 2023

PUBLIC VERSION

DISSENTING VIEWS OF COMMISSIONER JASON E. KEARNS

I find that the Orly Gator and the Amoji Garden Clog infringe Croc's registered 3D Marks – marks that are essential and distinguishing design features critical to the overall look of the Crocs Classic Clog. My analysis of the factors from the various tests of infringement, dilution, and secondary meaning is detailed in the pages that follow.

In essence, as illustrated below, I agree with the ID that the holes, trapezoids, and straps of the first two shoes, the Orly Gator and the Amoji Garden Clog, are "very similar" and "substantial[ly] similar" – confusingly similar, in my view – to the holes, trapezoids, and straps of the third shoe, the Crocs Classic Clog, and that these marks are used on practically identical and directly competitive products, namely molded, foam-based, clog-type footwear.

Thus, *DuPont* factors 1 (similarity of the marks) and 2 (similarity and nature of the goods) weigh in favor of finding infringement, as the ID found. Where I part ways with the ID is

in how I weigh this evidence against the survey evidence. As explained below, courts and the Trademark Trial and Appeal Board (TTAB) have found mark and product similarities like these sufficient to establish infringement on their own; survey evidence was not required. In my view, that is the right outcome here, given how clear and strong the similarities are. I also don't put as much stock in the Respondents' survey evidence.

I also part ways with the ID because I find that the 3D Marks (including the holes, trapezoids, and strap) make the Classic Clog distinctive and famous (*DuPont* factor 5); elements of the shoe that are generic, such as the overall clog shape, do not – and, by definition, *cannot* – make the shoe distinctive or famous. Thus, this factor lends considerable further support to a finding of infringement.

Based on these findings and others described below, I therefore respectfully dissent.

I. TRADEMARK INFRINGEMENT: LIKELIHOOD OF CONFUSION

A. Legal Standard

The ID and my colleagues accurately describe the "*DuPont* factors" we consider in determining whether a likelihood of confusion exists. ID at 15-16; Majority Opinion at 13-14. I focus on two further legal principles as discussed below.

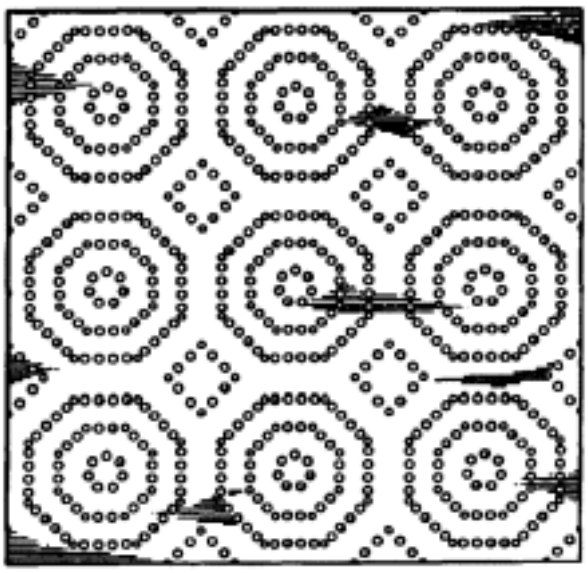
As an initial matter, "the first *DuPont* factor, the similarity or dissimilarity of the marks themselves, may be dispositive of the issue." McCarthy on Trademarks and Unfair Competition § 23:79 (5th ed.) ("McCarthy"). Even more so, where there are not only similarities between the marks, but also similarities between the goods (the second *DuPont* factor), a likelihood of confusion is even clearer. "While it must consider each [*DuPont*] factor for which it has evidence, the [decisionmaker] may focus its analysis on dispositive factors, *such as similarity of the marks and relatedness of the goods.*" *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1336 (Fed. Cir. 2001) (emphasis added). These are "two key considerations" in the *DuPont*

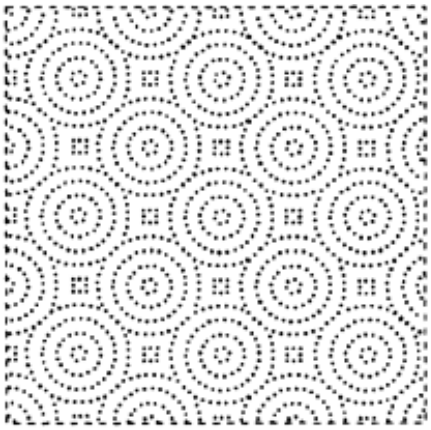
analysis. *In re SL&E Training Stable, Inc.*, 88 U.S.P.Q.2d 1216, 2008 WL 4107225 (T.T.A.B. 2008).[1]

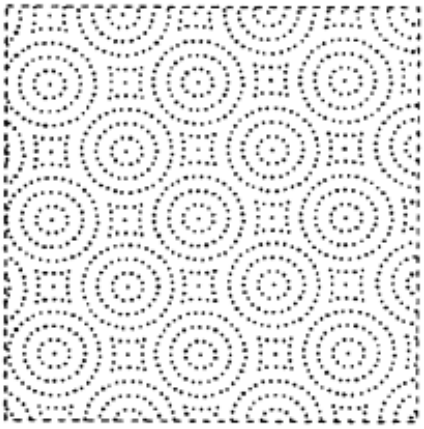
It follows that neither survey evidence nor direct evidence of actual confusion is a prerequisite to granting relief. "[A]ll courts agree that survey evidence is not required to prove a likelihood of confusion." McCarthy at § 23:17; *see Swagway, LLC v. International Trade Commission*, 934 F.3d 1332, 1339-1340 (Fed. Cir. 2019) (affirming Commission's finding of a likelihood of confusion based on the degree of similarity between the two marks and the strength of the marks, despite no evidence of actual confusion and complainant's failure to present survey evidence). A finding of infringement can instead be "based on an inference arising from a judicial comparison of the conflicting marks themselves and the context of their use in the marketplace." McCarthy § 23:63.

In *Fort James Operating Company v. Royal Paper Converting, Inc.*, 83 U.S.P.Q.2d 1624, 2007 WL 1676779 (2007), the TTTAB considered within the *DuPont* framework whether the pattern on the first paper towel, below, was likely to be confused with the following two patterns, which were already registered trademarks under the name Brawny, among other names.

[1] The importance of these first two *DuPont* factors is also reflected in the text of the Agreement between the United States of America, the United Mexican States, and Canada (USMCA): "Each Party shall provide that the owner of a registered trademark has the exclusive right to prevent third parties … from using in the course of trade *identical or similar signs* … for *goods or services that are related to those goods or services* in respect of which the owner's trademark is registered, if that use would result in a likelihood of confusion. In the case of the use of an *identical sign for identical goods or services*, a likelihood of confusion shall be presumed." USMCA, Article 20.19 (emphasis added).







The TTAB concluded that there was a likelihood of confusion based solely on the fact that: (1) the first design mark was "highly similar in overall commercial impression" to the Brawny registered marks (*DuPont* factor 1); (2) the marks were used in connection with identical goods, paper towels (*DuPont* factor 2); and (3) the goods were sold in the same channels of trade (*DuPont* factor 3) and to the same class of purchasers. It recognized that, "by definition, [the first factor] is a subjective determination and must take into account the overall commercial impressions created by the marks rather than any detailed analysis thereof." *Id.* at 4. It found all other *DuPont* factors neutral. It was not troubled by the fact that there was no evidence of actual

confusion, or by the fact that the maker of the Brawny paper towel, despite having ample opportunity to do so, did not present consumer surveys regarding potential confusion. *Id.* at 5-6.

In *adidas America, Inc. v. Skechers USA, Inc.,* 149 F.Supp.3d 1222 (D. Or. 2016), the court faced a more complicated record but again focused on the similarity of the marks and the similarity of the goods – and discounted survey evidence. adidas argued that the first shoe, shown below and sold by Skechers, infringed its "Three-Stripe" registered mark, illustrated on the second shoe shown below, and sought a preliminary injunction.[2] The court found adidas was "likely to succeed on the merits" in showing the marks on the first shoe were confusingly similar to adidas' registered "Three-Stripe" mark.

Skechers Relaxed Fit Cross Court TR

adidas Ultra Boost with the Three-Stripe Mark

The court found that Skechers' three-stripe design was "very similar in overall appearance to the adidas Three-Stripe mark." *Id.* at 1241. It recognized what it described as "minor distinctions," such as differences in stripe thickness and the rounded corners of the Skecher stripes, and that the Skechers stripes did not extend to the midsole and instead formed an "E," but found that "those minor differences do not change the overall impression of similarity

[2] The court considered three separate infringement claims, involving three separate adidas and Skechers shoes. I focus on just one of the three, involving the registered Three-Stripe mark, as the most relevant to my analysis in this case.

between the Skechers three-stripe design and adidas's Three-Stripe mark." *Id*. The court found this factor "weighs heavily in adidas's favor." *Id.*

The court then recognized that adidas and Skechers both "make athletic and casual footwear" and that "the products are reasonably interchangeable by buyers for the same purposes." *Id.* (Under Federal Circuit jurisprudence, of course, this analysis corresponds to *DuPont* factor 2.) The court found that this factor also "weighed strongly in adidas's favor." *Id.*

The court then found that the two products are sold in a common marketing channel, and noted that, taken together, "the similarity of the marks, relatedness of the goods, and this third factor, the 'use of a common marketing channel' are the key factors in the [Ninth Circuit's] Sleekcraft analysis [akin to the *DuPont* analysis]. *GoTo.com*, 202 F.3d at 1205 (referring to these first three factors as the "controlling troika")." *Id.* at 1242. The court found that other factors, such as the strength of the mark, the lack of care that an ordinary purchaser is likely to exercise in purchasing inexpensive athletic shoes, and Skechers' intent in selecting its mark, also supported a finding of confusion. *Id.* at 1243-44.

It then considered "actual confusion" and, specifically, the surveys submitted by adidas (incidentally, apparently conducted by "Poret," who also conducted a survey presented by Crocs in this investigation) and Skechers:

> Both adidas and Skechers submitted surveys which support their desired outcome in this case. … And both parties expended enormous effort arguing the merits and demerits of the competing surveys. … Skechers argues that the adidas survey is flawed because, among other things, … the survey's control was poorly designed. … adidas attacks the [Skechers] survey as improperly focused solely on point-of sale confusion, and thus irrelevant to an analysis of post-sale confusion.
>
> The Court declines to give controlling weight to either survey on the question of actual confusion, and concludes that this element favors neither party. Given adidas's strong showing on the other Sleekcraft factors that the Court has analyzed thus far, the neutrality of this factor does not preclude a finding that the Skechers shoes are likely to cause confusion. *See Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d at

> 1137, 1151 (9th Cir. 2011) ("actual confusion is not necessary to a finding of likelihood of confusion under the Lanham Act.").

Id. at 1245. The Ninth Circuit affirmed. *adidas America, Inc. v. Skechers USA, Inc.*, 890 F.3d 747 (2018).

A second legal principle worthy of mention is that, if after weighing the evidence, the issue of likelihood of confusion is in doubt, the question will be resolved in favor of the senior user, particularly when the senior user's mark is strong and well known. *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265 (Fed. Cir. 2002) ("This court resolves doubts about the likelihood of confusion against the newcomer because the newcomer has the opportunity and obligation to avoid confusion with existing marks.") Judge Learned Hand explained:

> Of course, the burden of proof always rests upon the moving party, but having shown the adoption of a similar trade name, arbitrary in character, I cannot see why speculation as to the chance that it will cause confusion should be at the expense of the man first in the field. He has the right to insist that others in making up their arbitrary names should so certainly keep away from his customers as to raise no question.

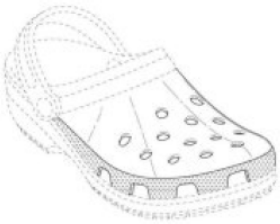
Lambert Pharmacal Co. v. Bolton Chemical Corporation, 219 F. 325, 326 (S.D. N.Y. 1915) ("LISTOGEN" infringed "LISTERINE," both for mouthwash).

B. 3D Marks

1. The Gator (Orly and Hobby Lobby)[3] [4]

a. Factors 1 and 2 (Similarity of Marks and Goods)

I agree with the ID that the accused Gator products have a "very similar" overall appearance to the 3D marks, as illustrated below:

Orly Accused Products CX-1720 at p. 1	**'328 Registration** JX-0002	**'875 Registration** JX-0006
		

Likewise, with respect to Factor 2, the Orly Gator and the Classic Clog are not only shoes, but more specifically molded, foam-based, clog-type footwear; the two products are directly competitive and as similar as two goods can be.[5]

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[3] There is no meaningful difference in my analysis of the likelihood of confusion with respect to the Gator or the Redesign as it concerns Orly or Hobby Lobby. I therefore address Orly and Hobby Lobby together here.

[4] I agree with the Majority's determination to reverse the ID's finding that Crocs waived its allegations with respect to the lined Gator. But, unlike the Majority, I find that both the unlined and the lined versions of the Gator infringe the 3D Marks. There is no meaningful difference in my analysis with respect to the unlined versions and the lined versions of the Gator, at least with respect to the '328 Registration. My analysis of the unlined versions of the Gator therefore reflects my views as to the lined versions of the Gator as well.

[5] The Majority would assign factor 2 (similarity of goods) "lesser weight because the trademark examiner found this clog shape to be a common feature that is not entitled to trademark protection." Majority Opinion at 19. But it typically is *not* the case that the good with which a mark is in use is itself also entitled to trademark protection – and yet that has not prevented the

b. Factors 3 and 4 (Trade Channels and Conditions of Sale)

I also agree with the ID that the Orly Gator and the Classic Clog are marketed and sold in the same trade channels (Factor 3), but that the conditions of sale of the Orly Gator differ from the conditions of sale of the Classic Clog (Factor 4), due in large part to a very significant difference in prices. In considering these two factors, however, it is worth bearing in mind that "post-sale confusion" is actionable under the Lanham Act (McCarthy § 23:76), and these two *DuPont* factors may have little or no relevance to post-sale confusion.

c. Factor 5 (Fame)

I disagree with the ID's analysis of the fame of the 3D marks on the Classic Clog. As the ID notes, relevant factors for determining fame include sales, advertising, length of use of the mark, market share, brand awareness, licensing activities, and variety of goods bearing the mark. *Recot, Inc. v. Becton*, 214 F.3d 1322, 1326 (Fed. Cir. 2000); *see also Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 1371 (Fed. Cir. 2002) ("[O]ur cases teach that the fame of a mark may be measured indirectly, among other things, by the volume of sales and advertising expenditures of the goods traveling under the mark, and by the length of time those indicia of commercial awareness have been evident.").

courts from according this factor considerable weight, particularly where both the marks and the goods are both similar. Indeed, the shape of the athletic shoes in *adidas America v. Skechers* was surely not entitled to trademark protection; nevertheless, the court there recognized that, taken together, "the similarity of the marks, *relatedness of the goods*, and … the 'use of a common marketing channel'" are typically the "controlling troika" in a trademark infringement analysis. *Adidas America, Inc. v. Skechers USA, Inc.*, at 1242; *see also VersaTop Support Sys., LLC v. Georgia Expo, inc.* 921 F.3d 1364, 1371-72 (Fed. Cir. 2019).

i. Advertising and Sales

Crocs has been using the 3D Marks consistently on the Classic Clog since the shoe was first introduced twenty years ago, as the ID recognized. ID at 111. The Classic Clog was "Shoe of the Year" as far back as 2005 and as recently as 2021.[6] ID at 125; Petition for Review at 1.

The ID describes the considerable and extensive sales, advertising, and publicity of the Classic Clog. For example, from 2018 to 2021 alone, Crocs has sold more than [redacted] pairs of Classic Clogs and generated nearly [redacted] in revenue. ID at p. 78. "There is no dispute that the Classic Clog has been prominently featured in Crocs' advertising" and that the advertising has been considerable. ID at 113-14.

Thus, there is no real question that the Classic Clog is famous. The ID, however, questions whether that fame has anything to do with the marks on the shoe: "[T]he evidence shows that the 3D Marks do not drive consumer recognition of the Classic Clog. Ms. Wagner, Crocs' corporate designee on sales, testified that what consumers recognize is the overall look of the Classic Clog." ID at 77-78.[7]

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[6] In *adidas America, Inc. v. Skechers USA, Inc.*, the court noted that adidas's Stan Smith shoe won Shoe of the Year in 2014 in support of its finding of distinctiveness. 149 F.Supp. 3d 1222, 1235 (D. Or, 2016).

[7] The ID includes a number of citations along these lines: "Wagner, Tr. At 169:6-18 (testifying that it is the 'entire single unit of the Classic Clog itself that is iconic.'), 170:14-16 (testifying that consumers think of the shoe in its entirey), 170:23-172:6 (testifying that the consumer thinks about the Classic Clog as a 'complete entity'), 172:7-10 (testifying that it is the overall aesthetic of the entire shoe that consumers look at and consider), 183:11-13, 183:18-184:7 (testifying that it is the design that drives people to buy the Classic Clog). Similarly, Ms. Sly testified that it is the design of the Classic Clog in totality that draws attention. RX-0053C at 186:22-187:6, 187:25-188:8; Sly, Tr. At 237:5-18; *see also id*. at 234:7-10 (testifying that consumers key off the shape of the shoe and the holes on the top). Likewise, Ms. Seamans testified that 'consumers associate Crocs with the entire shoe. As I say, it's the whole thing. It's not one part or the other.' Seamans, Tr. At 92:17: 93:4." ID at 77-78.

But in my view the 3D Marks (including the pattern of 13 holes on the top of the upper, the seven trapezoids on the side, the indentation in the heel strap) are not only essential components of, and inextricably linked to, the "overall look" and the "design" of the famous Classic Clog, which would be enough to find that the 3D Marks are themselves famous. They are also precisely what make the Classic Clog *distinctive* -- as the trademark examiner concluded. Crocs attempted to register a trademark for the overall look of the Classic Clog; the examiner rejected that application because it included generic elements:

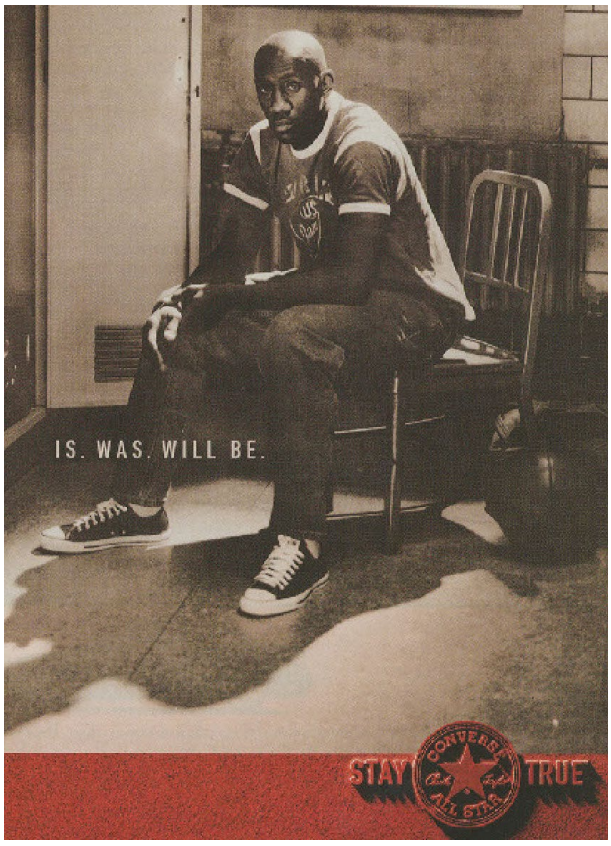
> Applicant seeks registration of a proposed mark described as "a three dimensional configuration of the outside design of an upper for a shoe". … In the present case, the overall clog shape of the proposed configuration mark and the presence of a defined midsole and topline collar appear to represent generic elements commonly present in waterproof strap clogs. These features are nondistinctive and do not function as a mark because such elements are so common in the industry for such products and are the same or substantially similar to the designs of competitors' products such that consumers are accustomed to seeing such elements on similar products. As such, applicant's request to exclude other shoe manufacturers from employing such ubiquitous design elements cannot be granted.

See, e.g., JX-0001 at CROCS_ITC044602-03 (Letter from USPTO Trademark Attorney to Crocs Counsel, July 6, 2016). Importantly, the Trademark Examiner further stated that "[t]he remaining elements of the proposed configuration which appear potentially capable of distinguishing applicant's goods comprise the specific shape and placement of ventilation/drainage holes." The Examiner suggested a mark description that is identical to the '328 Registration, and the marks were registered accordingly, and are therefore presumed to be distinctive.

The reason Crocs was unable to register the overall look of the Classic Clog is that the design elements, other than those later registered as the 3D Marks, were found to be generic. It would make no sense to now find that those generic elements of the Classic Clog are what make the Classic Clog distinctive and indeed famous. Doing so would place Crocs in a Catch-22.

The ID also includes a number of images which it says show that Crocs ads do not "highlight the trade dress in question," in contrast with what the Commission found in *Footwear Products*. ID at 114. In my view, those ads *do* highlight the trade dress in question here, and I do not agree that these ads are materially different from those we considered in *Footwear Products.*

In *Footwear Products*, Inv. No. 337-TA-936, Comm'n Op. (Remand) (September 24, 2020), the Commission considered a registered trademark, the "CMT," a trade-dress configuration of three design elements on the midsole of Converse's Chuck Taylor All Star shoes: the two stripes on the midsole of the shoe, the design of the toe cap, the design of a multi-layered toe bumper featuring diamonds and line patterns, and the relative position of these elements to each other. *Id.* at 6. The Commission cited ads, including the one below featuring Michael Jordan, that "prominently display the CMT". *Id.* at 29-30.



But in this case, the ID found that the following ad, featuring musician Post Malone, did *not* prominently display the 3D Marks:

ID at 116. I disagree. In my view, while the focus of the above ad is on the fact that Post Malone wears Classic Clogs (just as the focus of the Michael Jordan ad in *Footwear Products* is on Michael Jordan), the holes and trapezoids are clearly visible – and enable the consumer to determine that Post Malone wears Classic Clogs.

Similarly, I disagree with the ID's findings that the following ads do not "highlight the trade dress" in question:


there's only one you
(unless you're a shoe...
then there's two)


WILL YOU
"CROC"
HOCO
WITH ME?

ID at 118-19. In my view, these images *do* highlight the 3D Marks. It is too much to require, as the ID apparently does, that every individual element of a mark – particularly on a three-dimensional product – appear in a two-dimensional advertisement. We did not require that in *Footwear Products*, and we should not here.

ii. Fame Survey

In my view, just as the ID erroneously dismisses the evidence of extensive advertising and sales of the Classic Clog as being based on the "overall look" of the Classic Clog and unrelated to the 3D Marks, the ID erroneously dismisses the survey Crocs submitted to establish fame, conducted by Dr. Pittaoulis, for the same reason.

Dr. Pittaoulis showed 400 survey respondents photographs of three shoes: a Crocs Classic Clog; an adidas Adilette Aqua slide; and a Shade & Shore flip flop from Target. ID at 79. Each shoe had the branding removed: the 'CROCS' logo on the band of the shoe, the Crocs website URL from the arch of the shoe, and the Crocodile image on the strap fastener (*i.e.*, gromet). ID at 79. Dr. Pittaoulis found that 72.5 percent of respondents associated the 3D Marks, as reflected in the Classic Clog, with one company or brand, with almost all of these respondents (67.8 percent) naming Crocs as the brand.

The ID dismisses this evidence because "it assesses the overall look of the Classic Clog, not the 3D Marks." ID at 80. But, again, the 3D Marks are essential components of, and inextricably linked to, the "overall look" of the Classic Clog, and are in fact what distinguishes this shoe from others, according to the Trademark Examiner, as explained above.[8] Thus, unlike the ID, I would find that the Pittaoulis fame survey weighs in favor of a finding of fame.

[8] The ID also states that "[t]he proper stimuli would have isolated the design elements claimed in the 3D Marks." ID at 80. I, however, am not aware of any court decisions that require a registered trade dress to be laboratorically separated from the product it dresses. While the ID

But even if I were to agree with the ID that the Pittaoulis survey is unreliable, I could not agree with its conclusion that this factor weighs "against" a finding of fame. ID at 82. The ID cites to no survey or other evidence concerning "actual recognition of mark" that would lead one to reach a conclusion that the 3D Marks are *not* "widely recognized" or otherwise famous. Thus, even if one were to agree with the ID's finding that the Pittaoulis survey is unreliable, one could conclude only that the survey evidence is neutral, not that it weighs against a finding of fame.[9]

iii. Conclusion

The Federal Circuit has explained why a famous mark, like the 3D Marks, deserves special protection:

> The fifth *duPont* factor, fame of the prior mark, plays a dominant role in cases featuring a famous or strong mark. Famous or strong marks enjoy a wide latitude of legal protection. … After earning fame, a mark benefits not only its owner, but the consumers who rely on the symbol to identify the source of a desired product. Both the mark's fame and the consumer's trust in that symbol, however, are subject to exploitation by free riders. A competitor can quickly calculate the economic advantages of selling a similar product in an established market without advertising costs.

Kenner Parker Toys Inc. v. Rose Art Industries, Inc., 963 F. 2d 350, 352-53 (Fed. Cir. 1992) (Reversing TTAB and finding that "FUNDOUGH" was confusingly similar to "PLAYDOUGH"). The Court in *Kenner* recalled its earlier decision, in *Nina Ricci*: "[T]here is 'no excuse for even approaching the well-known trademark of a competitor ... and that all doubt as to whether

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cites to the IDs in *Motorized Vehicles* and *Footwear Products*, the issue in each of those cases was that the survey did not adequately distinguish between unregistered trade dress (the focus of those investigations) and other registered marks. Those are very different cases than what we have here.

[9] *See Converse, Inc. v. International Trade Commission,* 909 F. 3d 1110, 1123 (Fed. Cir. 2018) ("The ITC found that the Butler survey 'weighs against a finding of secondary meaning,' … relying on the ALJ's conclusion that the survey was 'insufficient to establish secondary meaning,' … We see no error in the conclusion that the survey does not establish secondary meaning, but we are unclear as to the ITC's reasoning as to why the survey supports the opposite[.]").

confusion, mistake, or deception is likely is to be resolved against the newcomer, especially where the established mark is one which is famous....'" *Nina Ricci S.A.R.I. v. E.T.F. Enterprises, Inc*, 889 F.2d 1070, 1074 (Fed. Cir. 1989) (*quoting Planter Nut & Chocolate Co. v. Crown Nut Company*, 305 F.2d 916, 924-25 (C.C.P.A. 1962)).

In my view, the evidence on the record establishes that the 3D Marks – essential and distinguishing design elements of the Classic Clog – are famous and deserve protection from free riders that compete against Crocs by selling molded, foam-based, clog-type footwear with very similar marks.

d. Factor 6 (Similar Marks in Use on Similar Goods)

The ID finds that the Respondents tried but failed to provide persuasive evidence that similar marks were in use on similar goods. He therefore finds this factor to be "neutral." I agree that there is no evidence on the record that similar marks are in use on similar goods, besides the Classic Clog.[10] It is unclear to me, however, whether the absence of any evidence that similar marks have been used on similar goods should render this factor "neutral," or instead should support a finding of infringement.[11]

[10] I recognize that Crocs did not assert this factor in support of infringement. But, of course, it is difficult, if not impossible, to provide evidence proving a negative.

[11] In any event, there is an inconsistency in how the ID treats factors when it finds a lack of evidence (i.e., "neutral" here instead of in "support"; "against" with respect to fame instead of "neutral"; and, below, "against" with respect to intent instead of "neutral").

e. Factors 7, 8, and 12 (Actual Confusion, Length and Conditions of Concurrent Use, Potential Confusion)

i. Direct Evidence of Confusion

The ID found that the record contains no persuasive direct evidence of confusion. I, on the other hand, believe the record provides a modicum of support for finding a likelihood of confusion.

Crocs relied on two comments posted on the Internet to show actual confusion by consumers, but the ID finds that neither of these documents necessarily demonstrates confusion:

> [I]n CX-0813, the comment reads: "I bought very cheap white crocs at hobby lobby and Lacey created these [emoji omitted]. Anyone else love crocs??"." … The post in CX-0815 is similar: "Decorated some hobby lobby crocs. Whatcha think? [sic] Yay, or nay." It is unclear whether the authors of these posts thought the Hobby Lobby shoes were "Crocs" branded shoes *or whether they were using the term "Crocs" as a category of shoe.* Thus, these social media posts are ambiguous at best.

ID at 34-35, emphasis added.

The suggestion that these consumers were referring to "crocs" as a category of shoe is inconsistent with the ID's later finding that the Respondents failed to show that the Word Mark (CROCS) is generic (i.e., whether that term "refer[s] to the genus of goods or services in question," quoting *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 989 (Fed. Cir. 1986)). ID at126-28. Thus, while the ID finds that Respondents failed to show that "CROCS" has "become synonymous with a type of clog-style shoe," it nevertheless dismisses evidence of actual confusion based on the possibility that these consumers were referring to "Crocs" as a synonym for a type of clog-style shoe.[12]

Next, the ID addresses the fact that Orly's own former Chief Operating Officer, Nabeel Shaikh, mistook an image of the Orly Gator for a Crocs shoe during his deposition. The ID

[12] I also note there is some inherent tension between the suggestion that Crocs has become a term designating a category of a clog-style shoe and a finding that its trade dress is not famous.

dismisses this evidence: "A review of his testimony reveals that Mr. Shaikh assumed the shoe was a Crocs shoes because *it looked like there was a logo on the strap*." ID at 35 (emphasis added). I, however, read the testimony to suggest just the opposite. While his explanation of his mistake is somewhat ambiguous, it seems to me that Mr. Shaikh explained that he could *not* see a logo on the strap, and so he assumed the shoe was a Crocs shoe without knowing what logo appeared on the shoe:

> Q. Okay. So when you saw the first image, though, you thought it was a Crocs shoe made by the company Crocs.
> Why did you think that?
> A. Could you go back to the first image?
> Q. Sure.
> A. So as the first image *I couldn't tell from the logo on the – on that strap. I couldn't see that;* so I assumed that was a Crocs shoe because it looks like a – like a logo to me.

(CX-1317C at 50-16-19, emphasis added.) In my view, everything about that testimony, other than perhaps the nonsensical "like a logo to me" at the end, indicates Mr. Shaikh could *not* see the logo and so simply assumed the shoe was a Crocs shoe because it looked like a Crocs shoe.[13]

The ID then finds that, even if these examples showed actual confusion, they would be *de minimis* in view of the 140,000 pairs of Accused Products Hobby Lobby ordered from Orly. ID at 35. It concludes that this evidence of actual confusion has "no probative weight." It cites McCarthy in support of that conclusion, who writes, "If there is a very large volume of contacts or transactions which could give rise to confusion and there is only a handful of instances of

[13] The Majority finds that, even if it were to credit his testimony, Mr. Shaikh's "confusion occurred during a deposition" and provides "little, if any, evidence of actual consumer confusion in a more real-life setting." Majority Opinion at 21-22. But in my view, the fact that Orly's own former Chief Operating Officer has trouble distinguishing the 3D Marks from the Orly Gators, and in a deliberative setting in which all attention is focused on that very issue, provides even stronger evidence of actual confusion. The Majority also notes that the shoe in the deposition did not have things like price tags attached to the shoe. But, as stated above and as recognized in the ID, the statute recognizes post-sale confusion, after prices have been paid and tags removed.

actual confusion, the evidence of actual confusion may receive relatively little weight." McCarthy § 23:14, quoted in ID at 36.

It is more appropriate to give this evidence "relatively little weight," as McCarthy says, rather than none at all.

The limited evidence of actual confusion in this case is not unusual and should not lead one to conclude there must not be any likelihood of confusion. While evidence of actual confusion can weigh strongly in *favor* of a finding of confusion, the lack of such evidence generally should not weigh *against* such a finding:

> Where evidence of actual confusion exists, it will often be the best evidence of likelihood of confusion, and as a result it receives substantial weight in the likelihood-of-confusion analysis. However, evidence of actual confusion is not required to establish likelihood of confusion, both because such evidence can be difficult to obtain, and because requiring such evidence would compel plaintiffs to postpone legal action until both they and the consumer have suffered harm from the defendant's infringing activities.

Mary LaFrance, Understanding Trademark Law, 157 (4th ed., 2020); see also *Harold F. Ritchie, Inc. v. Cheesebrough-Pond's, Inc.*, 281 F.2d 755, 761 (2d Cir. 1960) ("Actual confusion or deception of purchasers is not essential to a finding of trademark infringement or unfair competition, it being recognized that reliable evidence of actual confusion is practically almost impossible to secure."). As McCarthy explains: "'[t]he law recognizes that random instances of confusion often go unreported or unrecorded.' Persons who are truly confused will often never be aware of the deception. Others who were confused and later learned of their deception will often not bother to report the fact. Therefore, it is error for a court to find that plaintiff failed to prove injury caused by actual confusion[.]" McCarthy § 23:12; *see also PlayNation Play Systems, Inc. v. Velex Corp.*, 924 F.3d 11159, 1167-68 (11th Cir. 2019) ("PlayNation produced two ultimate purchasers of PlayNation's Gorilla Playsets swing sets who contacted Velex for customer service. ... Consumers also posted on retail websites selling Gorilla Playsets swings

and trapeze bars asking if those items work 'with the Gorilla Gym indoors.' …[T]he number of instances and the type of consumer [support] actual confusion[.] The customers PlayNation identified are ultimate consumers of the product, to which we give special weight. And the number of instances need not be large to be probative of confusion. *See Safeway Stores*, 675 F.2d at 1167 (finding one instance of actual customer confusion sufficient and holding that '[a]lthough the number of instances is small, the people confused are precisely those whose confusion is most significant.')."). Moreover, post-sale confusion is surely even less likely to go reported, and those who are confused are less likely to be aware of the confusion.

ii. Survey Evidence

The ID finds that the survey Crocs presented, conducted by Dr. Pittaoulis, is unreliable because her control does not hold constant elements of the shoe that are not part of the 3D Marks (*e.g.*, the control did not have a protruded heel or a heel strap, unlike the Classic Clog). I agree.[14] I do not believe the Pittaoulis survey supports a finding of infringement.

I disagree with the ID, however, in how to view the survey Orly presented, conducted by Mr. Wallace. The ID finds that that survey is reliable and supports a finding of no likelihood of confusion. In fact, it found this survey evidence, combined with differences in point-of-sale labels and signage, to be "[o]f particular importance" in concluding the Orly Gator did not

[14] Specifically, I agree with the description of the differences between the control shoe and the Classic Clog in the ID at page 40, with one important exception: the ID criticizes the control shoe for being too different from the Crocs shoe by having "dozens and dozens of holes" on the top of the shoe. But in my view the holes on the top of the shoe *should* be different from the Crocs shoe because those holes are a key component of the 3D Marks. "In designing a survey-experiment, the expert should select a stimulus for the control group that shares as many characteristics with the experimental stimulus as possible, *with the key exception of the characteristic whose influence is being assessed.*" (RX-2032 at 399 (Dr. Shari Dimond's chapter in the Reference Manual on Scientific Evidence) (emphasis added). The 13 holes at the top of the shoe is a characteristic that is being assessed.

infringe the 3D Marks – outweighing the factors the Federal Circuit has considered "dispositive," such as similarity of the marks and relatedness of the goods.

In my view, there are shortcomings in the Wallace survey that reduce its probative weight. Whereas the Pittaoullis survey is flawed because the elements of the test and control shoes that are *not* related to the 3D Marks are *not* sufficiently similar (*i.e.*, not held constant), the Wallace survey is flawed because the elements of the test and control show that *are* related to the 3D Marks *are* too similar to one another. Specifically, the Wallace control (illustrated below) includes a pattern of 9 rounded, pill-shaped holes on the horizontal portion of the upper of the shoe, which is not sufficiently different, in my view, from "a pattern of 13 round holes on the horizontal portion of the upper of the shoe" -- a key component of the 3D Marks.[15]

A more reliable control would have had, for example, many holes (like the dozens and dozens of holes on the Pittaoulis survey control), or none at all.[16]

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[15] While marks must be viewed in their entireties, "one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark." *Coach Services, Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012) (quoting *Leading Jewelers Guild,* 82 U.S.P.Q.2d 1901, 1905 (TTAB 2007)).

[16] The Majority describes several differences between the Wallace controls and the 3D Marks. See Majority Opinion at 29. I acknowledge those differences but do not find them significant enough to render the survey reliable – and don't see why the relevant elements of the control should come this close in appearance to the 3D Marks. I also note that one of the differences the

I also find the results of the Wallace survey non-sensical. I agree with the ID that, with respect to Factor 1, the Orly Redesign (illustrated on the left below) is *not* similar to the 3D Marks, whereas the Orly Gator (on the right) is "very similar" to the 3D Marks. See ID at 23.

And yet the Wallace survey finds a *greater* net confusion rate (2%) for the Orly Redesign than for the Orly Gator (0.5%).

Thus, while the Wallace survey may be more reliable than the Pittaoulis survey, and the survey evidence overall may weigh against a finding of infringement, I believe the similarity of the marks (Factor 1) and the relatedness of the goods (Factor 2) far outweigh these survey results. Indeed, given the particular facts of this case, to determine the likelihood of confusion in the marketplace, I believe it is better to consider the similarities of the marks and the goods directly, rather than to peripherally debate the similarities and differences of a third shoe (the Pittaoulis control) and a fourth (the Wallace control).[17] One's judgments about those "control"

Majority describes is that the Wallace controls have fewer holes than the 3D Marks (nine holes versus 13). But the Wallace controls have the same number of holes as the Orly Gator; nevertheless, the ID disregarded this difference and found the Orly Gator very similar to the 3D Marks, and the Majority agrees with that finding.

[17] *See Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd. Partnership*, 34 F.3d 410, 414-15 (7th Cir., 1994) (Posner, J.) ("To help judges strike the balance, the parties to trademark disputes frequently as here hire professionals in marketing or applied statistics to conduct surveys of consumers. … The battle of experts that ensues is frequently unedifying.");

shoes are no more objective than one's judgments about the similarities between the marks and the shoes themselves, and how those similarities indicate a likelihood of confusion.

f. Factors 9 (Variety of Goods), 10 (Market Interface), and 11 (Right to Exclude)

In my view, factors 9, 10, and 11 are neutral in this case. The ID found that Factor 10 (Market Interface) was not addressed by the parties in this case, and that Factor 11 (Right to Exclude) was neutral in this case. ID at 18 and 46. I agree.

With respect to Factor 9 (Variety of Goods), the ID finds the fact that Crocs does not use the 3D Marks on goods other than footwear weighs *against* a finding of infringement. ID at 46. I disagree and believe this factor is neutral in this case. *See, e.g., StarStruck Entertainment v. The Alexander Trust*, 2022 WL 17370234 at 22 (TTAB, Nov. 2022). While the use of a mark on a family of products generally can *support* an infringement finding, the use of a mark on a single category of products cannot argue *against* such a finding, at least in a case like this where one would never expect the trade dress of a shoe to be used on other products. Indeed, the very terms of the '328 Registration and the '875 Registration seem to *preclude* use on other products: "The mark consists of a three dimensional configuration of the outside design of an upper *for a shoe*" (emphasis added.)

g. Factor 13 (Other Considerations – Intent to Confuse)

The ID is not persuaded by the evidence Crocs presented which it claimed suggested Orly acted in bad faith and intended to confuse. While one might expect this failure to persuade would result in a conclusion that this factor is neutral, the ID instead found this factor "weighs

see also McCarthy §24:106 ("[S]urveys are not indisputably accurate measures of public perception. It is no secret that survey percentages can vary widely depending on which group of people are asked questions phrased in various ways.").

against finding a likelihood of confusion." This was in error. As the Sixth Circuit explained in reviewing a finding of non-infringement:

> [E]ven if the District Court correctly had ruled as a matter of law that defendant did not copy plaintiff's marks intentionally, the District Court misunderstood the legal significance of this lack of intent by finding that it decreased the likelihood of consumer confusion. … [T]he *presence* of intent can constitute strong evidence of confusion. The converse of this proposition, however, is not true: the *lack* of intent by a defendant is 'largely irrelevant in determining if consumers likely will be confused as to source.' … Intent therefore is an issue whose resolution may benefit only the cause of a senior user, not of an alleged infringer. Accordingly, if the District Court [determines] that defendant had only good intentions in adopting its name, it must find that this lack of intent neither reduces nor increases the probability of consumer confusion.

Daddy's Junky Music Stores, Inc. v. Big Daddy's Family Music Center, 109 F.3d 275, 287 (6th Cir. 1997) (emphasis in original).[18]

h. Conclusion

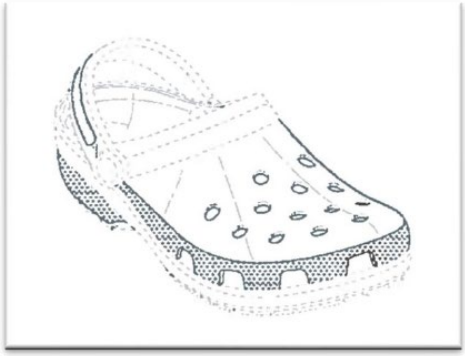
As I see it, the Orly Gator infringes the 3D Marks.[19] I agree with the ID's findings that the marks of the two shoes are very similar, and that the shoes compete directly against one another, but I would give those facts considerably more weight than the ID does and would find that they outweigh the survey evidence that arguably argues against a finding of a likelihood of confusion. I also believe Crocs has established that the 3D Marks are famous, and that fame also strongly supports a finding of infringement. And instead of finding that Factors 9 (Variety of Goods) and 13 (Intent to Confuse) weigh against a finding of infringement, I would find they are neutral in this case.

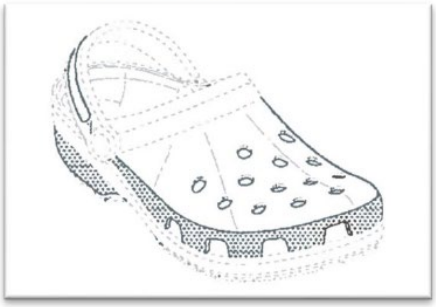
[18] While I do not base my determination that the Orly Gator infringes the 3D Marks on any intent to confuse, it is not clear to me that Orly and Hobby Lobby had only good intentions in selling the Gator. I disagree, for example, with the ID that internal Orly documents and labels that use the word "croc" or "crocs" can be dismissed as simply "describ[ing] a category of shoes." ID at 48. That is particularly true given that the term is not generic.

[19] I also find false designation of source with respect to these goods, as that finding follows from the finding of infringement.

2. Orly Redesign

I agree with the ID that the Orly Redesign does not infringe the 3D Marks. With respect to Factor 1, I agree with the ID that the Orly Redesign is not similar to the 3D Marks. Again, the images speak for themselves:

Orly Accused Redesign Footwear	Crocs' 3D Marks
	

Orly Accused Redesign Footwear	Crocs' 3D Marks Element
	

I find particularly important, and different from the 3D Marks, the fan-like pattern of the holes and the rectangle and square shape of the holes on the horizontal portion of the upper, as well as the absence of any openings on the vertical portion of the upper (as compared to the seven trapezoidal openings on the Classic Clog).

The remainder of my analysis of the *DuPont* factors largely mirrors my analysis concerning the Orly Gator. But Factor 1 is dispositive, in my view, particularly in the absence of

evidence of actual confusion.[20] Unlike the ID, I view the 3D Marks as famous, as explained above, but that has little bearing on the matter, given that I do not believe the Orly Redesign is similar to the 3D Marks. *See 7-Eleven, Inc. v. Lawrence I. Wechsler*, 83 U.S.P.Q. 2d 1715, 9 (TTAB 2007) ("Even though we have found that opposer's BIG GULP trademark has a very high degree of public recognition and renown, this factor alone is not sufficient to establish a likelihood of confusion. As stated in past cases, if that were the case, ownership of a famous mark would entitle the owner to a right in gross, and that runs counter to the trademark laws.").

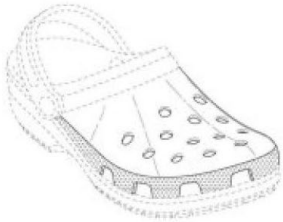
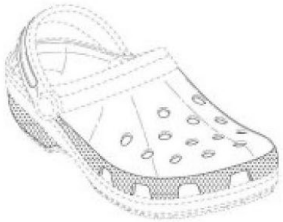
3. Amoji Garden Clog[21]

a. Factors 1 and 2 (Similarity of Marks and Goods)

I agree with the ID that there is "substantial similarity" in the overall appearance of the accused Amoji Garden Clog and the 3D Marks. What makes this a more difficult case than the analysis of the Orly Gator is the fact that the Garden Clog is branded with the word "AMOJI" in the top corner of the upper. However, as the ID stated, this label "may be difficult to see in the post-sale context, particularly if it is covered by the bottom of a pant leg." ID at 56. As for Factor 2, the Amoji Garden Clog and the Crocs Classic Clog are both molded, foam-based, clog-type footwear; the two products are directly competitive and as similar as two goods can be.

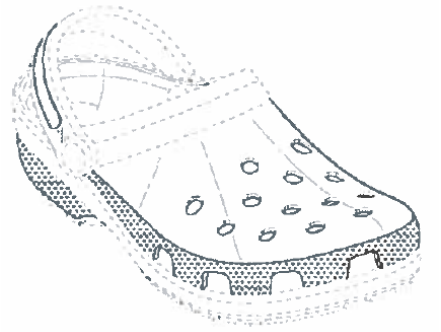
The images speak for themselves:

[20] There is less, or no, evidence of actual confusion with the Orly Redesign, compared to the Orly Gator. For example, as discussed above, Orly's former COO, Nabeel Shaikh, confused the image of the Orlay Gator – not the Orly Redesign – for a Crocs shoe during his deposition.
[21] The ID found that Crocs either did not allege or did not present evidence demonstrating that the Amoji Redesigns infringe the 3D Marks, and therefore failed to carry its burden to prove infringement. ID at 59. I agree.

ZhengDe Accused Products CPX-0027	**'328 Registration** JX-0002	**'875 Registration** JX-0006
		

The Majority, however, modifies the ID to find that *DuPont* factor 1 "either is neutral or leans only weakly in favor" of a likelihood of confusion. Majority Opinion at 19. It points to "noticeable differences" between the Amoji Garden Clog and the 3D Marks, including "a wide, raised tread on the side and underside of the sole (including the heel) that is visible from the side view, whereas the '875 Registration depicts "a textured strip on the heel of the shoe." *Id.* It cites to the following images in support:

Amoji Garden Clog



But the "tread" on the Crocs Classic Clog is not an element of the 3D Marks at issue in this case. And while there may be some relatively minor differences in the texturing on the vertical portion of the upper and on the heel (minor relative to the holes on the vertical and horizontal portions of the shoe), the ID properly recognized that one must compare the "overall impression" of the Garden Clog to the 3D Marks. Id at 55 (citing *Footwear Products*, Remand ID at 81; and quoting McCarthy § 23.20 ("Exact similitude is not required.")).

The Majority also notes that the Amoji Garden Clog "has a set of larger hexagonal holes (as opposed to smaller, round holes in the Crocs) on the upper, which are arranged in a somewhat more spread-out pattern." Id. at 55. It cites to the following images, and others, from the ID in support of this finding:

Crocs Classic Clog	Garden Clog
	

In my view, these images demonstrate the similarities much more than the differences between the holes on the uppers: the difference in the size of the holes, the difference in their shape, and the "somewhat more spread-out pattern" appear to me to be minor. In addition, in some ways the Amoji Garden Clog is *more* similar to the 3D Marks than the Orly Gator is to those Marks: whereas the Orly Gator has four fewer holes than the 3D Marks (nine versus 13), the Amoji Garden Clog has just one more hole than the 3D Mrks (14 versus 13).

Thus, I agree with the ID that the Amoji Garden Clog is substantially similar to the 3D Marks (factor 1), and both the Amoji Garden Clog and the Classic Clog are the same type of products (factor 2). I disagree with the Majority's analysis of these factors.[22] But, as in the case of the Orly Gator, I disagree with the ID in the weight given to these factors, relative to the other factors in this particular case. I would give these factors a great deal of weight.

[22] While the Majority does not address the Amoji Garden Clog in its analysis of *DuPont* factor 2, presumably its analysis of that factor as it relates to the Orly Gator and Orly Redesign applies to the Garden Clog as well (*i.e.*, it assigns lesser weight to this factor because the trademark examiner found the clog shape to be a common feature not entitled to trademark protection). As explained above, I disagree with that finding.

b. Factors 3 and 4 (Trade Channels and Conditions of Sale)

I also agree with the ID that the Amoji Garden Clog and the Crocs Classic Clog are marketed and sold in the same trade channels (Factor 3), and that the conditions of sale of the Amoji Garden Clog differ from the conditions of sale of the Classic Clog (Factor 4), due in large part to a very significant difference in prices. ID at 56-57. In considering these two factors, however, it is worth bearing in mind that "post-sale confusion" is actionable under the Lanham Act (see McCarthy §23:76), and these factors may have little or no relevance to post-sale confusion.

c. Factor 5 (Fame)

For the reasons discussed in section I.B.1.c. above, I find the 3D Marks to be famous, weighing strongly in favor of a finding of infringement.

d. Factor 6 (Similar Marks in Use on Similar Goods)

The ID finds that the Respondents tried but failed to provide persuasive evidence that similar marks were in use on similar goods. He therefore finds this factor to be "neutral." My views here are the same as they were with respect to the Orly Gator. See Section I.B.1.d., above.

e. Factors 7, 8, and 12 (Actual Confusion, Length and Conditions of Concurrent Use, Potential Confusion)

As the ID recognized, Respondents did not present *any survey evidence* regarding the Amoji Garden Clog. The finding that this factor "weighs against finding a likelihood of confusion" is therefore erroneous.[23]

Thus, there is no evidence for *or against* actual or potential confusion with respect to the Amoji Garden Clog. I therefore find this factor is neutral.

f. Factors 9 (Variety of Goods), 10 (Market Interface), and 11 (Right to Exclude)

As explained in section I.B.1.f. above, in my view, factors 9, 10, and 11 are neutral.

g. Factor 13 (Other Considerations – Intent to Confuse

The ID was not persuaded by the evidence Crocs presented which it claimed suggested Amoji acted in bad faith and intended to confuse, in part because "the Garden Clog bears AMOJI branding, which helps to dispel consumer confusion regarding the source of the product." ID at 59. I agree that there is no evidence of an intent to confuse.

But the ID found this factor "weighs against finding a likelihood of confusion." As explained in section I.B.1.g. above, I disagree that this factor weighs *against* an infringement finding. I instead find it is neutral.

[23] As the ID states, Crocs did not present any evidence of actual confusion with respect to the Amoji Garden Clog. Crocs did present survey evidence regarding the Amoji accused products, but as stated above, I agree with the ID that that survey is flawed and not reliable.

h. Conclusion

The Amoji Garden Clog infringes the 3D Marks, in my view.[24] While I agree with the ID's findings that the marks of the two shoes are substantially similar, and that the shoes compete against one another, I would give those facts considerably more weight than the ID does. I also believe Crocs has established that the 3D Marks are famous, and that fame also strongly supports a finding of infringement. And, importantly and unlike with the Orly Gator, because there is no survey or other evidence that there is no actual confusion, I disagree that Factors 7 and 8 weigh against a finding of confusion; they cannot; they are, instead, neutral. And, instead of finding that Factors 9 (Variety of Goods) and 13 (Intent to Confuse) weigh against a finding of infringement, I would find they are neutral in this case.

C. Word Mark

"GATOR." I agree with the ID that Orly's use of the word "GATOR" is not likely to confuse, in large part because "GATOR" is not similar, in any meaningful sense, to "CROCS". As the ID notes, "[t]he fact that one mark may bring another to mind does not in itself establish a likelihood of confusion as to source." ID at 61 (quoting *Jacobs v. Int'l Multifoods Corp.*, 668 F.2d 1234, 1236 (C.C.P.A. 1982) (quoting *In re Ferrero*, 479 F.2d 1395, 1397 (C.C.P.A. 1973)).

"CROC." I also agree with the ID's conclusion that Hobby Lobby's use of the word "CROC" is not likely to confuse, albeit under somewhat different reasoning. With respect to Factor 1, the ID finds that "CROC" is similar to the word "CROCS". I agree, those two words are obviously quite similar. However, further analysis is needed under this factor. Hobby Lobby uses the term "CROC" only on the back of a label, not on the shoe itself (eliminating concerns over post-sale confusion), and not on the front of the label. The front of the label identifies the

[24] I also find false designation of source with respect to these goods, as that finding follows from the finding of infringement.

brand of the shoe, not as Crocs, but as Hobby Lobby's "Spring Shop". Moreover, the term "CROC" is used on the back of the label as part of a longer description of the product: "SPRING SHOP-WEARABLE ART/FOOTWEAR-CROC SLIDES". While I cannot countenance Hobby Lobby's argument that it uses the term "Footwear-Croc Slides" simply to describe a type of shoe (when "CROCS" has not been found to be a generic term), I find it less likely that the use of "CROC" as part of a longer product description on the back of a label will be likely to confuse consumers. *See Blue Man Productions, Inc. v. Tarmann,* 75 U.S.P.Q. 2d 1811, 12 (2005) (In its analysis of the similarity of the marks, the Board took into account "the different commercial impressions engendered by the marks" and found that, while the marks themselves were "very similar in appearance and pronunciation," the "differences in connotations and the commercial impressions of the marks … outweigh the visual and phonetic similarity."). I therefore discount the weight of this factor.

I also differ from the ID in my consideration of Factors 7, 8, and 12, regarding actual confusion. Whereas Crocs offered no evidence of actual confusion, Respondents presented survey evidence to establish a lack of confusion. While I agree with the ID that this survey weighs against a finding of confusion, I give it less weight because I find its results somewhat non-sensical, as I found the Wallace survey with respect to the 3D Marks in section I.B.1.e. above. Specifically, while I agree with the ID that "CROC" is similar to "CROCS" and "GATOR" is not, the Wallace survey found a higher net level of confusion for "GATOR" (4%) than for "CROCS SLIDES" (-1%).

Taken as a whole, in my view, Crocs has not met its burden of establishing a likelihood of confusion between "CROCS" and "CROC" as that term is used on the label of the good sold by Hobby Lobby.

II. DILUTION

A. Fame Analysis

A threshold and key question for dilution is whether the mark is famous. The ID found that the Word Mark is famous.[25] ID at 83. I agree.

The ID found that Crocs failed to prove that "the 3D Marks are famous separate and apart from the Classic Clog as a whole." ID at 76-82. I disagree and would find that the 3D Marks are famous for the purpose of establishing dilution.

As the ID noted, "[f]ame for likelihood of confusion and fame for dilution are distinct concepts, and dilution fame requires a more stringent showing." *Coach Services, Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1373 (Fed. Cir. 2012). But the analysis under both concepts is similar, and Crocs relies on the same evidence to establish fame for both purposes. The ID used the statutory framework for considering fame in the dilution context to determine fame for likelihood of confusion as well. ID at 74. Thus, my analysis in section I.B.1.c. above, fully explains why I believe the 3D Marks are famous for the purpose of establishing dilution.[26] In

[25] The ID reached this finding of fame despite the fact that Crocs did not present any evidence of "actual recognition of mark" (*i.e.*, it did not present survey evidence), the third factor enumerated in the statute for considering fame for purposes of dilution. 15 U.S.C. § 1125(c)(2)(A)(iii). Instead, the ID relied on evidence concerning advertising and publicity (factor 1), sales (factor 2), and federal trademark registration (factor 4).

[26] Given the specific statutory framework for considering fame for purposes of dilution, however, it is important to note that the ID erroneously found that two of the four statutory factors (factor 1, regarding advertising and publicity, and factor 3, regarding actual recognition of the mark) weighed "against" a finding of fame, with one remaining factor (sales) "neutral" and the other (registration) weighing in favor. While the ID did not find persuasive Crocs' advertising and survey evidence concerning actual recognition of the mark, those findings do not suggest factors 1 and 3 weigh "against" fame, only that they do not support it. On the other hand, it is also important to note that federal registration of a mark cannot establish fame on its own. *See McCarthy* § 24:106 regarding registration: "One cannot logically inter {sic} fame from the fact that a mark is one of the millions on the Federal Register. On the other hand, one could logically infer lack of fame from a lack of registration[.]"

essence, the ID finds that the overall design and shape of the Classic Clog may be famous, but that doesn't mean that the 3D Marks are famous. ID at 77-78. As noted above, however, I believe the 3D Marks are key components of, and inextricably linked to, the overall look of the shoe. And, in fact, they are distinctive elements of the shoe, as the Trademark Examiner found.

B. Dilution by Blurring

1. 3D Marks

Having found the 3D Marks are not famous, the ID did not address the remaining factors for dilution by blurring. Because I believe the 3D Marks are famous, I would remand to the ALJ to address the remaining factors for dilution by blurring.

2. Word Mark and "GATOR"

The ID concludes that Orly did not dilute the Word mark by blurring in its use of the term "GATOR." ID at 86. I agree with that conclusion, and with the ID's analysis of Factors 1 (Degree of Similarity), 2 (Degree of Inherent or Acquired Distinctiveness), 3 (Exclusive Use), 4 (Degree of Recognition), and 5 (Intent of User). With respect to Factor 6 (Actual Association), I rely less on the confusion survey conducted by Respondents than the ID does, as explained above. Nevertheless, Crocs presented no survey evidence or other evidence of actual confusion to support its claim of dilution by blurring. Thus, in my view, Factor 1 – the dissimilarities between "CROCS" and "GATOR" – weighs heavily against a finding of dilution by blurring, and there is no evidence of actual confusion, survey results or otherwise, to support such a finding.

3. Word Mark and "CROC"

The ID concludes that Hobby Lobby did not dilute the Word mark by blurring in its use of the term "CROC" on the back of its label. I agree with that conclusion, and with the ID's analysis of Factors 2 (Degree of Inherent or Acquired Distinctiveness), 3 (Exclusive Use), 4 (Degree of Recognition), and 5 (Intent of User). With respect to Factor 1 (Degree of Similarity), the ID finds that "CROC" is similar to the word "CROCS". I agree, those two words are similar. However, as explained above, when understood in its full context, such as the fact that the front of the label has Hobby Lobby's brand on it and "CROC" only appears in a longer description of the product on the back of the label, I believe this factor deserves less weight.

I also differ somewhat from the ID in my consideration of Factor 6 (Actual Association). Whereas Crocs offered no evidence of actual confusion, Respondents presented survey evidence to establish a lack of confusion. While I agree with the ID that this survey weighs against a finding of confusion, I give it less weight because I find its results somewhat non-sensical. Specifically, while I agree with the ID that "CROC" is similar to "CROCS" and "GATOR" is not, the Wallace survey found a *higher* net level of confusion for "GATOR" (4%) than for "CROCS SLIDES" (-1%).

Taken as a whole, in my view, Crocs has not met its burden of establishing that Hobby Lobby diluted the Word Mark by blurring in its use of the term "CROC" on the back of its label.

C. Dilution by Tarnishment

Word Mark. Having found the Word Mark famous, the ID considered the remaining factors for dilution by tarnishment but found that Crocs failed to provide "any evidence of quality issues, complaints, or negative associations with the Accused Products, beyond a handful of conclusory and self-serving statements." ID at 86. I agree.

3D Marks. Having found the 3D Marks are not famous, the ID did not address the remaining factors for dilution by tarnishment. Because I believe the 3D Marks are famous, it is necessary to consider the remaining factors for dilution by tarnishment. I therefore would remand this investigation to the ALJ to address those factors.

III. VALIDITY

The ID found that the 3D Marks are invalid because they lack secondary meaning. ID at 92, 126, 149. I disagree, as explained below.[27]

A. The Presumption of Validity

To be valid, a trademark must be distinctive of a product's source, which, in a case like this one involving trade dress, must be shown by the mark having acquired distinctiveness – so-called "secondary meaning." *Converse*, 909 F.2d at 1116. A mark has developed secondary meaning if, "in the minds of the public, the primary significance of the mark is to identify the source of the product rather than the product itself." *Id*.

A registered mark is presumed to be valid and to have acquired secondary meaning. *Id.* at 1117. But the presumption of secondary meaning only operates prospectively from the date of registration. *Id.* at 1117-18. To establish infringement with respect to use before registration,

[27] I otherwise agree with the ID's findings concerning validity. Specifically, I agree that Respondents failed to show that (1) the 3D Marks are invalid as functional or generic (ID at 87-92; 126-127); or (2) the Word Mark is generic (ID at 128).

the mark owner must establish that the mark had acquired secondary meaning before such use without the benefit of a presumption of secondary meaning. *Id.* at 1118.

The ID notes that the 3D Marks were registered in 2017 and finds that Orly's first sale of its Gator product occurred in April 2016. ID at 94. Thus, it finds that, "with respect to Orly, the 3D Marks are not entitled to a presumption of validity." ID at 94. While not directly addressing the issue, the ID appears to find that Orly's first sale also negates the presumption of validity with respect to Hobby Lobby and Amoji.

As explained below, with respect to Hobby Lobby and Amoji, I find that the presumption of validity applies, and that Respondents' evidence does not overcome that presumption. With respect to Orly, I find that, while the presumption of validity may not apply, Crocs established that the 3D Marks acquired secondary meaning before Orly's first use.

1. Hobby Lobby and Amoji

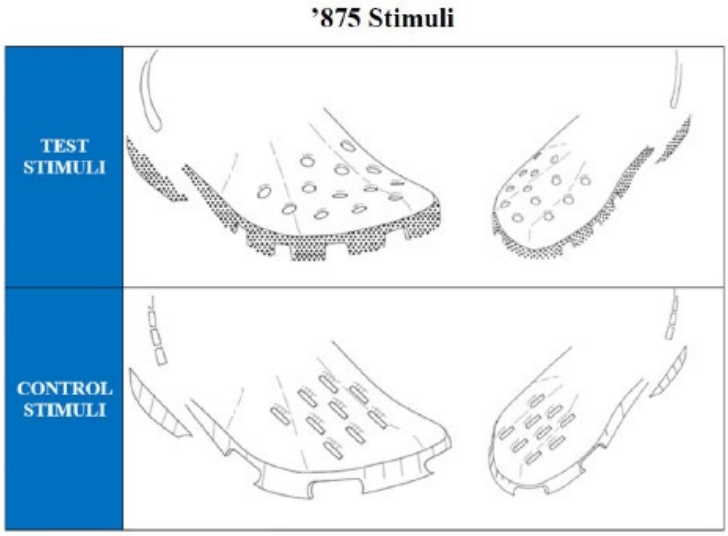
In my view, the ID erred in negating the presumption of validity with respect to Hobby Lobby and Amoji. *Converse* holds that "[i]n any infringement action, the party asserting trade-dress protection must establish that its mark had acquired secondary meaning before the first infringing use *by each alleged infringer*. *Converse* 909 F.3d at 1116-17 (emphasis added). The timing of Orly's first sale is only relevant to Orly and not to the other respondents, Hobby Lobby or Amoji. Hobby Lobby did not begin selling Gators until 2021. CX-1723 (Hobby Lobby's third supplemental response to Crocs's first set of interrogatories). And there is no evidence that Amoji sold its first Garden Clogs before the date of registration. See ID at 10-12. Thus, I find that the presumption of validity applies with respect to Hobby Lobby and Amoji.

The ID finds that its invalidity analysis "would not change if Orly's first use was on October 14, 2019" (*i.e.*, after registration of the 3D Marks) because "the survey evidence affirmatively shows a lack of secondary meaning," which is sufficient to "overcom[e] the 3D

Marks' presumption of validity." ID at 94 n. 41-42, 126. While the ID does not say so expressly, this finding would apply equally to all Respondents as it does not rely on Orly's first sale defense.

I disagree with the ID that the consumer surveys and other evidence submitted by Respondents are sufficient to overcome the presumption of validity of the 3D Marks. In my view, in particular, the Hollander surveys submitted by Respondents do not affirmatively demonstrate that the 3D Marks lack secondary meaning.

As shown below, Mr. Hollander's test and control images were very similar to each other, with the exception of minor changes to the number, shape, and pattern of the holes in the upper. Id at 103-04. The Hollander surveys shows that survey participants were almost equally likely (approximately 40 percent) to associate the test shoes bearing the 3D Marks with Crocs as they were the control images bearing minor variations of those Marks. Id at 105-06; RX-0002C (Hollander) at Q/A 139.



This could mean – and in my view it likely *does* mean – that consumers associated *both* sets of holes with Crocs (not either/or), supporting a finding of secondary meaning. See Hr'g Tr. (Pittaoulis) at 499:2-15; 500: 7-19.

Alternatively, at least in theory, the survey results could mean the participants were not responding to the holes at all but to the overall shape of the clog's upper, which was common to both sets of shoes but not covered by the 3D Marks. See ID at 104, 108 (citing RX-0002C (Hollander) at Q/A 71, 74-76, 79, 82; Hr'g Tr. (Hollander) at 767: 11-13, 815:23-816:3). This would mean the 3D Marks either do not have secondary meaning or it has not been affirmatively proven.

I do not accept this alternative explanation. As explained above, and as recognized in the ID, Crocs initially attempted to trademark the overall shape of the Classic Clog. ID at 5. But the Examiner rejected the application because the overall shape of the clog's upper included "generic elements … commonly present in waterproof strap clogs." ID at 5. Thus, it cannot be that the survey participants associated the overall shape of the shoes with Crocs, when the overall shape of the shoes has been found to be generic and non-distinctive. As stated above, finding otherwise would place Crocs in a Catch-22: first its application for a trademark on the overall look of the shoe is rejected because the elements of the shoe other than the holes and trapezoids are found to be non-distinctive, whereas the holes and trapezoids are registered because they are distinctive; then, that more limited trademark covering the holes and trapezoids is found to be invalid because we cannot tell whether consumers associated those marks, or instead associated the overall shape of the shoe, with Crocs.

The other evidence concerning secondary meaning is either neutral or leans *in favor* of finding secondary meaning. See ID at 111-26. None of these factors affirmatively proves there is no secondary meaning.

I therefore find that neither Hobby Lobby nor Amoji has overcome the presumption of validity.

2. Orly

The ID found that Orly's first sale of its Gator product (for 1,080 units at a price of $1,728) occurred in April 2016, before Crocs registered the 3D Marks, and as a result the 3D Marks are not entitled to a presumption of validity, and Crocs must establish that the 3D Marks acquired secondary meaning before April 2016. ID at 94. Crocs disputes both the facts and the law, arguing that there is insufficient evidence to establish that the shoe Orly sold in 2016 is the Gator, and that, in any event, this single sale to a wholesaler is insufficient as a matter of law to establish "use in commerce" that would eliminate the presumption of validity. See Crocs' Petition for Review at 27-33.

Crocs' factual and legal questions are not without merit.[28] But, even if the 3D Marks do not enjoy a presumption of validity with respect to Orly, I find that Crocs established that the 3D

[28] For example, Crocs argues that "use in commerce" should be defined here the same way it is defined in section 1127 of the Lanham Act to mean a "bona fide use of a mark in the ordinary course of trade," which courts have held does not include "sporadic, casual, or nominal" sales. See Petition for Review at 28. On the other hand, the Federal Circuit and other courts have held that the "use in commerce" definition of section 1127 – concerning eligibility for trademark *registration* – does not apply to trademark *infringement. See VersaTop Support Sys., LLC v. Georgia Expo, Inc.*, 921 F.3d 1364 1370 (Fed Cir. 2019) (holding that infringement can occur without even a single sale of an allegedly infringing good but instead through the use of a mark in advertising brochures). In other words, while a trademark holder must use a mark more than sporadically, casually, or nominally before that mark may be *registered*, a trademark holder may claim trademark *infringement* based on a single sale (or even no sale at all) of an allegedly infringing product.

But the issue here – whether a single sale occurring before registration is sufficient to negate the presumption of valid – arguably concerns neither trademark registration nor infringement *per se*; it may be considered a *tertium quid*. To be sure, the Federal Circuit stated in *Converse* that "[i]n any infringement action, the party asserting trade-dress protection must establish that its mark had acquired secondary meaning *before the first infringing use* by each alleged infringer." *Converse* at 1116 (emphasis added). But this issue did not squarely present itself in that case, which involved a number of allegedly infringing uses by a number of respondents in the ten years preceding registration.

And, it seems to me, this situation may be different from a case of infringement like the one in *VersaTop*. In infringement actions, the senior user is seeking relief and so is obviously aware of the allegedly infringing actions, even if they involve nominal sales or no sales at all.

Marks acquired secondary meaning before 2016, based on my analysis of the *Converse* factors, as described below.

a. Association of Trade Dress with the Source

In my view, as explained above, Respondents' survey, conducted by Mr. Hollander, is flawed and does not support the conclusion that consumers do not associate the 3D Marks with Crocs. Indeed, that is even clearer here, with respect to Orly, given that the question with Orly is whether the 3D Marks had acquired secondary meaning *in 2016*, whereas the Hollander survey was not conducted until six years after the fact. In *Converse*, the Federal Circuit stated that the ITC should give a secondary-meaning survey "little probative weight in its analysis, except to the extent that [it] was *within five years* of the first infringement by one of the intervenors." *Converse*, 909 F.2d at 1123 (emphasis added).[29]

b. Length, Degree, and Exclusivity of Use

I agree with the ID that the length, degree, and exclusivity of the use of the 3D Marks supports a conclusion that the 3D Marks acquired secondary meaning. Consumers have been exposed to those Marks for 20 years, and those Marks have always been part of the Classic Clog since the brand first launched in 2002. Crocs had "substantial exclusivity" of the 3D Marks from

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There is no reason in that situation to require the trademark holder to wait for the infringement to repeatedly occur before action may be taken. That rationale does not apply here.

[29] In footnote 56, the ID recognizes that the surveys were conducted outside of this five-year period, but recalls that "it is Crocs who bears the burden of proving secondary meaning." ID at 102. This statement is hard to square with the ID's conclusion, which puts much stock in this survey: "Here, the survey evidence affirmatively shows a lack of secondary meaning." ID at 126.

2011 to 2020, owing in large part to the Commission's issuance of a general exclusion order based on Croc's design patent in Inv. No. 337-TA-567. ID at 111-12.

c. Amount and Manner of Advertising

Much as it did with respect to its "fame" analysis (*DuPont* factor 5), the ID states that there is "no dispute" that the Classic Clog has been "prominently featured" in Crocs' advertising, but "[t]he question is whether those ads highlighted the trade dress in question." ID at 114. Whereas the ID found that they did not, I find that they do. My reasoning is generally explained above, and I will not repeat it here.

But one theme bears repeating: the ID states that "Croc's advertising … focuses on the overall impression of the Classic Clog and does not promote the 3D Marks as a source indicator. Ms. Wagner's testimony confirms that Crocs promotes the 'overall look' of the Classic Clog, not the elements of the 3D Marks." ID at 115. But, again, the Trademark Examiner rejected an application for the overall look of the Classic Clog because the elements of the Classic Clog, other than the 3D Marks, were found to be generic and nondistinctive. One must doubt that Crocs would focus its advertising campaign on elements of its shoe that are the same as other shoes. And, to put it another way, the 3D Marks and the 'overall look' of the Classic Clog cannot be divorced from one another. As the trademark registration history reveals, the 3D Marks are the distinctive elements of the Classic Clog as a whole.

d. Amount of Sales and Number of Customers

As it did with respect to its "fame" analysis (*DuPont* factor 5), the ID recognizes that "Crocs has sold a substantial number of Classic Clogs; indeed, a large portion of Crocs' annual sales revenue of [redacted] is attributable to Classic Clogs." ID at 123. But it finds these sales are attributable to factors other than the 3D Marks, such as the "overall look" of the shoe, and also to things such as "comfort" and the CrosliteTM material, a proprietary technology that gives

each pair of shoes "the soft, comfortable, lightweight, non-marking, and odor-resistant qualities" that Crocs fans "know and love." ID at 123.

In my view, while there may be other attributes that the public associates with and likes about the Classic Clog, that does not mean the distinctive holes and trapezoids on the shoe have nothing to do with the substantial sales and customer base behind the Classic Clog. Indeed, while Crocs' advertisements often display the 3D Marks, I am not aware of any advertisement on the record that, for example, highlights the CrosliteTM material.

e. Intentional Copying

With respect to "intentional copying," the ID refers back to its findings concerning *DuPont* factor 13, in which it addressed the "intent to confuse," and concludes that "Respondents did not copy the 3D Marks." In my mind, this is a different conclusion from the conclusion that Orly, Hobby Lobby, and Amoji did not intentionally seek to confuse. And, when I look at the Orly Gator or the Amoji Garden Clog, it appears to me that they in fact *did* copy, and did *intend* to copy, the 3D Marks – that's why the ID found the products look very similar to the 3D Marks. (Indeed, unlike with the Gator, Orly, with the Orly Redesign, "sought to design a product that lacked all the features that Crocs claimed ot [*sic*] be protected by their intellectual property" and Orly's "goal was to develop a product that Crocs would not even accuse of infringement." The same certainly cannot be said – and *wasn't* said -- about the Orly Gator.) I also question whether Orly can be found not to have copied the 3D Marks simply because it acquired the design from a contract manufacturer. Nevertheless, determining intent is a tricky business, and I do not believe this case turns on this factor. I therefore do not disturb the ID's finding that this factor is neutral.

f. Unsolicited Media Coverage

The ID states that the evidence shows "the Classic Clog had approximately 25 billion media impressions in 2020 alone." ID at 125. And there is ample evidence on the record that

the media coverage was extensive well before 2016 (*e.g.*, Footwear News first awarded the Classic Clog "Shoe of the Year" in 2005; see Petition for Review at 1). The ID finds, and I agree, that this factor supports a finding of secondary meaning.

g. Conclusion

In my view, the 3D Marks (especially the 13 holes, the seven trapezoids, and the indented heel strap on a Classic Clog) are key components of, and inextricably linked to, the overall look of the shoe; they are in large part what enables someone to identify a shoe as a Crocs Classic Clog. By the time Orly arguably sold its first Gator in 2016, Crocs had for fourteen years consistently used those Marks to identify their shoe, to the exclusion of other shoes. Those Marks are often found in Crocs' extensive advertising campaigns, which has contributed to billions upon billions of dollars in sales revenues over the years. I therefore find that Crocs established that the 3D Marks acquired secondary meaning long before 2016.

IV. DOMESTIC INDUSTRY AND REMEDY

Given my above determinations, I would also remand to the ALJ for further proceedings and development of the record with respect to the domestic industry requirement, including to better develop the details regarding Croc's expenditures and investments on various activities to enable him to assess which are properly considered in the economic prong analysis and which are for the activities of a "mere importer" (this latter category may include, for example, marketing, sales, warehousing, and distribution activities). I would also seek information on expenditures and investments in other countries relating to the DI products, including those related to manufacturing, to enable an appropriate quantitative significance analysis to determine whether there is a *domestic* industry. Because I would remand on the economic prong, I do not reach any remedy issues, including remedies against defaulting respondents.