

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

In the Matter of

CERTAIN FOAM FOOTWEAR

Investigation No. 337-TA-567

NOTICE OF COMMISSION DECISION NOT TO REVIEW A REMAND INITIAL DETERMINATION; FINDING OF A VIOLATION OF SECTION 337; REQUEST FOR WRITTEN SUBMISSIONS REGARDING REMEDY, BONDING, AND THE PUBLIC INTEREST

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the presiding administrative law judge's ("ALJ") remand initial determination ("ID") and has found a violation of section 337 in the above-captioned investigation. The Commission is requesting written submissions regarding remedy, bonding, and the public interest.

FOR FURTHER INFORMATION CONTACT: Clint Gerdine, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-5468. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <http://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on May 11, 2006, based on a complaint, as amended, filed by Crocs, Inc. ("Crocs") of Niwot, Colorado. 71 *Fed. Reg.* 27514-15 (May 11, 2006). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain foam footwear, by reason of infringement of claims 1-2 of U.S. Patent No. 6,993,858; U.S. Patent No. D517,789; and the Crocs trade dress (the image and overall appearance of Crocs-brand footwear). The complaint further alleged that an industry in the United States exists as required by subsection (a)(2) of section 337, and requested that the Commission issue a permanent

general exclusion order and permanent cease and desist orders. The complaint named eleven (11) respondents that included: (1) Collective Licensing International, LLC of Englewood, Colorado; (2) Double Diamond Distribution Ltd. (“Double Diamond”) of Canada; (3) Effervescent Inc. (“Effervescent”) of Fitchburg, Massachusetts; (4) Gen-X Sports, Inc. of Toronto, Ontario; (5) Holey Shoes Holding Ltd. of Canada; (6) Australia Unlimited, Inc. of Seattle, Washington; (7) Cheng’s Enterprises Inc. of Carlstadt, New Jersey; (8) D. Myers & Sons, Inc. of Baltimore, Maryland; (9) Inter-Pacific Trading Corp. of Los Angeles, California; (10) Pali Hawaii of Honolulu, Hawaii; and (11) Shaka Shoes of Kaliua-Kona, Hawaii. The Commission terminated the investigation as to the trade dress allegation on September 11, 2006. A twelfth respondent, Old Dominion Footwear, Inc. of Madison Heights, Virginia, was added to the investigation on October 10, 2006. All but two respondents have been terminated from the investigation on the basis of a consent order, settlement agreement, or undisputed Commission determination of non-infringement. The two remaining respondents are Double Diamond and Effervescent.

On April 11, 2008, the ALJ issued his final ID finding no violation of section 337. The ALJ’s final ID made no finding on whether either asserted patent was unenforceable due to inequitable conduct. The ALJ’s final ID also included his recommendation on remedy and bonding should the Commission find that there was a violation. On July 25, 2008, after review, the Commission affirmed the ALJ’s final ID with certain modifications and clarifications, and terminated the investigation with a finding of no violation of section 337. The Commission took no position regarding the issue of enforceability of the ‘858 and ‘789 patents. On February 24, 2010, the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) issued its judgment overturning the Commission’s findings regarding invalidity of the ‘858 patent, and non-infringement/lack of domestic industry concerning the ‘789 patent. The Federal Circuit also specifically “remand[ed] the investigation for a determination of infringement of the ‘858 patent and any appropriate remedies.” *See Crocs, Inc. v. United States Int’l Trade Comm’n*, 598 F.3d 1294, 1311 (Fed. Cir. 2010). On July 6, 2010, the Commission remanded the investigation to the ALJ to decide the remaining issue of enforceability of the patents.

On February 9, 2011, the ALJ issued his remand ID finding that the patents were not unenforceable. On February 25, 2011, respondents filed both a joint petition for review of the remand ID and a motion for leave to file the petition two (2) days late. On March 4, 2011, the Commission issued an order declining to grant respondents’ motion without prejudice to respondents refiling their motion stating good cause for the enlargement of time. On March 16, 2011, respondents filed a joint motion for an enlargement of the time for filing petitions for review of the remand ID. On March 18, 2011, the Commission issued an order granting respondents’ motion for an enlargement of time and making responses due on March 28, 2011. On March 28, 2011, Crocs and the Commission investigative attorney each filed a brief in response to respondents’ petition for review.

The Commission has determined not to review the subject remand ID. Also, the Commission has determined to reaffirm the ALJ’s previous ruling that claims 1 and 2 of the ‘858 patent are infringed by Effervescent’s accused products, and that claim 2 of the ‘858 patent is

infringed by Double Diamond's accused products. *See* 73 *Fed. Reg.* 35710-11 (June 24, 2008); Remand ID at 2 (February 9, 2011) (*citing* Final ID at 121 (April 11, 2008)); Comm'n Op. at 3-4, n. 1 (July 25, 2008). These actions, along with the Federal Circuit's decision, result in a finding of a violation of section 337 by Double Diamond and Effervescent.

In connection with the final disposition of this investigation, the Commission may issue an order that results in the exclusion of the subject articles from entry into the United States. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, *see In the Matter of Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843 (December 1994) (Commission Opinion).

When the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

When the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. *See* section 337(j), 19 U.S.C. § 1337(j) and the Presidential Memorandum of July 21, 2005, 70 *Fed. Reg.* 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

WRITTEN SUBMISSIONS: Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding, and such submissions should address the recommended determination by the ALJ on remedy and bonding issued on April 23, 2008 (public version). The complainant and the IA are also requested to submit proposed remedial orders for the Commission's consideration. Complainant is also requested to state the dates that the patents at issue expire and the HTSUS numbers under which the accused articles are imported. The written submissions and proposed remedial orders must be filed no later than close of business on May 6, 2011. Reply submissions must be filed no later than the close of business on May 13, 2011. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document and 12 true copies thereof on or before the deadlines stated above with the Office of the Secretary. Any person desiring to submit a document to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 C.F.R. § 210.6. Documents for which confidential treatment by the Commission is sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, and in sections 210.42-46 of the Commission's Rules of Practice and Procedure, 19 C.F.R. §§ 210.42-46.

By order of the Commission.

/s/

William R. Bishop
Acting Secretary to the Commission

Issued: April 25, 2011