

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

CERTAIN FOAM FOOTWEAR

Investigation No. 337-TA-567

**ORDER: DENYING PETITION TO MODIFY, SUSPEND, OR RESCIND THE
COMMISSION'S GENERAL EXCLUSION ORDER AND CEASE AND
DESIST ORDER WITH RESPECT TO U.S. PATENT NO. D517,789**

The Commission instituted this investigation on May 11, 2006, based on a complaint, as amended, filed by Crocs, Inc. ("Crocs") of Niwot, Colorado. 71 FR 27514-15 (May 11, 2006). The complaint alleged, *inter alia*, violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain foam footwear, by reason of infringement of claims 1-2 of U.S. Patent No. 6,993,858 ("the '858 patent") and U.S. Patent No. D517,789 ("the '789 patent"). The complaint named several respondents including Double Diamond Distribution Ltd. ("Double Diamond") of Saskatoon, Canada.

On July 25, 2008, the Commission issued its final determination finding no violation of section 337 based on non-infringement and non-satisfaction of the technical prong of the domestic industry requirement with respect to the '789 patent, and invalidity of the '858 patent as obvious under 35 U.S.C. § 103. 73 FR 45073-74 (Aug. 1, 2008). The Commission's final determination included a determination that the '789 patent was not invalid. *See Certain Foam Footwear*, Inv. No. 337-TA-567, Final Initial Determination at 114-15, 2008 WL 1855922, at *58-59 (Apr. 11, 2008). On July 15, 2011, after an appeal to the U.S. Court of Appeals for the Federal Circuit and subsequent remand vacating the Commission's previous finding of no violation, the Commission found a violation of section 337 based on infringement of the asserted

claims of the patents and issued a general exclusion order (“GEO”) and, *inter alia*, a cease and desist order (“CDO”) directed against Double Diamond. 76 FR 43723-24 (July 21, 2011).

On September 14, 2017, Double Diamond and U.S.A. Dawgs, Inc. (“USA Dawgs,” a non-party to the original investigation) of Las Vegas, Nevada (collectively, the “requesters”) petitioned to modify, suspend, or rescind enforcement of the GEO and CDO, with respect to the ’789 patent, under Commission Rule 210.76(a) based on final rejection of the sole claim of this patent by the U.S. Patent Office as unpatentable over the prior art at the conclusion of *inter partes* reexamination proceedings on August 9, 2017.

On September 25, 2017, Crocs filed a response in opposition to the petition. No other responses were received.

Commission Rule 210.76(a)(1) provides in pertinent part:

Whenever any person believes that *changed conditions of fact or law*, or the *public interest*, require that an exclusion order, cease and desist order, or consent order be modified or set aside, in whole or in part, such person may file with the Commission a petition requesting such relief . . . The petition shall state the changes desired and the changed circumstances warranting such action [and] shall include materials and arguments in support thereof [.]

19 C.F.R. § 210.76(a)(1) (emphasis added).

The Commission finds that the circumstances here are no different from *Certain Network Devices, Related Software and Components (II)*, Inv. No. 337-TA-945, Order (Sept. 11, 2017) (“*Network Devices*”), where the Commission determined that it would not disturb any issued remedial order, *i.e.*, modify, suspend, or rescind the order, based solely on a final rejection from the PTO.

Accordingly, upon consideration of the record and the submissions in this matter, the Commission hereby ORDERS that:

1. Requesters' petition is DENIED.
2. The Secretary to the Commission will serve this Order on all parties to the investigation.

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', written in a cursive style.

Lisa R. Barton
Secretary to the Commission

Issued: October 20, 2017

CERTAIN FOAM FOOTWEAR

**337-TA-567
(Violation)**

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served upon the following parties as indicated, on **October 20, 2017**.



Lisa R. Barton, Secretary
U.S. International Trade Commission
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On Behalf of Complainant Crocs, Inc.:

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

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On Behalf of Respondents Double Diamond Distribution and U.S.A Dawgs, Inc.:

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