

APPENDIX

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APPENDIX A

[FILED: OCTOBER 3, 2024]

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CROCS, INC.,

Plaintiff-Appellee,

v.

**EFFERVESCENT, INC., HOLEY SOLES
HOLDINGS, LTD.,**

Defendants

**DOUBLE DIAMOND DISTRIBUTION, LTD., U.S.A.
DAWGS, INC., MOJAVE DESERT HOLDINGS, LLC**

Defendants-Appellants

2022-2160

Appeal from the United States District Court for the
District of Colorado in No. 1:06-cv-00605-PAB-MDB,
Judge Philip A. Brimmer.

Decided: October 3, 2024

MICHAEL BERTA, Arnold & Porter Kaye Scholer
LLP, San Francisco, CA, argued for plaintiff-appellee.
Also represented by SEAN MICHAEL CALLAGY, ISAAC
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MATT BERKOWITZ, Reichman Jorgensen Lehman &
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defendants-appellants. Also represented by NAVID
CYRUS BAYAR.

Before REYNA, CUNNINGHAM, *Circuit Judges*, and
ALBRIGHT, *District Judge*¹.

REYNA, *Circuit Judge*.

Appellants Double Diamond Distribution, Ltd.; U.S.A. Dawgs, Inc.; and Mojave Desert Holdings, LLC (collectively, “Dawgs”) appeal from a decision of the United States District Court for the District of Colorado granting summary judgment in favor of Appellee Crocs, Inc. (“Crocs”).

Crocs sued Dawgs for patent infringement. Dawgs counterclaimed, alleging that Crocs was liable for damages for false advertising in violation of Section 43(a) of the Lanham Act. Crocs moved for summary judgment on grounds that Dawgs’ counterclaim failed as a matter of law. Crocs argued that the circumstances in this case do not give rise to a Section 43(a) cause of action. The district court agreed and entered summary judgment in Crocs’ favor. We hold that a cause of action arises from Section 43(a)(1)(B) where a party falsely claims that it possesses a patent on a product feature and advertises that product feature in a manner that causes consumers to be misled about the nature, characteristics, or qualities of its product. We reverse and remand.

BACKGROUND

The pertinent history of this appeal begins in 2006 when Crocs sued Double Diamond Distribution, Ltd. and several other competitor shoe distributors for patent infringement.² *See* Crocs’ Complaint for Patent

¹ Honorable Alan D Albright, District Judge, United States District Court for the Western District of Texas, sitting by designation.

² This appeal rises from a group of cases spanning multiple forums that have a long and complex history of litigation involving Crocs and

Infringement, *Crocs, Inc. v. Effervescent, Inc.*, No. 06-cv-00605-PAB-KMT (D. Colo. Apr. 3, 2006), ECF No. 1; *see also In the Matter of Certain Foam Footwear*, 71 Fed. Reg. 27514-01 (May 11, 2006).

In May 2016, Dawgs filed a counterclaim against Crocs alleging false advertising violations of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). In March 2017, Dawgs filed its operative pleading in the case, its Second Amended Answer and Counterclaims (“SACC”). *See* J.A. 469–580. The counterclaim alleges Dawgs was damaged by Crocs’ false advertisements and commercial misrepresentations. *See, e.g.*, J.A. 576, ¶ 345. Dawgs alleges that Crocs had engaged in a “campaign to mislead its customers” about the characteristics of the primary material Crocs uses to make its footwear products, a material it promoted as “Croslite.” J.A. 495, ¶ 51; J.A. 481, ¶ 7. According to Dawgs, Crocs’ website falsely described Croslite as “patented,” “proprietary,” and “exclusive” (collectively, “patented”). J.A. 575, ¶ 342; *see also* J.A. 603 (Ex. 21 to SACC); J.A. 608 (Ex. 23 to SACC). Dawgs

its competitors. The district court case against Double Diamond Distribution, Ltd. Was stayed for almost five years pending a contemporaneously filed Section 337 action before the International Trade Commission, which proceeded to an appeal before this court and a remand. *See Crocs, Inc. v. Int’l Trade Comm’n*, 598 F.3d 1294 (Fed. Cir. 2010). U.S.A. Dawgs was added as a defendant in the district court litigation after it resumed in 2012. The district court case was stayed again from 2012 to 2016 pending inter partes review proceedings. It was also stayed from 2018 to 2020 while U.S.A. Dawgs was engaged in bankruptcy proceedings, during which time Mojave Desert Holdings, LLC became involved in the litigation. Between these two stays, in 2016, Dawgs sued eighteen current and former Crocs officers and directors, alleging the same counterclaims against them as Crocs. The district court consolidated the cases and the individual defendants were later dismissed from the action. The facts and circumstances of the consolidated case are not at issue in this appeal.

alleges that by promoting Croslite as “patented,” Crocs misled current and potential customers to believe that “Crocs’ molded footwear is made of a material that is different than any other footwear.” J.A. 575, ¶ 342. Dawgs alleges that Crocs’ statements deceived consumers into believing that its competitors’ molded footwear products are “made of inferior material compared to Crocs’ molded footwear.” J.A. 576, ¶ 345.

During discovery, Crocs moved for summary judgment on grounds that Dawgs’ counterclaim was “legally barred” by the Supreme Court’s decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), and this court’s decision in *Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d 1300 (Fed. Cir. 2009). J.A. 1398–99; *see generally* J.A. 1393–99.

The district court agreed with Crocs and granted summary judgement in its favor. *Crocs, Inc. v. Effervescent, Inc.*, No. 06-cv-00605-PAB-KMT, 2021 WL 4170997, at *9 (D. Colo. Sept. 14, 2021) (“*Decision*”). The district court decided that in view of *Dastar* and *Baden*, Dawgs failed as a matter of law to state a cause of action under Section 43(a) of the Lanham Act. *Id.* at *7. The district court concluded that the terms “patented,” “proprietary,” and “exclusive” were claims of “inventorship.” *Id.* at *6; *see also* J.A. 1977. Applying *Dastar* and *Baden* to the SACC, the district court determined that Dawgs’ claims of inventorship were directed to a claim of false designation of authorship of the shoe products and not the nature, characteristics, or qualities of Crocs’ products. *Decision*, 2021 WL 4170997, at *7; *see also* J.A. 1969 (quoting 15 U.S.C. § 1125 (a)(1)(B)).

Dawgs moved for reconsideration, which the district court denied. J.A. 1966; J.A. 1981. Dawgs appeals. We have jurisdiction under 28 U.S.C. § 1295(a)(1).

STANDARD OF REVIEW

We review appeals involving interpretation of the Lanham Act *de novo*, applying the law of the regional circuit in which the relevant district court sits, in this case the Tenth Circuit. *Baden*, 556 F.3d at 1304; *Strauss v. Angie's List, Inc.*, 951 F.3d 1263, 1267 (10th Cir. 2020). Since the Tenth Circuit has not spoken on the legal issue, we must “predict how that regional circuit would have decided the issue in light of the decisions of that circuit’s various district courts, public policy, etc.” *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1575 (Fed. Cir. 1984).

Similarly, we review appeals of summary judgment under the law of the regional circuit. *Baden*, 556 F.3d at 1304. The Tenth Circuit reviews a district court’s grant of summary judgment *de novo*, applying the same legal standard as the district court. *Faustin v. City & Cnty. of Denver, Colo.*, 423 F.3d 1192, 1195 (10th Cir. 2005); *Hull v. IRS*, 656 F.3d 1174, 1177 (10th Cir. 2011). In determining whether to grant a motion for summary judgment, the district court considers whether the moving party is entitled to judgment as a matter of law. *Faustin*, 423 F.3d at 1198.

DISCUSSION

Dawgs raises a single issue on appeal: whether the district court erred in granting summary judgment against Dawgs’ counterclaim for failure to state a cause of action under Section 43(a)(1)(B) of the Lanham Act. Appellant Br. 6. We first address the Lanham Act.

The Lanham Act was enacted to “protect persons engaged in . . . commerce against unfair competition.” 15 U.S.C. § 1127. Section 43(a)(1) of the Lanham Act establishes a federal cause of action for unfair competition. *Dastar*, 539 U.S. at 29.

Section 43(a)(1) of the Lanham Act states,

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) *in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities,*

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1) (emphasis added).

The district court found no genuine issue of material fact in dispute supporting a cause of action under Section 43(a)(1)(A). *Decision*, 2021 WL 4170997, at *4. Dawgs does not appeal this ruling. Instead, Dawgs only challenges the district court’s decision on whether its counterclaim allegations sufficiently raise a cause of

action under Section 43(a)(1)(B) of the Lanham Act.³ We therefore do not separately address Section 43(a)(1)(A).

In addition, as a threshold matter, the key question of whether Crocs' representation that Croslite is patented is in fact false is not in dispute. Section 43(a)(1)(B) creates a cause of action for a person damaged by *false or misleading* commercial advertising or promotions that mislead consumers about the nature, characteristics, or qualities of goods or services. *See* 15 U.S.C. § 1125(a)(1)(B). Crocs conceded in its briefing, and at oral argument before this court, that its statements that Croslite was covered by a patent are false. *See* Appellee Br. 70–71; Oral Arg. Tr. 16:22–16:33. Stated differently, Crocs admits that it was never granted a patent for Croslite. Oral Arg. Tr. 16:22–16:33.

Dawgs' appeal focuses on Section 43(a)(1)(B). Dawgs argues that when commercial misrepresentations that a product is “patented,” “proprietary,” and “exclusive” are linked to the nature, characteristics, or qualities of the product, those misrepresentations are actionable under Section 43(a)(1)(B) of the Lanham Act. *See, e.g.*, Appellant Br. 23.

³ Various courts have taken the approach that “nature, characteristics, [or] qualities” in Section 43(a)(1)(B) relate to “the characteristics of the good itself,” not intangibles involving the source of ideas embodied in a product, like product authorship. *Baden*, 556 F.3d at 1307 (quoting *Sybersound Recs., Inc. v. UAV Corp.*, 517 F.3d 1137, 1144 (9th Cir. 2008)); *see also Kehoe Component Sales Inc. v. Best Lighting Prod., Inc.*, 796 F.3d 576, 590 (6th Cir. 2015). At least one circuit court has suggested in passing that there is an “open . . . possibility that some false authorship claims could be vindicated under the auspices of § 43(a)(1)(B)’s prohibition on false advertising.” *Zyla v. Wadsworth, Div. of Thomson Corp.*, 360 F.3d 243, 252 n.8 (1st Cir. 2004); *see also Baden*, 556 F.3d at 1308 n.1.

Dawgs asserts that the district court’s conclusion that *Dastar* and *Baden* are dispositive in this case is erroneous. Appellant Br. 36; *see Decision*, 2021 WL 4170997, at *6–7. First, Dawgs argues that those cases were based on circumstances different from the circumstances in this appeal. Appellant Br. 28–33, 36. *Second, Dawgs argues that its counterclaims adequately allege that Crocs used the terms “patented,” “proprietary,” and “exclusive” in its advertisements in a manner that misled consumers about the nature, characteristics, or qualities of its own products and the products of its competitors. Id. at 46–51.* As such, Dawgs argues that it has sufficiently alleged a cause of action under Section 43(a)(1)(B) and therefore the district court should not have granted summary judgment. *Id. at 6.*

Dastar and Baden

The district court concluded that based on binding precedent established in *Dastar* and *Baden*, Crocs’ false claims to have “patented” Croslite are not actionable under Section 43(a)(1)(B). *Decision*, 2021 WL 4170997, at *6. The district court likened falsely claiming to have “patented” something as similar “to plagiarizing or reverse passing off, which *Dastar* held not . . . covered by the Lanham Act’s false advertising prohibition.” *Id.* (footnote omitted). The district court similarly concluded that this court in *Baden* found non-actionable “terms that the court likened to claims of inventorship” and that in this case, “[f]alsely claiming to have ‘patented’ something is akin to claiming to have ‘invented’ it.” *Id.* The district court determined that Dawgs’ counterclaim could not stand because any claim that a product was patented was directed to inventorship, and thus the counterclaim was precluded by *Dastar* and *Baden. Id.* We disagree.

In *Dastar*, the Supreme Court considered the scope of unfair competition that is actionable under Section 43(a)(1)(A) of the Lanham Act, which relates to misrepresentations about the “origin, sponsorship, or approval” of goods or services. *Dastar*, 539 U.S. at 31. *Dastar* involved a World War II television series first broadcast in 1949. *Id.* at 26. Although the copyright on the television series expired in the 1970s, the respondents acquired exclusive rights to distribute the series on video in the late 1980s. *Id.* In 1995, petitioner Dastar purchased tapes of the original 1949 series, copied them, and edited them with minor changes. *Id.* at 26–27. It then sold the video set as its own product, with no reference to the original series. *Id.* at 27. Respondents brought an action against Dastar under Section 43(a)(1)(A) of the Lanham Act for false designation of origin. *Id.* at 27, 31.

The Court found that “origin” in Section 43(a)(1)(A) of the Lanham Act means “the producer of the tangible goods that are offered for sale, and not . . . the author of any idea, concept, or communication embodied in those goods.” *Id.* at 37. The Court concluded that this section of the Lanham Act was not intended to protect originality or creativity, and that “[t]o hold otherwise would be akin to finding that § 43(a) created a species of perpetual patent and copyright, which Congress may not do.” *Id.* Because Dastar was the originator of the products it sold, the Court found the Lanham Act claim failed. *Id.* at 38. The Court concluded that parties in respondents’ shoes might still have other forms of relief for conduct like Dastar’s. *Id.* If, for example, a party substantially copied a series but suggested in advertising that the work was “quite different” from the earlier series, they might be entitled to relief under Section 43(a)(1)(B). *Id.* The Court observed that a Lanham Act cause of action does not arise for

merely claiming that a party is the producer of the video. *Id.*

In *Baden*, this court considered the effect of *Dastar* in a Section 43(a)(1)(B) action brought in the Ninth Circuit. *Baden*, 556 F.3d at 1304–08. In a suit between two competing basketball manufacturers, Baden argued that its competitor Molten’s advertising violated the Lanham Act. *Id.* at 1302. Molten promoted its basketballs as having a “dual-cushion technology” that its advertisements described as “innovative.” *Id.* at 1302–03. Baden argued that by advertising its basketballs as “innovative,” Molten deceived consumers into believing that it was the originator of the dual-cushion technology. *Id.* at 1303. At trial, the jury issued a verdict in favor of Baden. *Id.* at 1304. We reversed.

We explained that in the Ninth Circuit, a claim based on false designation of authorship is not actionable under Section 43(a)(1)(A) or Section 43(a)(1)(B). *Id.* at 1307. Baden had argued that Molten’s advertisements were false “precisely because Molten was not the source of the innovation,” *i.e.*, not the author. *Id.* We held that “authorship, like licensing status, is not a nature, characteristic, or quality, as those terms are used in Section 43(a)(1)(B) of the Lanham Act.” *Id.*; *see Sybersound*, 517 F.3d at 1144. Because Baden based its false advertising claims on allegations that Molten was improperly asserting itself as the innovator, *i.e.*, the author, of the technology, Baden had no claim under Section 43(a)(1)(B). *Id.*

Although *Dastar* and *Baden* are based on different circumstances, the analysis used by the Supreme Court and this court in those cases is informative in this appeal. *Dastar* cautions that a false claim of origin, and nothing more, is a claim of authorship and does not give rise to a

cause of action under Section 43(a)(1)(A) or (B). But, here, the false claim that a product is patented does not stand alone. Dawgs presents allegations and evidence that the falsity of Crocs' promotional statements is rooted in the nature, characteristics, or qualities of Crocs' products.

Both the district court and Crocs quote *Baden* to suggest that permitting a Section 43(a)(1)(B) claim based on linking "patented" with a product characteristic would contravene *Dastar* by allowing reframing of a claim that is based on false attribution of authorship. *Baden*, 556 F.3d at 1307; *see Decision*, 2021 WL 4170997, at *7; Appellee Br. 59. We disagree. A claim that a product is constructed of "patented" material is not solely an expression of innovation and, hence, authorship. Again, *Baden* did not involve false advertisements linking such claims to a product's tangible nature, characteristics, or qualities. In this case, for example, Dawgs submitted webpage printouts that purported to show promotional statements by Crocs that a patent covers Croslite. *See, e.g.*, J.A. 603 (Ex. 21 to SACC), J.A. 608 (Ex. 23 to SACC). Those promotional materials further included statements that Croslite has numerous tangible benefits found in all of Crocs' shoe products. J.A. 603 (Ex. 21 to SACC), J.A. 608 (Ex. 23 to SACC).

Dawgs argues it has stated a cause of action because the falsehood that Croslite is patented was used by Crocs to ascribe characteristics that go to the nature and qualities of Croslite. Dawgs alleges that "Crocs' statements referring to the closed-cell resin that [it] call[s] 'Croslite' as 'exclusive,' 'proprietary,' and/or 'patented'" causes customers to believe that "Crocs' molded footwear is made of a material that is different than any other footwear." J.A. 575, ¶ 342. Dawgs further alleges that Crocs' promotional materials "deceive consumers and potential consumers into believing that all

other molded footwear . . . is made of inferior material compared to Crocs' molded footwear." J.A. 576, ¶ 345.

We agree with Dawgs that these allegations about Crocs' advertisement statements are directed to the nature, characteristics, or qualities of Crocs' shoes. We hold that a cause of action arises from Section 43(a)(1)(B) where a party falsely claims that it possesses a patent on a product feature and advertises that product feature in a manner that causes consumers to be misled about the nature, characteristics, or qualities of its product.

CONCLUSION

We have considered Crocs' remaining arguments and find them unpersuasive. Because Dawgs timely presented a theory under Section 43(a)(1)(B) of the Lanham Act linking Crocs' alleged misrepresentations in commercial advertisements to the nature, characteristics, or qualities of Crocs' shoes, the district court erred in granting summary judgment on Dawgs' Lanham Act counterclaim. We accordingly reverse and remand for further proceedings.

REVERSED AND REMANDED

COSTS

Costs against Crocs.

APPENDIX B

[FILED: SEPTEMBER 14, 2021]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Philip A. Brimmer

Civil Action No. 06-cv-00605-PAB-KMT
(Consolidated with Civil Action No. 16-cv-02004-
PAB-KMT)

Civil Action No. 06-cv-00605-PAB-KMT

CROCS, INC.,

Plaintiff,

v.

EFFERVESCENT, INC., et al.,

Defendants.

Civil Action No. 16-cv-02004-PAB-KMT

U.S.A. DAWGS, INC., et al.,

Plaintiffs,

v.

RONALD SNYDER, et al.,

Defendants

ORDER

This matter is before the Court on (1) the Motion for Summary Judgment of Lanham Act Claim [Docket No. 909] filed by Crocs, Inc. (“Crocs”) and the Individual Defendants;¹ (2) the motions to dismiss filed by U.S.A. Dawgs, Inc. and Double Diamond Distribution Ltd. (individually and/or collectively, with Mojave Desert Holdings, LLC, referred herein as “Dawgs”) pursuant to Federal Rule of Civil Procedure 41(a)(2) [Docket Nos. 997, 1019];² and (3) Dawgs’s Motion for Leave to File Supplemental Opposition to Crocs, Inc.’s Motion for Summary Judgment in View of New Survey Evidence from Both Parties [Docket No. 1002]. The Court first considers Crocs’s motion for summary judgment, then Dawgs’s motion to file a supplemental summary judgment response, and finally Dawgs’s motions to dismiss.

I. CROCS’S MOTION FOR SUMMARY JUDGMENT

A. Background³

In its Lanham Act counterclaim against Crocs, Dawgs alleges, among other things, that Crocs falsely marketed its shoes in violation of the Lanham Act by advertising Croslite, the foam material that Crocs shoes

¹ The “Individual Defendants” include Ronald Snyder, Lyndon Hanson, Daniel Hart, Sara Hoverstock, Jeffrey Lasher, Donald Lococo, Michael Margolis, John P. McCarvel, and Erik Rebich (together with Crocs, “Crocs”).

² The Court also considers Dawgs’s Unopposed Motion for Leave to File Amended Reply in Support of its Motion to Dismiss [Docket No. 1018].

³ All facts are undisputed unless otherwise noted. The Court assumes familiarity with this fifteen-year-long dispute and will not detail the procedural history or background facts beyond what is necessary to resolve this motion for summary judgment. Additional background can be found in previous orders and recommendations. *See, e.g.*, Docket Nos. 673, 897.

are made from, as “patented,” “proprietary,” and “exclusive.” Docket No. 909 at 2, ¶ 1 (citing Docket No. 487 at 107–08, ¶¶ 341–47). Dawgs also asserts that the Individual Defendants are liable under the Lanham Act for, among other things, causing Crocs to make statements that Croslite is patented, proprietary, and exclusive. *Id.*, ¶ 2 (citing Docket No. 487 at 105–06, ¶¶ 255–62). When asked in an interrogatory why Dawgs lost sales due to Crocs’s advertising, Dawgs stated that it “received numerous inquiries from its customers and potential customers regarding Dawgs’[s] foam material in comparison with Croslite” and that these inquiries “have consistently revealed a concern that Croslite is superior *because it is held out as patented, exclusive[,] or proprietary* such that[,] in the mind of the customer, Crocs is *perceived to have invented* a superior [ethyl vinyl acetate (“EVA”)] material that no other manufacturer can match.” *Id.* at 2–3, ¶ 3.

Crocs admits that its advertisements have “linked” such terms as “patented,” “proprietary,” and “exclusive” to features, characteristics, and qualities of the product material, Docket No. 913 at 4, ¶ 1,⁴ and that Crocs’s goal in its Croslite messaging was to imply that its products

⁴ The parties dispute the effect of these advertising terms. Dawgs states that the terms were “leveraged . . . in order to drive a price premium and an image of product superiority.” *Id.* Crocs disagrees with the implication that the terms “drove a ‘price premium’ or ‘image of product superiority.’” Docket No. 916 at 2, ¶ 1. Dawgs also insists that customers have been misled into believing that Crocs’s shoe material is better than competitors’, Docket No. 913 at 5–6, ¶ 3, which Crocs disputes. Docket No. 916 at 3, ¶ 3.

have “superior characteristics, qualities, and features.” *Id.* at 5, ¶ 2.⁵

B. Legal Standard

Summary judgment is warranted under Federal Rule of Civil Procedure 56 when the “movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986). A disputed fact is “material” if, under the relevant substantive law, it is essential to proper disposition of the claim. *Wright v. Abbott Labs., Inc.*, 259 F.3d 1226, 1231-32 (10th Cir. 2001). Only disputes over material facts can create a genuine issue for trial and preclude summary judgment. *Faustin v. City & Cnty. of Denver*, 423 F.3d 1192, 1198 (10th Cir. 2005). An issue is “genuine” if the evidence is such that it might lead a reasonable jury to return a verdict for the nonmoving

⁵ Dawgs states that its false-advertising theory is found in its second amended complaint and counterclaim as well as in its response to Crocs’s interrogatories. *Id.* at 6, ¶ 5. This statement is not a disputed fact that could preclude summary judgment, but rather appears to be legal argument that is not permitted in this section. *See* Practice Standards (Civil cases), Chief Judge Philip A. Brimmer § III.F.3.b.vii. Even if this were a fact, however, Dawgs fails to support it with a specific reference to the material in the record. *See id.* at § III.F.3.b.v (“Each separately numbered and paragraphed fact shall be accompanied by a **specific reference** to material in the record which establishes the fact or at least demonstrates that it is disputed.”). Dawgs cites to its entire 112-page second amended complaint and counterclaim and its fourteen-page supplemental interrogatory response. *See* Docket No. 913 at 6, ¶ 5. The Court’s practice standards state that “[g]eneral references to pleadings, depositions, or documents are insufficient if the document is over one page in length.” *See* Practice Standards (Civil cases), Chief Judge Philip A. Brimmer § III.F.3.b.ii; *see also* D.C.COLO.LCivR 56.1(c).

party. *Allen v. Muskogee*, 119 F.3d 837, 839 (10th Cir. 1997).

Where “the moving party does not bear the ultimate burden of persuasion at trial, it may satisfy its burden at the summary judgment stage by identifying a lack of evidence for the nonmovant on an essential element of the nonmovant’s claim.” *Bausman v. Interstate Brands Corp.*, 252 F.3d 1111, 1115 (10th Cir. 2001) (quotations omitted). “Once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter.” *Concrete Works of Colo., Inc. v. City & Cnty. of Denver*, 36 F.3d 1513, 1518 (10th Cir. 1994). The nonmoving party may not rest solely on the allegations in the pleadings, but instead must designate September 13, 2021 “specific facts showing that there is a genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quotations omitted). “To avoid summary judgment, the nonmovant must establish, at a minimum, an inference of the presence of each element essential to the case.” *Bausman*, 252 F.3d at 1115. When reviewing a motion for summary judgment, a court must view the evidence in the light most favorable to the non-moving party. *Id.*

C. Analysis⁶

The Lanham Act provides, in relevant part:

[a]ny person who, on or in connection with any goods or services, or any container for goods, uses in

⁶ The Federal Circuit has exclusive original appellate jurisdiction over patent cases pursuant to 28 U.S.C. § 1295(a)(1). *See Larson v. Correct Craft, Inc.*, 569 F.3d 1319, 1323 (Fed. Cir. 2009). In deciding whether to apply its own law or the law of the circuit from where a case arises, the Federal Circuit consults a “courtesy rule” under which it applies the law of the regional circuit on certain procedural matters and

commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which –

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person,

or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1). Thus, the Lanham Act “creates two distinct bases of liability; false association, § 1125(a)(1)(A), and false advertising, § 1125(a)(1)(B).” *Lexmark Int’l*,

nonpatent issues. *Viam Corp. v. Iowa Export-Import Trading Co.*, 84 F.3d 424, 428 (Fed. Cir. 1996). However, the Federal Circuit applies “[its] own law to both substantive and procedural issues intimately involved in the substance of enforcement of the patent right.” *Amana Refrigeration, Inc. v. Quadlux, Inc.*, 172 F.3d 852, 856 (Fed. Cir. 1999) (internal quotation marks omitted); see also *Alcohol Monitoring Sys., Inc. v. Actsoft, Inc.*, 682 F. Supp. 2d 1237, 1241 (D. Colo. 2010). As a result, in considering the Lanham Act claims, the Court applies the law of the Tenth Circuit. See *Research Corp. Techs. v. Microsoft Corp.*, 536 F.3d 1247, 1255 (Fed. Cir. 2008) (citations omitted).

Inc. v. Static Control Components, Inc., 572 U.S. 118, 122 (2014).

To succeed on a false advertising claim, a plaintiff must show: “(1) that defendant made material false or misleading representations of fact in connection with the commercial advertising or promotion of its product; (2) in commerce; (3) that are either likely to cause confusion or mistake as to [] the origin, association or approval of the product with or by another . . . ; and (4) injure the plaintiff.” *Digital Ally, Inc. v. Util. Assocs., Inc.*, 882 F.3d 974, 978 (10th Cir. 2018). False association claims are similar, except that in a false association claim, a plaintiff “alleges the misuse of a trademark, i.e., a symbol or device such as a visual likeness, vocal imitation, or other uniquely distinguishing characteristic, which is likely to confuse consumers as to the plaintiff’s sponsorship or approval of the product.” *See Amazon Inc. v. Cannondale Inc.*, No. 99-cv-00571-EWN-PAC, 2000 WL 1800639, at *7 (D. Colo. July 24, 2000). At issue here is whether Crocs’s advertisements about Croslite were statements of authorship and inventorship, not covered by the Lanham Act’s false advertising provisions, or statements of origin and thus within the Lanham Act’s scope.

Dawgs’s Lanham Act claim against the Individual Defendants is that the Individual Defendants have misled “the public and consumers by claiming that Crocs footwear is made of an exclusive and proprietary closed-cell resin that they call ‘Croslite,’ when, in fact, ‘Croslite’ is merely the common ethyl vinyl acetate used by many footwear companies around the world.” Docket No. 273-1 at 106, ¶ 256. Dawgs argues that these statements, referring to Croslite as “exclusive,” “proprietary,” or “patented,” are false and misleading, are prohibited by the Lanham Act, and have induced customers into believing that Crocs’s footwear is made of a material

“different than any other footwear” and that Crocs “owns the rights to such material.” *Id.*, ¶¶ 257, 259. Similarly, Dawgs’s Lanham Act claim against Crocs is that Crocs has made the same statements and that its false advertising “explicitly and implicitly attempts to, and does, deceive consumers and potential consumers into believing that all other molded footwear, including molded footwear sold by [Dawgs], is made of inferior material compared to Crocs’[s] molded footwear.” Docket No. 487 at 108, ¶ 345.

Crocs seeks summary judgment on Dawgs’s Lanham Act counterclaim against Crocs as well as Dawgs’s Lanham Act claim against the Individual Defendants. *See generally* Docket No. 909. Crocs argues the terms “patented,” “proprietary,” and “exclusive” say “nothing about the *material* itself, but instead refer to *authorship* or *inventorship*,” which “are not within the scope of the false advertising provision of the Lanham Act.” *Id.* at 1–2. Crocs argues that neither § 1125(a)(1)(A) nor § 1125(a)(1)(B) is implicated by its advertising. *Id.*

As to § 1125(a)(1)(A), which concerns false statements regarding the “origin, sponsorship, or approval” of goods, Crocs relies on *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003). In *Dastar*, the producer and several distributors of a television series about General Eisenhower’s military campaign in Europe during World War II, that is now in the public domain, alleged that Dastar violated § 1125(a)(1)(A) when it sold, as its own product and without attribution to the creator, a lightly edited version of the television series. 539 U.S. at 26–28. The respondent argued that, in marketing and selling the new series as its own without acknowledging the nearly “wholesale reliance” on the earlier series, petitioner made a “false designation of origin, false or misleading description of fact, or false or misleading

representation of fact.” *Id.* at 31. The Court held that application of the term “origin” of goods in the Lanham Act is not limitless. *Id.* at 29. “Origin” is “incapable of connoting the person or entity that originated the ideas or communications that ‘goods’ embody or contain.” *Id.* at 31–32. That is, the term “origin of goods” does not refer to the producer of the earlier television series. The Court concluded that “the phrase [origin of goods] refers to the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods.” *Id.* at 37. The Court determined that, because there was no dispute as to the origin of the tangible goods, i.e., the newer series that was offered into the market by Dastar, there was no Lanham Act violation. Even if Dastar’s representation of itself as the “producer” of its videos “amounted to a representation that it originated the creative work conveyed by the videos, allowing a cause of action under [the Lanham Act] for that representation would create a species of mutant copyright law.” *Id.* at 34 (internal citation and quotation omitted). Crocs argues that because there is no dispute that it is the producer of the tangible item, Crocs’s shoes, there is no § 1125(a)(1)(A) violation under *Dastar*. Docket No. 909 at 6.

The Court finds that there are no genuine issues of material fact as to the § 1125(a)(1)(A) issues because there is no dispute regarding the origin of the tangible goods, i.e., Crocs shoes, that are offered for sale, and *Dastar* holds that the Lanham Act does not provide a cause of action for claims concerning authorship. *See Dastar*, 539 U.S. at 37. That is, there is no dispute that Crocs produced Croslite and the shoes, just as there was no dispute that Dastar produced the video series. *See also Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d 1300, 1306 (Fed. Cir. 2009) (holding that because Baden had not argued that

someone other than Molten produced the allegedly infringing basketballs, and nothing in the record indicated as such, Baden's claims were not actionable under § 1125(a)(1)(A) because they do not "cause confusion . . . as to the origin" of the basketballs). Dawgs appears to concede this and focuses its argument on § 1125(a)(1)(B). *See* Docket No. 913 at 10 (arguing that Crocs's conduct "goes to the heart of the Lanham Act's prohibition on false advertising regarding the 'nature, characteristics, or qualities' of a product" (citing § 1125(a)(1)(B))). Thus, the Court finds that, as held in *Dastar*, § 1125(a)(1)(A) of the Lanham Act does not prohibit the conduct complained of here. *See MDM Grp. Assocs., Inc. v. ResortQuest Int'l, Inc.*, No. 06-cv-01518-PSF-KLM, 2007 WL 2909408, at *6 (D. Colo. Oct. 1, 2007).⁷

As to § 1125(a)(1)(B), which concerns false statements about the "nature, characteristics, qualities, or geographic origin" of goods, Crocs relies on *Baden Sports*. In *Baden Sports*, Baden, a basketball manufacturer, argued that Molten had engaged in false advertising when Molten claimed that its basketballs were "innovative," "exclusive," and "proprietary" when its "innovative" layer of padding beneath the cover was invented by Baden, not Molten. 556 F.3d at 1303. The district court granted Molten's motion for summary judgment, finding that "exclusive" and "proprietary" were terms that conveyed that Molten invented and owned the basketball technology, and held that those terms were excluded from Lanham Act liability under

⁷ Because the Court has found no genuine dispute of material fact as to Dawgs's false designation of origin claim, any issue about whether the statements caused consumer confusion under § 1125(a)(1)(A) is immaterial. In other words, because there is no dispute about the origin of Crocs's shoes or Croslite, there can be no confusion on that issue.

Dastar. Id. However, the court denied summary judgment on Molten’s use of the word “innovative” because, the district court held, that term does not necessarily connote inventorship, but rather could describe the “nature, characteristics, or qualities of the basketballs themselves.” *Id.* (internal citation omitted).

The Federal Circuit reversed, holding that § 1125(a)(1)(B) did not bar the statements because “[n]o physical or functional attributes of the basketballs [were] implied by Molten’s advertisements.” *Id.* at 1307. Rather, the court held that use of the terms “innovative,” “exclusive,” and “proprietary” involves a “false designation of authorship,” but “authorship, like licensing status, is not a nature, characteristic, or quality as those terms are used in [§ 1125(a)(1)(B)].” *Id.* Similarly, the Sixth Circuit in *Kehoe Component Sales, Inc. v. Best Lighting Prods., Inc.*, applied *Dastar* and granted summary judgment, holding that “a misrepresentation about the source of the ideas embodied in a tangible object . . . is not a misrepresentation about the nature, characteristics, or qualities of the object” for the purposes of § 1125(a)(1)(B). 796 F.3d 576, 590 (6th Cir. 2015).

Crocs argues that Dawgs’s claims are about “misrepresentations of inventorship” or the “source of the ideas” (Croslite) “embodied in a tangible object” (Crocs shoes), which are not actionable under the Lanham Act, rather than the origin or nature, characteristics, or qualities of Crocs’s shoes, which are actionable. Docket No. 909 at 5–6 (citing *Kehoe*, 796 F.3d at 590). In characterizing Dawgs’s arguments, Crocs cites Dawgs’s Lanham Act claim and counterclaim. *See, e.g.*, Docket No. 487 at 13, ¶ 7 (Crocs’s “promotional materials touted Croslite was unique enough to be ‘patented,’ but in truth Crocs never sought a patent. Nor was Croslite ‘proprietary’ or ‘exclusive’ – as Crocs has claimed – when

Crocs just copied it.”); *id.* at 25, ¶ 46 (“After copying [the] formula Crocs named its knock-off material ‘Croslite’ and outrageously began touting that Croslite was ‘patented,’ ‘exclusive’ and/or ‘proprietary,’ when it was none of those things.”); Docket No. 273-1 at 105–06, ¶ 256 (Crocs and the Individual Defendants “have been misleading the public and consumers by claiming that their footwear is made of an exclusive and proprietary closed-cell resin that they call ‘Croslite’ when, in fact, ‘Croslite’ is merely the common ethyl vinyl acetate used by many footwear companies around the world.”).

Dawgs argues that Crocs has misunderstood or misconstrued Dawgs’s false advertising arguments. Docket No. 913 at 1. Dawgs asserts that Crocs has falsely advertised Croslite as patented, proprietary, and exclusive in order to create a false impression regarding specific qualities and characteristics of its shoe material, including that its shoes are superior to competitors’, that they are soft, comfortable, lightweight, odor-resistant, and non-marking, which goes to the nature, characteristics, or qualities of the products. *Id.* at 1–2. Dawgs asserts that this has influenced customers and their purchasing decisions, thus meeting the elements of § 1125(a)(1)(B) liability. *Id.* at 2. Dawgs also argues that Crocs advertised that, “as a result of the material being patented, proprietary, and/or exclusive, its shoe material has superior qualities and features, and implied [that] other competitors . . . used inferior materials,” which goes to the heart of the Lanham Act’s “prohibition against false advertising regarding the ‘nature, characteristics, or qualities’ of a product.” *Id.* at 10 (quoting § 1125(a)(1)(B)). But while this may be Dawgs’s argument today, Dawgs did not make these arguments in its claim or counterclaim. In its claim and counterclaim, Dawgs argued that Croslite is merely a variation of ethyl vinyl

acetate used by many footwear companies around the world and that, by Crocs claiming to have invented Croslite, Crocs has implied that Dawgs's footwear is inferior. *See* Docket No. 487 at 107–08, ¶¶ 341, 345 (claim); Docket No. 273-1 at 105–07, ¶¶ 256, 260 (counterclaim). Dawgs did not mention anything about Croslite being soft, comfortable, lightweight, odor-resistant, or non-marking.

Moreover, Dawgs argues that none of the cases that Crocs relies on is relevant to Dawgs's false advertising claims because the cases only hold that “false designations of authorship, and misrepresentations about the intellectual origin of a product, are not, by themselves, within the literal scope of the Lanham Act.” Docket No. 913 at 3. Dawgs states that it “has alleged that Crocs used false claims that its shoe material was patented, proprietary, and/or exclusive, to differentiate the qualities, properties, and characteristics of the material in the eyes of the consumer.” *Id.* at 7.

More specifically, Dawgs seeks to distinguish *Dastar* because, Dawgs argues, in *Dastar*, the issue was whether the company had made a false designation of origin likely to cause confusion about the origin of the videotapes, while here the issue is whether Crocs's use of terms like “patented” misrepresented the nature, characteristics, or qualities of the shoes under § 1125(a)(1)(B). *Id.* at 8 (citing *Dastar*, 539 U.S. at 38). Similarly, Dawgs argues that *Baden Sports* was focused “*solely* on advertising directed to the creative origin of the falsely advertised product,” which the court held was “not a nature, characteristic, or quality” under § 1125(a)(1)(B). *Id.* (citing *Baden Sports*, 556 F.3d at 1307). Additionally, Dawgs seeks to distinguish *Baden Sports* because the Federal Circuit applied the law of the Ninth Circuit regarding the

Lanham Act claim, which, Dawgs argues, makes the case less relevant. *Id.* (citing *Baden Sports*, 556 F.3d at 1304).

The parties dispute whether consumers have been misled into believing that Crocs’s shoe material, Croslite, is better than competitors’ material because the consumers believe that Crocs shoes are made from superior, patented, proprietary material that no other consumer can use. Docket No. 913 at 5, ¶ 3. The parties also dispute whether this disagreement is material to the Lanham Act claims. *See* Docket No. 916 at 3, ¶ 3 (“Nor is customer confusion material under *Dastar*.”).⁸

While *Baden Sports* is not binding on the Court because the Federal Circuit applied the law of the Ninth Circuit, the Court finds persuasive its reasoning that claims of authorship do not concern the nature, characteristics, or qualities of a product as those terms are used in § 1125(a)(1)(B). *See Baden Sports*, 556 F.3d at 1307. Moreover, though neither the Supreme Court in *Dastar* nor the Federal Circuit in *Baden Sports* considered the use of the word “patented,” the Court in *Dastar* held that the Lanham Act must be limited to its text and “common-law foundations” in order to avoid creating a “cause of action for, in effect, plagiarism,” *see* 539 U.S. at 37, since the Lanham Act is not to be read as co-extensive with patent or copyright laws. *See id.* at 33–34. Further, the court in *Baden Sports* considered terms that the court likened to claims of inventorship. 556 F.3d at 1303. Falsely claiming to have “patented” something is

⁸ Crocs also argues that Dawgs’s purported evidence of consumer confusion, unauthenticated screenshots from online reviews of Crocs shoes, are inadmissible double hearsay. *Id.* The Court agrees that the screenshots, as presented by Dawgs, are not admissible evidence and, as such, cannot create a genuine issue of material fact to overcome summary judgment. *See* Fed. R. Civ. P. 56(c)(2).

akin to claiming to have “invented” it, *see id.* at 1307, and to plagiarizing or reverse passing off,⁹ which *Dastar* held not to be covered by the Lanham Act’s false advertising prohibition.

As in *Baden Sports*, Dawgs is attempting to “avoid the holding in *Dastar* by framing a claim based on false attribution of authorship” – that Croslite was not patented, proprietary, or exclusive, just as Baden claimed that Molten’s basketballs were not innovative – “as a misrepresentation of the nature, characteristics, and qualities of a good.” *See* 556 F.3d at 1307. But, as in *Baden Sports*, Dawgs has alleged nothing more than a false designation of authorship, i.e., that Crocs falsely claimed it created Croslite, when, in fact, Croslite is “merely the common ethyl vinyl acetate used by many footwear companies around the world.” Docket No. 273-1 at 106, ¶ 256. The Court also finds persuasive the reasoning in *Kehoe*, where the Sixth Circuit applied *Dastar* to grant summary judgment, holding that “a misrepresentation about the source of the ideas embodied in a tangible object . . . is not a misrepresentation about the nature, characteristics, or qualities of the object.” 796 F.3d at 590. Here, even assuming that Crocs misrepresented the source of the ethyl vinyl acetate as a proprietary and exclusive foam, Croslite, *Kehoe* explains that is not enough for a Lanham Act false advertising claim under § 1125(a)(1)(B).

⁹ “Passing off (or palming off, as it is sometimes called) occurs when a producer misrepresents his own goods or services as someone else’s.” *Dastar*, 539 U.S. at 27 n.1 (citing *O. & W. Thum Co. v. Dickinson*, 245 F. 609, 621 (6th Cir. 1917)). “Reverse passing off,” as its name implies, is the opposite: The producer misrepresents someone else’s goods or services as his own.” *Id.* (citing *Williams v. Curtiss-Wright Corp.*, 691 F.2d 168, 172 (3rd Cir. 1982)).

Dawgs argues that Crocs’s advertising of its shoes as superior is indistinguishable from Crocs’s advertising that Croslite is “exclusive” or “proprietary.” Neither statement concerns the nature, characteristics, or qualities of the product for the reasons discussed above. Moreover, a claim of superiority is puffery, which is not actionable under the Lanham Act. *See Intermountain Stroke Ctr., Inc. v. Intermountain Health Care, Inc.*, 638 F. App’x 778, 788–89 (10th Cir. 2016) (unpublished) (affirming dismissal of Lanham Act challenge to hospital’s claim that it had “best” or “high[est] quality” care). Therefore, the Court finds Crocs is entitled to summary judgment on Dawgs’s Lanham Act claim and counterclaim.¹⁰

II. DAWGS’S MOTION FOR LEAVE TO SUPPLEMENT SUMMARY JUDGMENT RESPONSE

Although Dawgs did not file a motion under Federal Rule of Civil Procedure 56(d) to conduct discovery before responding to the summary judgment motion, it now claims that its declaration in response to Crocs’s motion invoked Rule 56(d). Docket No. 1002 at 8. Rule 56(d)

¹⁰ Because the Court has found no genuine dispute of material fact as to Dawgs’s false designation of origin, the Court need not consider whether Crocs’s statements caused consumer confusion. Moreover, because the Court has found that Dawgs has failed to establish a genuine issue of material fact that Crocs made a “false or misleading representation[] . . . in connection with the commercial advertising or promotion of its product,” the Court need not consider the issue of consumer confusion. *See Digital Ally*, 882 F.3d at 978 (listing elements of a false advertising claim under § 1125(a)(1)(A): “(1) that defendant made material false or misleading representations of fact in connection with the commercial advertising or promotion of its product; (2) in commerce; (3) that are either likely to cause confusion or mistake as to [] the origin, association or approval of the product with or by another . . . ; and (4) injure the plaintiff”).

permits the Court to, among other things, deny a premature summary judgment motion, delay ruling on such a motion, or allow additional time to take discovery or obtain information. To succeed on a Rule 56(d) motion, “the movant must submit an affidavit (1) identifying the probable facts that are unavailable, (2) stating why these facts cannot be presented without additional time, (3) identifying past steps to obtain evidence of these facts, and (4) stating how additional time would allow for rebuttal of the adversary’s argument for summary judgment.” *See Cerveney v. Aventis, Inc.*, 855 F.3d 1091, 1110 (10th Cir. 2017) (citation omitted); *Comm. for First Amendment v. Campbell*, 962 F.2d 1517, 1522 (10th Cir. 1992). “Summary judgment should be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition.” *Id.* (alterations omitted) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986)). However, “relief under Rule 56(d) is not automatic,” *id.* (citation omitted), and is an alternative relief that is waived where a party responds to a motion for summary judgment. *Pasternak v. Lear Petroleum Expl., Inc.*, 790 F.2d 828, 833 (10th Cir. 1986) (“The protection afforded by [Rule 56(d)] is an alternative to a response in opposition to summary judgment under [56(c)] and is designed to safeguard against a premature or improvident grant of summary judgment.”); *Villa v. Bd. of Cnty. Comm’rs of Cnty. of Arapahoe*, 931 F.2d 900 (Table), 1991 WL 70714, at *4 (10th Cir. 1991) (“[Rule 56(d)] may be used only as an alternative to the filing of a brief and answer under [Rule 56(c)]. And when, as here, a party has responded to a summary judgment motion under [Rule 56(c)], that party waives any option it may have had to proceed under [Rule 56(d)].”).

Because Dawgs responded to Crocs’s motion for summary judgment, on December 16, 2020, it waived its

ability to retroactively seek relief under Rule 56(d) six months later, on June 30, 2021. *See Pasternak*, 790 F.2d at 833; *Villa*, 1991 WL 70714, at *4. Nevertheless, even if Dawgs had not waived its Rule 56(d) argument, the Court would find that Dawgs failed to satisfy the requirements under *Cerveny*. In its motion for leave, Dawgs relies on three paragraphs from a declaration provided with its response to Crocs’s summary judgment motion. *See* Docket No. 1002 (citing Docket No. 913-1 at 6, ¶¶ 23–25). The declaration states that there are likely numerous instances of Croslite, the foam material that Crocs uses to make its shoes, being falsely promoted as proprietary or patented and having superior qualities, that discovery was ongoing, that Dawgs’s counsel and Crocs’s counsel had not been able to meet and confer before Dawgs’s deadline to respond to Crocs’s summary judgment motion, that depositions were being scheduled, and that Dawgs expected to develop additional evidence. Docket No. 913-1 at 6, ¶¶ 23–25. This is not sufficient to raise a Rule 56(d) argument. Even if the affidavit were sufficient to meet first three requirements in *Cerveny*, the affidavit does not show how the information would be sufficient to create a genuine issue of material fact to defeat summary judgment. *See Cerveny*, 855 F.3d at 1110; *Campbell*, 962 F.2d at 1522. The Court will therefore deny Dawgs’s motion for leave to file a supplemental response to Crocs’s summary judgment motion.

III. DAWGS’S MOTIONS TO DISMISS

The Court finally considers Dawgs’s motions to dismiss four of the Individual Defendants – Jeffrey Lasher, Erik Rebich, Daniel Hart, and Sara Hoverstock – pursuant to Rule 41(a)(2). *See* Docket Nos. 997, 1019. Rule 41(a)(2) provides that a case may be “dismissed at the plaintiff’s request only by court order, on terms that the court considers proper.” Rule 41(a)(2) is designed to

prevent voluntary dismissals that adversely affect the opposing party. *Brown v. Baeke*, 413 F.3d 1121, 1123 (10th Cir. 2005). Dawgs seeks dismissal of its counterclaims against Lasher, Rebich, Hart, and Hoverstock without prejudice or conditions. Docket No. 997 at 2; Docket No. 1019 at 2. However, Dawgs states that it would agree to dismiss the counterclaims with prejudice if the Court granted the Individual Defendants' summary judgment motion. Docket No. 997 at 3; Docket No. 1019 at 3. In response, Lasher, Rebich, Hart, and Hoverstock argue that the dismissal should be with prejudice and that Dawgs be ordered to pay the costs incurred by them or by Crocs. Docket No. 1007 at 5; Docket No. 1035 at 6. However, they ask the Court to defer ruling on the issue of attorney's fees so that issue may be addressed by separate motion. Docket No. 1007 at 5; Docket No. 1035 at 6. Because the Court will grant the summary judgment motion for the reasons discussed in Part I and will dismiss with prejudice the Lanham Act claims and counterclaims, which are the only remaining claims against Lasher, Rebich, Hart, and Hoverstock, the issue of prejudice is resolved.

The questions of costs and attorney's fees remain. "The issue of costs is somewhat different and somewhat more complicated than the granting of a motion to dismiss with prejudice or without and the awarding of attorney's fees." *Williams v. Proud*, No. 09-cv-00157-PAB-MJW, 2009 WL 10685274, at *2 (D. Colo. Oct. 29, 2009). This is because, rather than relying solely on the "terms and conditions" clause of Rule 41(a)(2), a defendant typically is entitled to its costs as "a prevailing party under Rule 54 when, in circumstances not involving settlement, the plaintiff dismisses its case against the defendant, whether the dismissal is with or without prejudice." *Cantrell v. Int'l Bhd. of Elec. Workers*, 69 F.3d 456, 456 (10th Cir.

1995). This rule also applies even if the party did not prevail on every issue. *Id.* at 458 (citing *Roberts v. Madigan*, 921 F.2d 1047, 1058 (10th Cir. 1990); *Howell Petroleum Corp. v. Samson Resources Co.*, 903 F.2d 778, 783 (10th Cir.1990)). Here, Dawgs has moved to dismiss its case against the individual defendants, and there is no indication that the dismissal involves a settlement. Lasher, Rebich, Hart, and Hoverstock are, therefore, prevailing parties.

Indeed, Rule 54(d)(1) creates “a presumption that the district court will award costs to the prevailing party.” *Id.* at 458–59. Therefore, only where a district court can provide a “valid reason” for not awarding costs to a prevailing party will such a decision be upheld. *Id.* at 459. According to the Tenth Circuit, valid reasons for which a district court may deny costs to a prevailing party include: where a party was only partially successful; where prevailing parties were obstructive and acted in bad faith during the course of the litigation; where the damages awarded were nominal or recovery is otherwise insignificant; where the non-prevailing party was indigent; where the costs are unreasonably high or unnecessary; or where the issues are close and difficult. *Id.*

Furthermore, it is the non-prevailing party’s burden to establish that a valid reason exists for a denial of costs. See *Rodriguez v. Whiting Farms, Inc.*, 360 F.3d 1180, 1190 (10th Cir. 2004). In deciding whether the burden has been met, a court must keep in mind that “the denial of costs is in the nature of a severe penalty, and there must be some apparent reason to penalize the prevailing party if costs are to be denied.” *Id.* at 1190 (internal quotation marks omitted). Dawgs, therefore, may avoid the payment of costs only if it can establish an exception to this general rule. See *id.* As to Lasher, Rebich, and Hart,

Dawgs relies on the exception mentioned in *Cantrell* that it is not an abuse of discretion for a district court to decline to award costs to a party that was only partially successful or only had nominal damages. Docket No. 1016 at 4 (citing *Cantrell*, 69 F.3d at 459). Dawgs insists that Lasher, Rebich, and Hart “did not actually *do* anything” and so should not be awarded costs. Docket No. 1016 at 4.¹¹ The Court disagrees. Dawgs has not overcome the presumption in Rule 54(d) for the Court to award costs, and Lasher, Rebich, Hart, and Hoverstock should not face the “severe penalty” of having costs withheld. *See Rodriguez*, 360 F.3d at 1190. Lasher, Rebich, Hart, and Hoverstock have been defendants in this matter for many years, *see, e.g.*, Docket No. 487, and, now that Dawgs has made the strategic decision to dismiss them from the lawsuit rather than risk losing at trial, they are entitled to the costs that they have incurred. The Court will therefore award costs to Lasher, Rebich, Hart, and Hoverstock.

As to the issue of attorney’s fees, Lasher, Rebich, Hart, and Hoverstock request that the Court defer ruling on this issue so that they may file a separate motion or bring an action for malicious prosecution. Docket No. 1007 at 5; Docket No. 1035 at 6. A request for attorney’s fees must be made by separate motion both under the Local Rules and Federal Rule of Civil Procedure 54(d)(2)(A). *See* D.C.COLO.LCivR 7.1(d) (“A motion shall not be included in a response or reply to the original motion. A motion shall be made in a separate paper.”); *see also* Fed. R. Civ. P. 54(d)(2)(A) (“A claim for attorney’s fees and

¹¹ Dawgs does not address the issues of costs with respect to Hoverstock except to note that she “barely participated as a defendant” and to ask that each side bear their own costs. *See* Docket No. 1060 at 1, 4.

related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.”). The Court therefore grants their request to defer ruling on attorney’s fees until after they have filed a separate motion.

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED that Crocs and the Individual Defendants’ Motion for Summary Judgment of Lanham Act Claim [Docket No. 909] is **GRANTED**. It is further

ORDERED that Dawgs’s seventh claim and fifteenth counterclaim are **DISMISSED with prejudice**. It is further

ORDERED that Counterclaim Plaintiffs’ Motion to Dismiss [Docket No. 997] is **GRANTED in part** and **DENIED in part**. It is further

ORDERED that all claims against defendants Jeffrey Lasher, Erik Rebich, and Daniel Hart are **DISMISSED with prejudice**. It is further

ORDERED that Counterclaim Plaintiffs’ Motion to Dismiss Defendant Sara Hoverstock [Docket No. 1019] is **GRANTED in part** and **DENIED in part**. It is further

ORDERED that all claims against defendant Sara Hoverstock are **DISMISSED with prejudice**. It is further

ORDERED that Jeffrey Lasher, Erik Rebich, Daniel Hart, and Sara Hoverstock are awarded their costs, to be taxed by the Clerk of Court, pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1. It is further

ORDERED that Counterclaim Plaintiffs' Unopposed Motion for Leave to File Amended Reply in Support of its Motion to Dismiss [Docket No. 1018] is **GRANTED**.¹² It is further

ORDERED that Dawgs's Motion for Leave to File Supplemental Opposition to Crocs, Inc.'s Motion for Summary Judgment in View of New Survey Evidence from Both Parties [Docket No. 1002] is **DENIED**.

DATED September 14, 2021

BY THE COURT:

/s/Philip A. Brimmer

PHILIP A. BRIMMER
Chief United States District Judge

¹² The Court considered Dawgs's amended reply in ruling on its motion to dismiss.

APPENDIX C

[FILED: FEBRUARY 18, 2025]

NOTE: This order is nonprecedential

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CROCS, INC.,

Plaintiff-Appellee,

v.

**EFFERVESCENT, INC., HOLEY SOLES
HOLDINGS, LTD.,**

Defendants

**DOUBLE DIAMOND DISTRIBUTION, LTD., U.S.A.
DAWGS, INC., MOJAVE DESERT HOLDINGS, LLC**

Defendants-Appellants

2022-2160

Appeal from the United States District Court for the
District of Colorado in No. 1:06-cv-00605-PAB-MDB,
Judge Philip A. Brimmer.

ON PETITION FOR REHEARING EN BANC

Before MOORE, *Chief Judge*, LOURIE, DYK, PROST,
REYNA, TARANTO, CHEN, HUGHES, CUNNINGHAM, AND
STARK, *Circuit Judges*¹, and ALBRIGHT, *District Judge*.²

¹ Circuit Judge Newman and Circuit Judge Stoll did not participate.

² Honorable Alan D. Albright, District Judge, United States District
Court for the Western District of Texas, sitting by designation,
participated only in the decision on the petition for panel rehearing.

37a

PER CURIAM.

O R D E R

Crocs, Inc. filed a petition for rehearing en banc. The petition was first referred as a petition to the panel that heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

February 18, 2025

Date

FOR THE COURT



Jarrett B. Perlow
Clerk of Court

APPENDIX D

15 U.S.C. § 1125. False designations of origin and false descriptions forbidden

(a) Civil action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which-

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

(2) As used in this subsection, the term "any person" includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity.

(b) Importation

Any goods marked or labeled in contravention of the provisions of this section shall not be imported into the

United States or admitted to entry at any customhouse of the United States. The owner, importer, or consignee of goods refused entry at any customhouse under this section may have any recourse by protest or appeal that is given under the customs revenue laws or may have the remedy given by this chapter in cases involving goods refused entry or seized.

APPENDIX E

[FILED: JULY 1, 2022]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Philip A. Brimmer

Civil Action No. 06-cv-00605-PAB-MEH

CROCS, INC.,

Plaintiff,

v.

DOUBLE DIAMOND DISTRIBUTION, LTD., and

U.S.A. DAWGS, INC.,

Defendants.

ORDER

This matter is before the Court on Dawgs' Motion for Reconsideration of September 14, 2021 (Dkt. No. 1071), or, in the Alternative, Certification of Certain Orders (Dkt. Nos. 929, 1071) as Final under Fed. R. Civ. P. 54(b) [Docket No. 1087]. Crocs, Inc. ("Crocs") responded, Docket No. 1095, and U.S.A. Dawgs, Inc. and Double Diamond Distribution Ltd. (individually and/or collectively, with Mojave Desert Holdings, LLC, referred herein as "Dawgs") replied. Docket No. 1101.

I. BACKGROUND

The Court assumes familiarity with this dispute and will not detail the procedural history or background facts beyond what is necessary to resolve this motion for

reconsideration. Additional background facts can be found in previous orders and recommendations. *See, e.g.*, Docket Nos. 673, 897.

Crocs and the Individual Defendants¹ (collectively, “Crocs”) moved for summary judgment on Dawgs’s Lanham Act claim against the Individual Defendants and Dawgs’s Lanham Act counterclaim against Crocs. *See generally* Docket No. 909.

In its September 14, 2021 order granting Crocs’s summary judgment motion, the Court noted that the Lanham Act “creates two distinct bases of liability; false association, § 1125(a)(1)(A), and false advertising, § 1125(a)(1)(B).” Docket No. 1071 at 6 (quoting *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 122 (2014)).² The Court explained that, to succeed on a false advertising claim, a plaintiff must show: “(1) that defendant made material false or misleading representations of fact in connection with the commercial advertising or promotion of its product; (2) in commerce; (3) that are either likely to cause confusion or mistake as to [] the origin, association or approval of the product with or by another . . . ; and (4) injure the plaintiff.” *Id.* (quoting

¹ The Individual Defendants are those individuals whom Dawgs sued in Case No. 16-cv-02004-PAB-STV, which was consolidated with Case No. 06-cv-00605-PAB-MEH. *See* Docket No. 426.

² The Lanham Act prohibits the “false designation of origin, false or misleading description of fact, or false or misleading representation of fact,” (A) that is “likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person,” 15 U.S.C. § 1125(a)(1)(A) (false association), or (B) “in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities.” 15 U.S.C. § 1125(a)(1)(B) (false advertising).

Digital Ally, Inc. v. Util. Assocs., Inc., 882 F.3d 974, 978 (10th Cir. 2018)). The Court also explained that in a false association claim, a plaintiff “alleges the misuse of a trademark, i.e., a symbol or device such as a visual likeness, vocal imitation, or other uniquely distinguishing characteristic, which is likely to confuse consumers as to the plaintiff’s sponsorship or approval of the product.” *Id.* (quoting *Amazon Inc. v. Cannondale Inc.*, No. 99-cv-00571-EWN-PAC, 2000 WL 1800639, at *7 (D. Colo. July 24, 2000)).

Dawgs’s Lanham Act claim and counterclaim asserted that Crocs and the Individual Defendants falsely marketed Crocs shoes in violation of the Lanham Act by advertising Croslite, the ethyl vinyl acetate (“EVA”) foam material that Crocs shoes are made from, as “patented,” “proprietary,” and “exclusive,” when EVA is used by other footwear companies. *Id.* (citing Docket No. 909 at 2, ¶ 1). Dawgs also claimed that these false and misleading statements deceived customers into believing that Crocs’s shoes are made of different material than other EVA shoes and are therefore superior to other EVA shoes. *Id.* at 6–7 (citing Docket No. 273-1 at 106, ¶¶ 256–57, 259). Dawgs stated in response to an interrogatory that it believed it lost sales because customers believed that Croslite is superior “*because it is held out as patented, exclusive[,] or proprietary*” and, as a result “Crocs is *perceived to have invented*” a superior EVA. *Id.* at 2–3 (citing Docket No. 909 at 2–3, ¶ 3). Crocs admitted that its advertisements “linked” Crocs’s use of the terms “patented,” “proprietary,” and “exclusive” to “features, characteristics, and qualities” of Croslite and that Crocs’s goal in these advertisements was to imply that its products have superior characteristics, qualities, and features. *Id.* at 3 (citing Docket No. 913 at 4–5, ¶¶ 1–2).

Crocs's summary judgment motion was based almost exclusively on Dawgs's pleadings. *See* Docket No. 909 at 2–3; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1977) (there is “no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent’s claim. On the contrary, Rule 56(c), which refers to ‘the affidavits, *if any*’ . . . , suggests the absence of such a requirement.” . . . Thus, in cases such as this one, “where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the ‘pleadings, depositions, answers to interrogatories, and admissions on file.’”).

Crocs's motion argued that Crocs was entitled to judgment on Dawgs's Lanham Act claim and counterclaim because Dawgs's claims focused on Crocs's use of the terms “patented,” “proprietary,” and “exclusive,” whereas the Lanham Act “does not provide a cause of action for claims concerning authorship of an invention, idea, or product,” which is what “patented,” “proprietary,” and “exclusive” connote. Docket No. 909 at 3. The issue on summary judgment was whether Crocs's advertisements about Croslite were statements of authorship and inventorship, which the Lanham Act does not cover, or statements of “origin, sponsorship, or approval” or “nature, characteristics, qualities, or geographic origin,” which the Lanham act does cover. *Id.* at 3, 7 (quoting §§ 1125(a)(1)(A), 1125(a)(1)(B)). In other words, Crocs asserted that it was entitled to summary judgment because there was no dispute that Dawgs's Lanham Act allegations and claims were directed at Crocs's use of the terms “patented,” “proprietary,” and “exclusive,” yet those terms say “nothing about the *material* itself, but instead refer to *authorship* or

inventorship,” which is not the Lanham Act’s focus. Docket No. 909 at 1–2.

The Court agreed with Crocs and found that there was no genuine issue of material fact on Dawgs’s false association claim because there was no dispute regarding the origin of the tangible goods, i.e., Crocs shoes, that are offered for sale. Docket No. 1071 at 8–9 (citing *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 29–37 (2003) (holding that the application of the term “origin” of goods in the Lanham Act is “incapable of connoting the person or entity that originated the ideas or communications that ‘goods’ embody or contain,” but rather “the phrase [origin of goods] refers to the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods”)). The Court found that, under *Dastar*, the Lanham Act did not prohibit the conduct that Dawgs complained of. *Id.* at 9.

As to Dawgs’s false advertising claim, the Court agreed with Crocs that Dawgs’s claims concerned Crocs’s alleged misrepresentation of inventorship through Crocs’s use of the terms “patented,” “proprietary,” and “exclusive,” which are not actionable under the Lanham Act, rather than the origin, nature, characteristics, or qualities of Crocs’s shoes, which are actionable. *Id.* at 10. Although Dawgs argued in its response to Crocs’s summary judgment motion that Crocs falsely advertised Croslite as patented, proprietary, and exclusive in order to create a false impression regarding qualities and characteristics of Croslite, including representations that Crocs shoes are superior to competitors’ shoes and are soft, comfortable, lightweight, odor-resistant, and non-marking, *see id.* at 11 (citing Docket No. 913 at 1–2), the Court found that Dawgs’s claims instead focused on exposing Croslite as a variation of the same EVA that

many footwear companies use and on Crocs allegedly disseminating promotional materials falsely touting Croslite as patented, proprietary, and exclusive. *Id.* at 12. The Court concluded that Crocs was entitled to summary judgment because false designation of authorship – i.e., that Crocs falsely claimed that it had created Croslite, when it had not – is not an actionable Lanham Act claim. *Id.* at 13–14 (citing *Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d 1300, 1306 (Fed. Cir. 2009); *Kehoe Component Sales, Inc. v. Best Lighting Prods., Inc.*, 796 F.3d 576, 590 (6th Cir. 2015)).

II. LEGAL STANDARD

A. Motion for Reconsideration

The Federal Rules of Civil Procedure do not specifically provide for motions for reconsideration. *See Hatfield v. Bd. of Cnty. Comm’rs for Converse Cnty.*, 52 F.3d 858, 861 (10th Cir. 1995). Instead, motions for reconsideration fall within a court’s plenary power to revisit and amend interlocutory orders as justice requires. *See Paramount Pictures Corp. v. Thompson Theatres, Inc.*, 621 F.2d 1088, 1090 (10th Cir. 1980) (citing Fed. R. Civ. P. 54(b)); *see also Houston Fearless Corp. v. Teter*, 313 F.2d 92, 92 (10th Cir. 1962). In order to avoid the inefficiency of repeated re-adjudication of interlocutory orders, judges in this district have imposed limits on their broad discretion to revisit interlocutory orders. *See, e.g., Montano v. Chao*, No. 07-cv-00735-EWN-KMT, 2008 WL 4427087, at *5-6 (D. Colo. Sept. 28, 2008) (applying Rule 60(b) analysis to the reconsideration of interlocutory order); *United Fire & Cas. Co. v. McCreary & Roberts Constr. Co.*, No. 06-cv-00037-WYD-CBS, 2007 WL 1306484, at *1-2 (D. Colo. May 3, 2007) (applying Rule 59(e) standard to the reconsideration of the duty-to-defend order). Regardless of the analysis, the basic

assessment tends to be the same: courts consider whether new evidence or legal authority has emerged or whether the prior ruling was clearly in error. *Cf. Alpenglow Botanicals, LLC v. United States*, 894 F.3d 1187, 1203 (10th Cir. 2018) (“[A] motion for reconsideration is appropriate where the court has misapprehended the facts, a party’s position, or the controlling law.”). Motions to reconsider are generally an inappropriate vehicle to advance “new arguments, or supporting facts which were available at the time of the original motion.” *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000).

B. Motion for Certification Under Rule 54(b)

Federal Rule of Civil Procedure 54(b) allows a district court to “direct entry of final judgment as to one or more, but fewer than all, claims” where “the court expressly determines that there is no just reason for delay.” Fed. R. Civ. P. 54(b). In order to direct entry of judgment under Rule 54(b), a court must find that three prerequisites are met: “(1) multiple claims; (2) a final decision on at least one claim; and (3) a determination by the district court that there is no just reason for delay.” *Jordan v. Pugh*, 425 F.3d 820, 826 (10th Cir. 2005). In determining whether to enter judgment pursuant to Rule 54(b), the Court is to “weigh[] Rule 54(b)’s policy of preventing piecemeal appeals against the inequities that could result from delaying an appeal.” *Stockman’s Water Co., LLC v. Vaca Partners, L.P.*, 425 F.3d 1263, 1265 (10th Cir. 2005). Ultimately, the granting of a Rule 54(b) motion is left to the sound discretion of the trial court, which “must take into account judicial administrative interests as well as the equities involved.” *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980).

III. ANALYSIS

A. Motion for Reconsideration

As noted previously, Crocs argued on summary judgment that Dawgs's Lanham Act claim failed as a matter of law because the Lanham Act "does not provide a cause of action for claims concerning authorship of an invention, idea, or product." Docket No. 909 at 3. Crocs's motion focused principally on Dawgs's pleadings. *See id.* at 2–3; *Celotex*, 477 U.S. at 323–24.

Dawgs argues in its motion for reconsideration that the Court erred in granting summary judgment for Crocs because the Court "overlooked" portions of Dawgs's pleadings in which Dawgs alleged that "Crocs leveraged false advertising to enhance consumer perception about the qualities and characteristics of its products," which led the Court to mistakenly conclude that this case is similar to *Dastar* and *Baden Sports*. Docket No. 1087 at 2.

In its motion for reconsideration, Dawgs cites to particular allegations that it claims the Court ignored. *See id.* at 4–6. These allegations are found at Docket No. 487 at 13, 25–27, ¶¶ 7, 46–47, 49–50. The allegations "incorporate by reference" eight exhibits. *See id.* Dawgs, however, never identified these allegations or exhibits in its response to Crocs's summary judgment motion and did not connect these allegations to any Lanham Act argument on summary judgment. Instead, as the Court noted in its summary judgment order, Dawgs stated that its false-advertising theory was found in its second amended complaint and counterclaim and its response to Crocs's interrogatories. *See* Docket No. 1071 at 3 n.5 (citing Docket No. 913 at 6, ¶ 5). The Court explained, however, that Dawgs's citation to its entire 112-page complaint and counterclaim, which contain 552 pages of exhibits, and its 14-page supplemental interrogatory

response was inadequate because the Court's practice standards state that "[g]eneral references to pleadings, depositions, or documents are insufficient if the document is over one page in length." Docket No. 1071 at 3 n.5 (citing Practice Standards (Civil cases), Chief Judge Philip A. Brimmer § III.F.3.b.ii; D.C.COLO.LCivR 56.1(c)).

Moreover, although Dawgs attached exhibits in its response to Crocs's summary judgment motion, *see* Docket No. 913 at 4–7, ¶¶ 1–6, Dawgs did not identify those exhibits as having been the ones that it attached to its second amended complaint and counterclaim. Thus, even if the Court had sifted through the hundreds of pages of Dawgs's pleadings and exhibits to locate Dawgs's Lanham Act theory, as Dawgs asked the Court to do, *see id.* 6, ¶ 5 ("Dawgs'[s] Second Amended Complaint and Counterclaim, as well as its interrogatory responses, detail Dawgs'[s] false advertising theory and supporting evidence."), Dawgs does not suggest that the Court would have been directed to any other facts or evidence than what Dawgs presented in its summary judgment response. *See United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs."). Thus, although Dawgs now identifies particular allegations and exhibits, Dawgs does not contend that it identified those on summary judgment. A motion for reconsideration is not an appropriate vehicle to advance arguments or facts that were available during the original motion. *See Servants of the Paraclete*, 204 F.3d at 1012.

Dawgs is also mistaken in its claim that the allegations at Docket No. 487 at 13, 25–27, ¶¶ 7, 46–47, 49–50 are material. The Court determined that there was no genuine dispute of material fact as to the false association issues because there was no dispute regarding the "origin,

sponsorship, or approval” of the tangible goods, i.e., Crocs shoes. Docket No. 1071 at 8–9. Even assuming that Crocs did misrepresent Croslite as proprietary and exclusive, Crocs’s statements about Croslite do not concern the nature, characteristics, or qualities of goods, meaning that Dawgs’s false advertising claims also failed. Although the Court did not explicitly reference each allegation in recounting Dawgs’s claims, the Court reviewed the allegations and the incorporated exhibits because Crocs referenced them in its statement of undisputed material facts, which facts Dawgs admitted. The allegations Dawgs identifies did not change the Court’s conclusion.

Crocs stated in its summary judgment motion that, in its Lanham Act counterclaim against Crocs, Dawgs alleged that Crocs falsely marketed its shoes by advertising Croslite as “patented,” “proprietary,” and “exclusive.” Docket No. 909 at 2, ¶ 1 (citing Docket No. 487 at 13, 25–27, 93, 107–108 ¶¶ 7, 46, 47, 49, 50, 283(d), 301(d), 341–47). In response, Dawgs “[a]dmitted that Dawgs included these allegations in its Second Amended Answer and Counterclaim but [denies] insofar as Crocs implies that this was the full extent of Dawgs’[s] false advertising allegations about the terms ‘patented,’ ‘proprietary[,]’ and/or ‘exclusive.’” Docket No. 913 at 3, ¶ 1. Dawgs noted that Crocs also claimed in promotional materials that Croslite was “unique enough to be patented.” *Id.* (citation and quotation omitted).

Dawgs argued in its response to Crocs’s summary judgment motion that Crocs promoted Croslite’s unique characteristics and claimed Croslite was unique enough to be patented, *see id.*, but, because Crocs never sought a patent for Croslite, these statements were misleading, i.e., Croslite was not “patented,” “proprietary,” or “exclusive.” *See* Docket No. 487 at 13, ¶ 7. The Court granted Crocs summary judgment because, as

mentioned, Crocs's claims that Croslite was "patented," "proprietary," or "exclusive" were not sufficient for a Lanham Act violation. Dawgs fails to show that the Court misapprehended Dawgs's position as stated in ¶ 7 of Dawgs's answer.

In paragraph 46 of its answer, Dawgs alleges, "[a]fter copying FinProject's formula Crocs named its knock-off material 'Croslite' and outrageously began touting that Croslite was 'patented,' 'exclusive[.],' and/or 'proprietary,' when it was none of those things. In fact, 'Croslite' was merely a run-of-the-mill common rubber-like copolymer EVA." *Id.* at 25, ¶ 46. This allegation also relates to Crocs's allegedly false claims of inventorship and Crocs's "actively mislead[ing]" customers to believe that Croslite was patented and exclusive, even after Crocs had apparently conceded that Croslite was not. *Id.*, ¶ 47 (alleging that Crocs executives "conspired with Crocs to mislead the public as to the falsity about Croslite being patented"). This allegation falls outside the scope of Lanham Act liability, and Dawgs fails to show that the Court misapprehended its position.

In paragraph 49 of its answer, Dawgs identifies Crocs's promotional materials where Crocs claimed that Croslite was patented. *Id.* at 26, ¶ 49. This allegation incorporates by reference screenshots of Crocs's promotional materials or advertisements, which contain text that Dawgs presumably highlighted to show relevance. *Id.* Dawgs has highlighted text such as "[t]he Crocs @ Work™ collection is built with the patented Croslite™ material," *see* Docket No. 487-21 at 2, and that "[a]ll Crocs™ shoes feature Croslite™ material, a proprietary, revolutionary technology." *See* Docket No. 487-23 at 2. The highlighted text in these materials show that Dawgs's claim was that Crocs falsely claims that it invented Croslite and that Croslite was not common EVA,

which does not support a Lanham Act claim. Dawgs has not shown that the Court misapprehended its position in ¶ 49 of Dawgs’s answer.

Paragraph 50 of Dawgs’s answer clarifies that Dawgs’s Lanham Act focus was on Crocs’s advertisement that it invented or patented Croslite. Docket No. 487 at 26–27, ¶ 50. Dawgs alleges, on information and belief, that Crocs’s promotional materials were “false or misleading” because “Crocs did not own any exclusive, proprietary, or patent rights to the materials from which its footwear are made” and “Crocs and others have known since the inception of Crocs that the material known as ‘Croslite’ could not have been patented by Crocs as it was a material developed and used by (at least) FinProject years before Crocs existed” and is “widely available from DuPont.” *Id.* This is another allegation about Crocs’s false claims that Croslite was patented, proprietary, or exclusive, not something the Lanham Act prohibits. The Court did not misapprehend Dawgs’s claim as reflected in ¶ 50 of Dawgs’s answer.³

These allegations show that Dawgs’s Lanham Act claims were not that Crocs used the terms “patented,” “proprietary,” and “exclusive” to “impl[y] that [Crocs’s] product features – its odor and bacteria-free properties – are better than those in competitor shoes,” *see* Docket No. 1087 at 4–5, but rather that Dawgs targeted Crocs’s claims of inventorship. Thus, Dawgs has not shown that the Court’s prior ruling was “clearly in error,” *see*

³ Dawgs’s Lanham Act claim against the Individual Defendants is almost identical to its claim against Crocs. *See* Docket No. 273-1 at 22, 88, 93, 105–107, ¶¶ 22, 198(c), 216(d), 255–62).

Alpenglow Botanicals, 894 F.3d at 1203, since the Lanham Act does not reach such claims.⁴

Dawgs next argues that, because the Court misapprehended its position, the Court misapplied *Baden Sports* and *Kehoe*. Docket No. 1087 at 7–9. Dawgs insists that those cases are distinguishable when considered against the allegations that Dawgs claims the Court ignored. The Court disagrees. Because it did not overlook Dawgs’s allegations or “misapprehend[] the facts” or Dawgs’s “position,” the Court need not reconsider its application of *Baden Sports* and *Kehoe*.

Finally, Dawgs argues that the Court should not have resolved factual disputes about what consumers understood “patented,” “proprietary,” and “exclusive” meant in Crocs’s advertising. *See id.* at 9–11. The Court, however, did not resolve any factual disputes. Rather, the Court decided Crocs’s summary judgment motion based on the undisputed facts without reaching consumer confusion. *See* Docket No. 1071 at 15 n.10 (noting that, because there was no genuine dispute of material fact that Dawgs’s Lanham Act claim and counterclaim were based on allegations of authorship and inventorship, the issue of

⁴ Dawgs makes a passing argument that, even if it failed to allege an actionable Lanham Act claim, there would be no prejudice now in granting its motion for reconsideration and denying Crocs’s summary judgment motion. *See* Docket No. 1087 at 7 (“Nor can the Court grant summary judgment simply upon a finding that Dawgs did not set out its legal theory in its counterclaim, even if there had been such a failure (which there was not).” (citing *Elliott Indus. Ltd. v. BP Am. Prod. Co.*, 407 F.3d 1091, 1121 (10th Cir. 2005) (Absent prejudice, the “failure to set forth in the complaint a theory upon which the plaintiff could recover does not bar a plaintiff from pursuing a claim.”))). Dawgs does not explain how there could be no prejudice. After the Court granted Crocs’s motion, the parties agreed that certain other motions were moot. *See* Docket No. 1076. Reinstating the motions now would prejudice Crocs, especially given that trial is imminent.

consumer confusion was immaterial). The Court will therefore deny Dawgs's motion for reconsideration.

B. Motion for Certification Under Rule 54(b)

In the alternative, Dawgs asks for the Court to enter partial final judgment pursuant to Rule 54(b) on Dawgs's Lanham Act claim and counterclaim as well as the Court's March 11, 2021 order, *see* Docket No. 929, accepting the magistrate judge's recommendation to deny Dawgs's motion for leave to add claims under the Colorado Consumer Protection Act ("CCPA"). Docket No. 1087 at 11–15. Crocs opposes this request. *See* Docket No. 1095 at 9–15.

As noted previously, the Court may enter final judgment on fewer than all claims if the Court has reached a final decision on those claims and the Court finds that there is no just reason for delay the appeal of that final decision. *See Jordan*, 425 F.3d at 826. Ultimately, granting a Rule 54(b) motion is a matter of the district court's discretion. *Curtiss-Wright Corp.*, 446 U.S. at 8.

The Court declines to exercise its discretion to certify for appeal either its summary judgment order on Dawgs's Lanham Act claims or its order accepting the magistrate judge's recommendation to deny Dawgs's motion for leave to amend. First, there is some dispute whether the Court's order on the motion to amend is a final order. Dawgs says that it is, *see* Docket No. 1087 at 12–13, and Crocs says that it is not. *See* Docket No. 1095 at 9–11. The Tenth Circuit has explained that "an order denying leave to amend is not, in most cases, a final decision, as a final decision is one that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Combs v. PriceWaterhouse Coopers LLP*, 382

F.3d 1196, 1204 (10th Cir. 2004) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

Second, even assuming that both orders are final, Dawgs fails to show that there is “no just reason for delay,” given that Dawgs’s Rule 54(b) motion will not cause Dawgs undue hardship. *See Okla. Turnpike Auth. v. Bruner*, 259 F.3d 1236, 1242 (10th Cir. 2001) (“[T]rial courts should be reluctant to enter Rule 54(b) orders since the purpose of this rule is a limited one: to provide a recourse for litigants when dismissal of less than all their claims will create undue hardships.” (citation omitted)). Trial is set for July 11, 2022. *See* Docket No. 1104. Even if the Tenth Circuit ultimately reverses the Court on the motion for leave to amend or the motion for summary judgment, the Tenth Circuit would not resolve Dawgs’s appeal of those orders before trial. All remaining issues will be resolved soon, and Dawgs may appeal any adverse ruling or jury verdict after trial. This includes Crocs’s motion for summary judgment and Dawgs’s motion for leave to amend. The prospect of Dawgs having to wait to appeal until after trial is not a “harsh effect” that will cause Dawgs any prejudice, given that trial will conclude in less than one month.⁵ *See* 10 Fed. Prac. & Proc. Civ. § 2659 (4th ed., Apr. 2022) (stating that federal courts should allow piecemeal review “only in the infrequent case in which a failure to do so might have a harsh effect”);

⁵ Any claim of urgency or that there is no just reason for delay is belied by the fact that, although Dawgs states in its motion for reconsideration that it “intends to contemporaneously move for a stay pending a ruling on this motion,” *see* Docket No. 1057 at 3 n.1, Dawgs has not filed any such motion, and it is not clear what specifically Dawgs would have sought to stay. Dawgs’s claim of urgency is also undercut by the fact that the Court issued the order on the motion for leave to amend in March 2021, well over a year ago, yet Dawgs did not seek reconsideration of that order – or Rule 54(b) certification – until it filed this motion, seven months later.

Stockman's Water, 425 F.3d at 1265; *see also EEOC v. JBS USA, LLC*, No. 10-cv-02103-PAB-KLM, 2019 WL 4751756, at *2 (D. Colo. Sept. 30, 2019) (denying Rule 54(b) motion because defendant failed to “demonstrate any inequity or prejudice it will suffer from denying the motion”); *see also Fireman's Fund Ins. Co. v. Steele St. Ltd. II*, No. 17-cv-01005-PAB-SKC, 2019 WL 3778304, at *3 (D. Colo. Aug. 12, 2019) (finding no “great[] prejudice” to plaintiff). Accordingly, the Court will deny Dawgs's Rule 54(b) motion.

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED that Dawgs' Motion for Reconsideration of September 14, 2021 (Dkt. No. 1071) or, in the Alternative, Certification of Certain Orders (Dkt. Nos. 929, 1071) as Final under Fed. R. Civ. P. 54(b) [Docket No. 1087] is **DENIED**.

DATED July 1, 2022.

BY THE COURT:

/s/Philip A. Brimmer

PHILIP A. BRIMMER
Chief United States District Judge