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FORM 337 - Rule 337

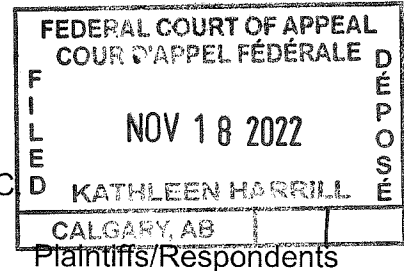
NOTICE OF APPEAL

Docket No. A-249-22

FEDERAL COURT

BETWEEN:

CROCS CANADA, INC. AND CROCS INC



- and -

DOUBLE DIAMOND DISTRIBUTION LTD.

Defendant/Appellant

NOTICE OF APPEAL

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at Saskatoon, Saskatchewan.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the Federal Courts Rules and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, WITHIN 10 DAYS of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the Federal Courts Rules instead of serving and filing a notice of appearance.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

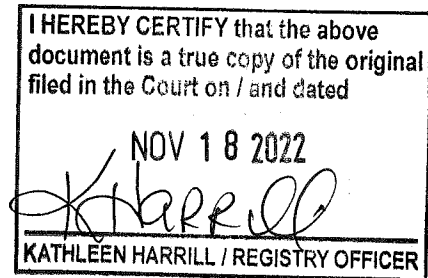
(Date) November 18, 2022

Issued by: _____
(Registry Officer) **ORIGINAL SIGNED BY
KATHLEEN HARRILL
A SIGNÉ L'ORIGINAL**

Address of local office: 635 8th Avenue SW

TO: The Administrator
Federal Court
Thomas D'Arcy McGee Building
90 Sparks Street
Ottawa, Ontario K1A 0H9

AND TO: Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario, K1P 1C3
Anthony Creber/Alexander Gloor
Tel: (613) 786-0140/0172
Fax: (613) 563-9869



Solicitors of Record for the Plaintiff/Respondents

Docket No. _____

FEDERAL COURT

BETWEEN:

CROCS CANADA, INC. AND CROCS INC.

Plaintiffs/Respondents

- and -

DOUBLE DIAMOND DISTRIBUTION LTD.

Defendant/Appellant

APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the order of Judge Janet M. Fuhrer of the Federal Court in Ottawa, Ontario, dated October 21, 2022, by which the trial court ordered: 1. The Plaintiffs' action for infringement of Canadian Industrial Design Number 120939 dated December 30, 2008 entitled SHOE [939 Design] is allowed. 2. The Defendant's counterclaim for invalidity of the 939 Design is dismissed. 3. The Plaintiffs are awarded an accounting of the Defendant's profits in the amount of \$649,779.17, together with pre-judgment interest only up to March 20, 2022 in the amount of \$44,321.69. 4. The Plaintiffs also are awarded post judgment interest at the rate of 5% per year on all amounts owed by the Defendant pursuant to this Judgment and Reasons, and any Supplemental Judgment and Reasons or Costs Order. 5. The Plaintiffs are entitled to their costs of this action, payable by the Defendant, excluding the costs of any motions or other pre-trial steps for which the Plaintiffs already have been awarded costs. 6. If the parties cannot agree on an amount, they may serve and file submissions not exceeding five (5) pages, with their bill of costs attached, according to the following schedule: (i) the Plaintiffs will have until November 15, 2022; (ii) the Defendant will have until November 22, 2022; and (iii) Plaintiffs will have until November 25, 2022 for any reply submission.

THE APPELLANT ASKS that the order be overturned in whole or in part, that the action be dismissed, judgment ordered in favor of the Appellant, or that declaration be made that the Appellant did not infringe the 939 Design, or that a new trial and/or redetermination be granted, and that costs be assessed against the Respondents.

THE GROUNDS OF APPEAL are as follows:

1. Pursuant to the standards of review in *Housen v Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33, whether the federal trial court erred in law and on the evidence, and/or abused its discretion:
 - a. in its application of the *Industrial Design Act*, R.S.C., 1985, c. I-9;
 - b. in its application of the “informed consumer test”;
 - c. in using the standard of “minutiae” as to differences between designs and products in general and specifically to the design at issue and the Appellant’s shoe (Canadian Industrial Design Number 120939 [“939”];
 - d. in its assessment of the 939 Design and the inconsistencies in the same;
 - e. in its assessment of prior art presented by the Appellant in its pleadings, in discovery, in production, and at trial (pursuant to the demand of the Respondents in their reply pleadings and in discovery), which should have been presented by the Respondents as part of their mandate to their Expert, and which should have been presented to the trial court and its expert as part of the prior art so as to properly inform the trial court in its inquiry of the 939 Design;
 - f. in its assessment of the “utilitarian function of the article or to any method or principle of manufacture or construction”;
 - g. in its assessment, the weight given, and utilization and/or non-utilization of the testimony of the expert witness and witnesses of the Respondents and the witnesses of the Appellant;
 - h. in its finding of two different standards regarding inadmissible evidence apply to expert witnesses and witnesses and using the same to the benefit of the Respondents and to the detriment of the Appellant;
 - i. in its admission and acceptance of the Respondents’ Expert report and testimony from and on that report despite the cross-examination of the Expert;
 - j. in its finding of infringement against the Appellant and that the Respondents met their burden of proof as to infringement;
 - k. in its application of the *Canada Evidence Act*, R.S.C., 1985, c. C-5;
 - l. in its evidentiary rulings and rulings regarding the *Canada Evidence Act*, *Industrial Design Act*, the ‘939 Design, Prior Art, the prior art shoes of the

Respondents and the pleadings in federal court regarding the same, sales, profits and expenses of the Appellant, the admission of the Respondents' Expert Testimony and the Expert report and the weight given, the admission of witness testimony and the weight given, and the Respondents' Expert Report, the admission of the same, and weight given, and pretrial orders regarding sworn evidence to be given to the Respondents regarding Appellant's finances, sales, profits, and expenses, and procedures regarding what the parties intended to produce and/or read-in at the time of trial, and the representations regarding the same;

- m. in its finding that the Respondents met their burden of proof as to damages and/or an accounting of profits;
- n. in its calculation of damages and/or an accounting of profits against the Appellant in general and in particular without giving fair consideration to the evidence of the Appellant and the weight to be accorded to that evidence, as well as granting damages and/or an accounting of profits to the Respondents based upon inadmissible hearsay evidence;
- o. in its awarding costs against the Appellant;
- p. in its awarding interest against the Appellant; and,
- q. based upon the totality of the circumstances, in its failure to observe procedural fairness or other procedure that it was required by law to observe and apply.

The Appellant requests the Federal Court to send a certified copy of the following material that is not in the possession of the Appellant but is in the possession of the tribunal to the appellant and to the Registry: All materials in the court below.

November 18, 2022



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Double Diamond Distribution, LTD.

SOR/2004-283, ss. 35 and 38