

# KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 33**

Date: **2024 02 29**  
Docket: QBG-SA-00059-2008  
Judicial Centre: Saskatoon

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BETWEEN:

LEE SMITH

PLAINTIFF  
(DEFENDANT BY COUNTERCLAIM)

- and -

DAWGS CANADA DISTRIBUTION LTD. (formerly known  
as DAWGS WORLD DISTRIBUTION LTD.), DOUBLE  
DIAMOND DISTRIBUTION LTD., ANGIE FRIESEN,  
101086342 SASKATCHEWAN LTD., BARRIE MANN,  
BAM MARKETING INC., STEVEN MANN, and TOP  
DAWG MANAGEMENT INC.

DEFENDANTS

- and -

DOUBLE DIAMOND DISTRIBUTION LTD.

PLAINTIFF BY COUNTERCLAIM

**Appearances:**

Brandi M. Rintoul	for the plaintiff
Tom Stepper and Katelyn A. Rath	for Dawgs Canada Distribution Ltd., Double Diamond Distribution Ltd. Angie Friesen, 101086342 Saskatchewan Ltd., Steven Mann and Top Dawg Management Inc.
Barry Mann	appearing on his own behalf and BAM Marketing

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DECISION  
February 29, 2024

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SCHERMAN J.

## Introduction

[1] Because there is more than one defendant with the Mann surname I have chosen to utilize first names throughout this decision when identifying parties or witnesses.

[2] Lee Smith [Lee] commenced the subject action against the defendants alleging, *inter alia*:

- a. A friend relationship and agreement with Steven Mann [Steve] and Angie Friesen [Angie] resulted in a legal partnership to carry on a business in common [Dawgs Clogs] with a view to profit, pursuant to which they owed him a duty of good faith and fiduciary obligations which they breached (claim paras. 25 - 29);
- b. Oppressive and prejudicial acts by the defendants that unfairly disregarded his interests (claim paras. 30 – 32); and
- c. Breach of an oral contract pursuant to which, in consideration of Lee investing money in the Dawgs Clogs business, he would be provided a proportionate shareholding interest in any corporation created to carry on the Dawgs Clogs business (claim paras. 34 – 37)

[3] Lee's claim asks the court to provide various claimed relief including:

- a. Specific performance of the oral contract to provide a proportionate shareholding interest in any corporation created to carry on the Dawgs Clogs business or in the alternative damages for the breach of contract; and

- b. Damages for breach of fiduciary duties, breach of contract, acting in bad faith, unjust enrichment and oppression or in the alternative disgorgement of all profits realized by the defendants by the breach of their fiduciary duties.

[4]

The defendants filed a defence in which, *inter alia*, they:

- a. State the Dawgs Clogs business was founded by Steve and Angie and they incorporated the defendant Double Diamond Distribution Ltd. [DDD] on June 7, 2005 to be the operating company for the Dawgs Clogs business, before any discussion took place with Lee regarding the business;
- b. Acknowledge discussions with Lee in the summer of 2005 about him participating in the business; but during which Steve made it clear that if Lee was going to be involved it would be his responsibility to develop the business in Europe and contribute substantially to the growth of the company (defence para. 9);
- c. The discussions lacked the certainty and clarity of terms required to constitute a legally binding contract (defence para. 10);
- d. In the alternative Lee failed to comply with the contract conditions that he was to develop the business in Europe and contribute substantially to the growth of the company and thus he is not entitled to receive any shares whatsoever (defence para. 11);
- e. Deny owing a duty of good faith or fiduciary obligations to Lee or any breach of a duty to act fairly and in good faith (defence paras. 18 and 19); and

- f. Deny any oppression, unfairly prejudicial acts or unfairly disregarding Lee's interests (defence para. 21).

[5] The defendants also counterclaimed alleging that Lee carried on a competing business and engaged in the acts detailed in paragraph 21 of the defence and, as particularized in paragraph 28, engaged in the tort of passing off and other actions harmful to the business of the defendant DDD for which it claims damages.

[6] The matter proceeded to a pre-trial conference before Goebel J. on dates between February 15, 2021 and March 31, 2022. The pre-trial conference report contains the following endorsement "Order to issue bifurcating liability and damages to both claim & counterclaim. This trial is to determine liability:". A flyleaf endorsement of Goebel J. of February 15, 2021 reads "Counsel for the defendants [Tom Stepper] confirmed that he consents to the form & substance of the draft bifurcation order filed on Nov 1/19. Given the prior endorsement of the management judge, that order may issue". It was discovered during trial that this bifurcation order had never been formally issued. Both counsel agreed it should issue in the form of the draft filed and thus on January 8, 2024 I ordered that it issue.

[7] The bifurcation order issued on January 8, 2024 stating the action should be bifurcated as follows:

1. The issues of liability with regard to both the statement of claim and the counterclaim shall proceed to trial; and
2. The issues of damages with regard to both the statement of claim and the counterclaim shall, if necessary, proceed to trial in a subsequent trial to take place after resolution of the issues of liability by trial judgment and any appeals from trial judgment.

[8] The briefs of law and submissions of counsel at trial focused on whether there was a contract between the parties and whether the tort of passing off had been proven by the defendants. The bifurcation order puts all issues of liability with regard to both the statement of claim and the counterclaim before the court for determination.

[9] The issues of potential liability raised by the claim and counterclaim are wider than the issues of whether a contract existed and whether there was passing off. By way of example, the claim alleges the existence of a partnership to carry on in common the “Dawgs Clogs” business, with a view to profit, pursuant to which Steve and Angie owed Lee a duty of good faith and fiduciary obligations which they breached.

[10] Given the breadth of the liability allegations in the claim and counterclaim and the narrow focus of counsel’s submissions, I convened a conference call with counsel and advised counsel I would give them an opportunity to make further submissions, if they wished to. Counsel advised that they did not wish to make further submissions. Plaintiff’s counsel specifically informed the court that they were not alleging a partnership was formed but rather based their claim in contract and/or unjust enrichment.

**The evidence and position of the parties in brief**

[11] Lee’s position and claim is based on his *viva voce* evidence at trial and the evidence at trial generally. That evidence reduced to its basic elements was that:

- a. He and Steve had been friends since university.
- b. In June or July of 2005, while back in Canada visiting from his home in Stockholm, Sweden, Lee spent time with Steve. During this time Steve informed Lee of a business venture he, Steve, had begun pursuing. That venture was to arrange for the manufacture of EVA clogs in China, import the same into Canada and market them. Steve

viewed the concept as presenting an interesting opportunity, and he had chosen “Dawgs Clogs” as a name for the venture.

- c. Steve suggested that they do Dawgs Clogs as a business venture together.
- d. Lee expressed interest in becoming involved in the business, and he and Steve agreed to him becoming involved in the business.
- e. Because they were friends, their agreement was not reduced to writing. Lee testified the agreement between him and Steve was that:
  - i. Lee would contribute 1/3 of the cost of the first container of EVA clogs, which Steve had not yet ordered from a factory in China;
  - ii. Lee, Steve and Steve’s wife, Angie, would be the “founding partners” or shareholders of a corporate entity for the venture;
  - iii. Lee’s shareholding in the corporate entity created for the venture would be proportionate to his financial contribution to the cost of the first container of clogs;
  - iv. On October 28, 2005 Lee transferred \$23,000 Canadian to DDD (Exhibit P1, Tab 9).
  - v. An undated proforma invoice (subject to sample approval) for the first shipment of clogs showed a total CDN price of \$66,875. (Exhibit P-1, Tab 5, \$23,000 was 34.4% of \$66,875).
  - vi. Lee’s position is that pursuant to their agreement he was to become a 1/3 shareholder in the corporation that would own the Dawgs Clogs business

[12] Steve's evidence and position was to the effect that he and Lee had discussions about participating in the business, but those discussions never proceeded beyond being, at most, an agreement to agree which was dependent upon:

- a. Lee contributing \$35,000 US;
- b. Contributing substantially to the growth of the company; and
- c. Working to develop the Dawgs Clogs business in Europe;

none of which he testified Lee did.

[13] Steve testified to the effect that if there was an agreement, Lee breached the agreement by actions which he says were inimical to becoming a "potential Dawgs' shareholder", such actions consisting of:

- a. Irresponsible actions that were potentially harmful to the existence or success of the venture; and
- b. Preparing to and in fact competing against Dawgs Clogs.

[14] The defendants' position is that, if there was a contract, these actions constituted a breach of contract. The defendants counterclaimed that Lee had committed the tort of passing off by selling in Europe "knockoffs" of Dawgs Clogs' products.

[15] The *viva voce* evidence of Lee and Steve was in direct conflict with one another. The overarching issues in this liability trial are whether the evidence proves, on the balance of probabilities, Lee and Steve had reached a legally binding agreement and, if so, whether Lee breached that agreement, bringing it to an end and the breach giving rise to a claim of damages on DDD's part. Those decisions will necessarily involve making credibility and reliability findings in respect of their evidence. A detailed review of the documentary evidence exhibited at trial will play a significant role in these credibility and reliability assessments.

- [16] I have structured my analysis and decision into the following sections:
- a. The law respecting the formation of contracts and the duties of contracting parties;
  - b. A timeline of correspondence and actions disclosed by the documentary evidence exhibited relevant to the issue of whether a contract came into being and whether there was a breach thereof;
  - c. My credibility and reliability findings in respect of the *viva voce* evidence;
  - d. My findings with respect to the issue of whether a legally enforceable agreement came into existence and, if so, what the terms thereof were; and
  - e. My findings in respect of the breach of contract issues.

**The law respecting the formation of contract and the duties of contracting parties**

[17] In the defendants' brief of law they quote from paragraph 12 of my decision in *Newton v Anderson*, 2012 SKQB 269, 401 Sask R 54, where I essentially quoted from various sections of the *Canadian Encyclopedic Digest*, (online) [CED], on the topic of formation of contracts. The theme that counsel extracts from my decision and the decision of other judges and courts is that for a court to find a contract exists the court must find that there was *consensus ad idem* or a meeting of the minds of the contracting parties on all matters essential to the contract and that such a meeting of minds has not been proven here.

[18] The requirement for *consensus ad idem* continues to be a fundamental principle of the law of contracts. However since 2012 the law with respect to *consensus*

*ad idem* has become more nuanced. Section 1 of the *CED*, Contracts headed Contract Defined now reads:

A contract is a legally recognized agreement between two or more persons which gives rise to an obligation that may be enforced in the courts. More comprehensively, a valid and operative contract may be defined as an agreement free from vitiating factors such as mistake or misrepresentation, and constituted by the unconditional acceptance of an outstanding offer involving a reasonably precise and complete set of terms between two or more contractually competent parties, who intend to create mutual and reciprocal rights and duties that may be the subject of judicial sanction, if they are expressed in any required form, and are free from the taint of illegality or immorality, and are not subsequently discharged by law, by agreement, by breach, or by sufficient supervening circumstances.

(Emphasis added)

This definition in and of itself portends the nuances that now exist in the law of contracts.

[19] Section 2, *Consensus Ad Idem* now reads as follows:

Since mutuality lies at the root of any legally enforceable agreement, a contract requires a meeting of the minds of the parties on all essential matters relating to it (*consensus ad idem*). However, rather than trying to find the real subjective intention of each party, the courts have generally applied the dispassionate and objective test of the reasonable man. Therefore, whatever a party's real intention may be, if he or she acts in such a way that a reasonable person would believe that the party was assenting to the terms proposed by the other party, and if the other party, upon that belief, enters into an agreement with him or her, an enforceable contract will come into effect. For a contract to be binding, the parties must come to the same determination, which must be disclosed by written or spoken words, or by some other sign of intention from which an implication of law, or an inference of fact, or both, may arise. Consensus may be manifested by a combination of words, written or oral, and conduct. In conclusion, the law of contract describes the formation of a contract in terms of rules that order and define the process of contract formation. A contract does not exist until there has been a definite offer and an unqualified and unconditional acceptance of the offer communicated to the offeror. There is also a general rule, however, that a court should interpret a contract, if possible, so as to make it work. Lastly, a valid contract will not be found where the parties have only agreed to agree. This will be the

case where they have left important aspects of the intended contract to be determined at a later date.

Similarly, whether a statement is to be construed as an offer capable of direct acceptance to form a contract depends upon a reasonable, objective interpretation of the words used.

Occasionally, however, a court's equitable jurisdiction may be exercised to permit a more subjective assessment of the circumstances of the case. The existence and/or contents of the contract in such cases may be determined by reference to a party's subjective belief, rather than by reference to the understanding of the reasonable person.

In determining whether the parties have reached agreement for legal purposes, the starting point must be the alleged contract itself. If there is a written contract whose wording reveals a plain and unambiguous intention, that will ordinarily be the end of the matter. But where it is unclear whether or not the parties have in fact agreed, the court may resort to evidence beyond the contractual language, including the factual matrix in existence at the relevant time and the genesis and aim of the transaction. The conduct of the parties during and subsequent to the purported making of a contract is also admissible to determine whether they did in fact make a binding contract, and, if they did, what the contractual terms were.

The absence of real consent to a contract apparently complete and binding may be shown to have resulted from mistake, fraud, or mental incapacity.

...

The burden of proving a consensus between the parties is upon the party seeking to prove its existence, on a balance of probabilities.

(Emphasis added)

Footnoted cases are the basis for this summary.

[20] Significant in this more nuanced approach is the use of the objective test of the reasonable man in the exercise of the task of finding the subjective intention of each party. Consensus may be manifested by a combination of words, actions, the factual matrix in existence at the relevant time and the genesis and aim of the transaction. The conduct of the parties during and subsequent to the purported contract is admissible to determine whether they did in fact make a binding contract. A court should interpret a contract if possible so as to make it work.

[21] Section 3, Uncertainty and Incompleteness of Terms now reads as follows:

Even when parties intend to contract, the essential terms of the bargain must be agreed and possess a sufficient degree of clarity before a legally binding agreement can be said to exist. Where, therefore, an agreement is incomplete because essential provisions have not been settled, or the agreement is too general or uncertain to be valid in itself, or the understanding of the parties is that their legal obligations are to be deferred until a formal contract has been executed, no binding contract will have been created, even if the parties may have thought they were bound. In such circumstances, the purported contract is often characterized as a mere “agreement to agree” or an agreement to negotiate, which is not legally enforceable. Where, on the other hand, the parties have settled all disputed primary terms and expressed their agreement with sufficient reasonable certainty to allow the court to give it practical meaning, their agreement will bind them, even if a formal written document is thereafter to be prepared and signed.

Where not all the price is to be paid at once and the rest, the balance, is to be arranged, the contract is rendered void for uncertainty.

Although uncertainty and incompleteness are distinct conceptual notions, their application in contract law is often intermingled. Incompleteness refers to parties failing to indicate adequately by their words or actions, objectively determined, that they have completed an agreement. Uncertainty, on the other hand, presupposes that the parties have in principle reached an agreement, but it is impossible for the court, within the rules of evidence, to give any clear or substantial meaning to their bargain. In practical terms, both uncertainty and incompleteness create problems regarding enforceability, since a court cannot make a contract for the parties where they have not sufficiently indicated what their intentions and expectations are.

Accordingly, the failure of contracting parties to agree on one or more essential terms will prevent the creation of a binding contract. Further, the terms agreed upon must be clear and certain, in the sense that they must either be stated with reasonable specificity, or be reasonably ascertainable by application of an agreed formula, method, or principle of determination. Specificity is particularly important in regard to terms of payment, although promises to pay money or perform services “when able to do so” have generally been treated as enforceable. It is permissible, however, to leave for determination during the course of performance of a contract, insignificant details necessarily incidental to the carrying out of the work involved. And the fact that the parties fail to reach agreement on a severable and collateral aspect of their negotiations will not preclude enforcement of

a concluded agreement with respect to transfer of an interest in property.

The courts have consistently maintained that they will not supply essential terms necessary to convert a mere “agreement to agree” into a concluded contract, even if the parties themselves believe that they have made an enforceable contract. Similarly, the presence of particularly vague primary terms will preclude the finding of an enforceable contract.

Notwithstanding, where a completed contract exists, but ambiguity remains in what the parties have purportedly agreed upon, some lack of clarity will not necessarily render the “agreement” unenforceable. Courts will strive to give effect to the reasonable expectations of the parties, objectively determined, where it is apparent that they intended some legal relationship to exist between them. Some courts have asserted that a contract will be rendered unenforceable only where a missing term is so essential that the court cannot collect the real intentions of the parties from the language within the four corners of the instrument without it, and so give effect to such intentions by supplying anything necessarily to be inferred. The principles of construction of contracts should be applied liberally to give legal effect to a clause in an agreement if the words used can be given a plain and ordinary meaning that is not in conflict with the agreement as a whole. This is particularly so where the precise nature of what are usually subsidiary or minor (that is, non-essential) contractual terms is in issue, or where there has been partial performance of the agreement. Lastly, it is not for a court to fill in essential terms in an otherwise incomplete agreement.

One means of giving effect to the parties' contractual intentions is the judicial technique of implying terms to flesh out the agreement in order to give it business efficacy. However, it will be necessary for a court to define the nature of any implied terms with particularity only where there is a live issue and specific facts before it whose effect depends on that aspect of the agreement; otherwise, the court may simply satisfy itself that the absence of an express provision is not such an obstacle to the proper operation of the agreement as to render it unenforceable. Remaining issues of interpretation can be reasonably resolved at a subsequent time by employing the ordinary tools of documentary construction available to the courts.

A reference to the “usual terms” of a particular type of contract has often been sufficient to render a contract binding. Subsequent correspondence may clarify uncertainties in an agreement. A meaningless clause can often be ignored.

The plaintiff has the burden of showing that the contract is so unambiguous that the defendant will not be permitted to set up an

alleged misunderstanding. The court must be satisfied with some degree of confidence on an objective basis that it can clearly identify the terms on which the parties have agreed. An agreement to agree does not constitute an enforceable agreement.

(Emphasis added)

[22] Section 12, Acceptance – Acceptance by Conduct or by Inaction reads in part as follows:

Conduct, including conduct subsequent to the making of a purported contract, which, in the eyes of a reasonable person, is unequivocally referable to performance of a contract on the terms suggested by the offeror, will be treated as an acceptance of the offer, binding the parties to all of the suggested terms. Accordingly, conduct unaccompanied by any verbal or written undertaking can constitute acceptance of an offer.

...

A party may be estopped from denying the existence of a contract if he or she fails to object to statements of another party to the effect that dealings between the parties have resulted in the formation of a contract on stated terms, at least if both parties thereafter act as if such a contract has been made between them.

...

(Emphasis added)

[23] Section 168, Specific Types of Implied Terms – Duty of Cooperation and Good Faith reads as follows:

Canadian courts have generally accepted that, once a contract has been entered into, the parties must perform their respective obligations in good faith, even if there is no express contractual provision to this effect in the contract itself.

Footnote:

*Bhasin v Hrynew* (2014), 2014 CarswellAlta 2046 (SCC) (Supreme Court of Canada creating new common law duty under broad umbrella of good faith performance of contracts and holding that there is general duty of honesty in contractual performance);

[24] Section 197 entitled “Generally” contains the following statements:

The terms of a contract may be modified or varied by mutual agreement for the parties’ benefit or convenience by altering the original agreement. It has been held that when parties to a contract

agree to vary its terms, the variation should be enforceable without fresh consideration, absent duress, unconscionability or other public policy issues that would render an otherwise valid term unenforceable.

...

(Emphasis added)

### **Lee's claim and the defence and counterclaim**

[25] Lee's evidence is to the effect that the agreement he had with Steve in the summer of 2005 was that:

- a. He would become a shareholder in a company Steve would incorporate for the Dawgs Clogs business concept;
- b. It was contemplated that the company would have clogs of EVA plastic or resin manufactured offshore, import them into Canada and distribute them and perhaps also deal in other products;
- c. At the time no specific shoe models or manufacturer had been identified and no shoes had been ordered;
- d. Lee's interest in the company was to be proportional to his investment or contribution to the purchase of the first order of shoes; and
- e. He, along with Steve, was involved in researching for and contacting potential manufacturers in China, and he was to be involved in potential marketing into Europe.

[26] Steve's evidence was that:

- a. He and Lee had discussions about Lee participating in the Dawgs Clogs business, but those discussions never proceeded beyond being at most an agreement to agree dependent upon:
  - i. Lee contributing \$35,000 U.S.;

- ii. Contributing substantially to the growth of the company;
  - iii. Working to develop the Dawgs business in Europe, none of which he did; and
- b. If there was an agreement Lee breached that agreement by actions by:
- i. Preparing to and in fact competing against Dawgs Clogs; and
  - ii. Other actions which were harmful to the interests of Dawgs Clogs.

[27] Steve testified that DDD was incorporated on June 7, 2005 for the purpose of being the entity that would run the Dawgs Clogs business. It was incorporated without shareholders, and Angie was the then sole director. In his cross-examination Steve conceded that he and Lee discussed terms of Lee becoming an investor in the company but stated there were conditions precedent. He testified that it was never his intention to sell 1/3 of the company for \$23,000 and that such a suggestion is unreasonable because they were spending a lot of money setting up a website, marketing, getting warehouses and hiring employees in Canada. No additional evidence in respect of these activities was tendered however.

**A detailed timeline of actions and correspondence relevant to the issue of whether a contract came into being and whether there was a breach thereof**

[28] A detailed analysis of the correspondence and related documents filed as exhibits is required. The communication between Lee and Steve provides objective evidence of whether or not there was a meeting of the minds of the parties leading to a legally enforceable agreement; albeit this will involve drawing inferences. My credibility assessments will involve the reasonable inferences to be drawn from the documentary evidence.

[29] The detailed analysis of the documentary evidence has two distinct phases. Phase 1 from June of 2005 to the end of January 2006 relates to the issue of whether there was a contract and what Lee was doing to contribute to the venture during this period. This contribution or lack of contribution issue impacts both whether there was a contract and if it was breached. The phase 2, from January 30, 2006 forward, relates to Lee's efforts to get acknowledgement of his claimed interest and Steve's responses thereto. All subsequent references to documents are to the indicated tab number in Exhibit P-1 unless otherwise indicated.

[30] During the phase 1 to January 30, 2006 the documentary evidence and other evidence generally at trial included the following:

- Aug. 10/05 – Exhibit P-1, Tab 1: Steve sends Lee an email respecting a “Sandal With Dawgs Logo” and a jpeg image of same.
- Aug. 27/05 – Exhibit P-1, Tab 2: Email exchange between Steve and Fun-Ring City Inc. where Steve reports placing a \$2,632.33 USD order for sample clogs.
- Aug. 25 to 31/05 – Exhibit P-1, Tab 2: Email exchanges among Steve and Angie and Lee evidencing:
  - Lee informing Steve he is attempting to organize a booth at the Madrid Spain footwear show for the end of September;
  - Angie informing Lee samples, yet to arrive, will be shipped to him along with catalogue for the trade show;
  - Steve telling Lee to check out “bambags.com” and stating “WE CAN HAVE CANADIAN AND EUROPE DISTRIBUTION IF WE WANT. LET ME KNOW WHAT YOU THINK”. This, Lee

testified, related to discussions he and Steve had about the Dawgs Clogs venture also extending to the marketing of other products like jewelry, sunglasses and accessories.

- Aug. 31/05 – Exhibit P-1, Tab 3: Steve forwards to Lee a Chinese manufacturer’s catalogue of clog products and prices stating “CHECK IT OUT LEE. SAMPLES WILL BE COMING SHORTLLY [*sic*].” The Chinese manufacturers email to Steve was directed to him at steve@edoublediamond.com. This was the first reference to DDD in the correspondence.
- Sept. 8/05 – Exhibit P-1, Tab 5: Steve forwards Lee email communication with a Chinese clog manufacturer providing the manufacturer with the Dawgs’ logo and instructions regarding the manufacturer applying the logo to his sample request of the manufacturer’s Model 9012.
- Sept. 8/05 – Exhibit P-1, Tab 5: Steve forwards Lee a proforma purchase order for some 27,000 pairs of clogs over 12 different models (including the above noted model 9012) and specified sizes for each model at a price of \$66,875 CDN and asking “WHAT DO YOU THINK LEE. SUBJECT TO SAMPLE APPROVAL OF COURSE.”
- Sept. 9-10/05 – Exhibit P-1, Tab 6:
  - Steve emails Lee addressing him as “LEE DAWG” regarding a store on Broadway in Saskatoon stating “THEY WANT TO HANDLE OUR PRODUCTS WHEN THEY COM [*SIC*] IN”.

- Lee emailing Steve advising that he might not be able to get into the Madrid show having been told it is full and that he has not received samples yet.
- Steve responding telling Lee to “DO WHAT YOU CAN.”, that he is awaiting receipt of samples with the logo and will be sending Lee proofs of all materials for his review, suggesting a women’s line called Catz and stating “OUR LINE COULD BE CALLED ‘DAWGS AND CATZ’. WOULD ALSO BE A GOOD NAME FOR A RETAIL STORE CHAIN. WHAT DO YIU [sic] THINK?”
- Sept. 14-15/05 – Exhibit D-1, Tab 3: Steve sends Lee a Dawgs’ order sheet and informs him brochures will be mailed that night. Lee responds, asking, in the context of leaving next week for the Madrid shoe show, for a pair of Dawgs Clogs for each of him and Ruben to wear and for “nice looking” cards for him and Ruben before the show starts, with telephone numbers for them and suggested titles of “Manager – China, European Union for him and “Lead Designer” for Ruben together with a suggested business address to use.
- Sept./05 – Exhibit P-1, Tab 7: Photograph of the Dawgs Clogs’ booth at the Madrid footwear show which Lee testifies he attended accompanied by his friend Ruben Gúerrero from Stockholm, who later did design work for Dawgs Clogs. Steve agreed on cross-examination that Lee paid the costs of attendance at the Madrid show. Lee testified that:

- He had a limited number of samples for visitors to touch and feel but there was no inventory available for him to sell and no orders were obtained.
- At the show he made contact with one Patrick, a Netherlands distributor (by the name of SGA Vanneste) for the EVA clog company Crocs and testified he was communicating with Patrick to see if he might stop distributing for Crocs and take on the Dawgs' product.
- Oct. 1/05 – Exhibit P-1, Tab 8: Steve emails Lee with “Confidential” information about a potential Mazatlan resort store and advises Lee that he should “HAVE ALL EMAILS SET UP BY TOMORROW”. Following this Lee had and used an email address lee@doublediamond.com. Ruben also was provided and used a DDD email address, all such email accounts being on the DDD server.
- Oct. 5/05 – Exhibit D-1, Tab 1: Lee emails Patrick of SGA Vanneste, utilizing his DDD email address, copying Ruben at his DDD email address stating that Patrick’s logistic capabilities were of great interest to him “as we begin our efforts in Europe”.
- Oct. 28/05 – Exhibit P-1, Tab 9: Lee transferred \$23,000 Canadian to DDD.
- Nov. /05: The order of clogs from the Chinese manufacturer arrives in Canada. Lee’s understanding was that Steve would be distributing these in Canada. No shoes from this order were provided to Lee for Europe. No evidence was provided indicating that an additional order of clogs was either placed or received in 2005.

- Dec. 8/05 – Exhibit P-1, Tab 10: Lee, using his DDD email address is corresponding with the Swedish Association of Agents, who had a listing of businesses relating to shoes, to obtain their member list and advertising rates which he stated was because Dawgs would be wanting to market to them.
- Jan. 8-12/06 – Exhibit P-1, Tab 11: Email communication between Lee and Steve “Re: New Dawgs” which is clearly communication regarding the design of new Dawgs’ products for future orders. Lee testified that he had been working on design concepts with Steve and Ruben who was able to do CAD or computer assisted design.
  - In a January 12, 2006 email Lee reports to Steve “We are online now. He [Ruben] has been banged up . . . hurt his back. Been out of action for a couple of days. . . We are trying to incorporate the different suggestions right now. Upon acceptance of the shoe, will you be able to organise the transfer of the 1500 ASAP. You can transfer directly to him via TT or you can transfer it to my account and i can take it out of the bank machine. I will send you the jpegs asap.”
  - Steve responds “HEY LEE. NO PROBLEM. ONCE WE ACCEPT THE FINAL VERSION WITH THE MINOR CHANGES WE CAN TT TO WHEREVER YOU PREFER. KEEP ME POSTED STEVE”
- Exhibit P-1, Tabs 12 and 13: Undated design materials. I am satisfied by the evidence that Tab 12 is a hand-drawn sole design prepared by Steve, bearing his handwriting and forwarded to Lee. Tab 13 is what Ruben produced utilizing CAD technology based on Tab 12. I am

satisfied that Tab 13 was provided to Steve. Steve testified this document was produced by DDD from files on its server.

- Jan. 12/06 – Exhibit D-1, Tab 8: Email from Steve to Lee re; “new Dawgs” stating *inter alia*:
  - “HOW ARE THE FINAL CHANGES COMING. THE FACTORY IS ANXIOUS TO GET THE DESIGN SO THAT THE MOULD MAKERS CAN START THE INITIAL MOULDS...”
  - “I HAVE SENT YOU AN ATTACHMENT. THE RED SHOE NEEDS A SMALL CHANGE TO THE OPENING IN THE SIDE SO IT DOES NOT LOOK VERY SIMILAR TO THE COMPETITION (THE NILE).” The evidence establishes the competition being referred to was Crocs and the Nile being a Crocs’ clog.
  - “THE BLUE SHOE, OUR WORKING DAWG, JUST NEEDS OUR LOGOS CARVED ONTO THE BOTTOM IN A PATTERN AS CLOSE AS POSSIBLE TO THE NEW DESIGN OR PREFERABLY EXACTLY THE SAME BUT WITH VARIATION FOR THE SHAPE OF THE SOLE. AGAIN HOW SOON COULD RUBEN HAVE A LOOK AT THIS AS THE FACTORIES CAN WORK ON THESE MOULDS OVER THE HOLIDAYS” (referencing Chinese New Year.)
- Jan. 16/06 – Exhibit D-1, Tab 9: Steve emails Lee advising funds were put into his account that morning and asking “HOW IS RUBEN MAKING OUT WITH THE DESIGN?”

- Jan. 20/06 – Exhibit D-1, Tab 4: Lee, writing from his DDD email account, to a Swedish Investment Bank stating, *inter alia* “Our company is currently growing rapidly and as a major shareholder in the firm, I am interested to educate myself, and study our options in order to begin mapping out a clear future fund raising strategy. Our business is based in Canada, with sales throughout north america and in Europe, is experiencing growth which may force us to look at external funding sources to pay for this growth. ...”
- Jan. 23-30/06 – Exhibit P-1, Tab 14: Email communication between Lee and Steve regarding design including the following statements:
  - Jan. 23 Lee emails Steve stating “Another version” and Steve responds advising “I THINK THIS IS OUR CHOICE. CAN RUBEN GO AHEAD AND PUT THIS ON THE SOLE OF THE NEW DESIGN OR IS HE STILL HAVING PROBLEMS? IF HE IS STILL HAVING PROBLEMS CAN HE SEND THE LATEST VERSION OF THE NEW DESIGN WITH CLEAR INSTRUCTIONS FOR THE FINAL CHANGES. 1. FINAL SOLE DESIGN. 2 LIP AROUND THE TOP OF THE SHOE. 3. NARROW OVAL VENT HOLES ALONG THE OUTSIDE TOP OF EACH SHOE. LEE CAN HE ALSO NOTE WE WOULD LIKE STRONG ARCH SUPPORT AND THICK SOLES. LOOKS LIKE WE ARE ALMOST READY TO PROCEED. OUR GUYS ARE IN TILL THURSDAY AND CAN FORWARD THE NEW DESIGN TO THE MOULD FACTORY TO LOOK AT UP TILL THEN.”

- Jan. 25 Lee responds advising “still have huge problems with rendering on the PC . . . so i had him just do this so that you can get it over to the factory.” To which Steve responds “I THINK WE CAN WORK WITH THESE IMAGES BUT CAN RUBEN ADD IN WITH LINES AND WORDS WHERE THE HOLES WILL GO AND THEIR SHAPE AS WELL AS WHERE THE LIP WILL GO.”
- Jan. 28 Lee emails Steve asking if he managed to get the files to the factory and states:
  - “Ruben and I are rendering the 3D model of the sole, so that the higher arch and deeper heel support is clearly visible... We are doing it according to the specifications of the IBV (The Spanish Biomechanical Institute).”
  - Steve responds on Jan. 30 stating “I WILL WAIT TILL WE GET THE FINISHED VERSION OF THE SHOE AS THE FACTORY IS ON HOLIDAYS RIGHT NOW. THIS WAY THERE WILL BE LESS EXPLAINING TO THEM. CAN RUBEN INCLUDE INSTRUCTIONS FOR THE LIP AND THE HOLES AS WE DISCUSSED. THEY DON’T NEED TO BE DRAWN IN IF HE IS STILL HAVING PROBLEMS.”
- Lee testified that AutoCAD is a demanding program, that Ruben’s version of the program could not produce a full-fledged AutoCAD design and they found a factory that was able to provide a full 3D rendering of the design. He testified that their design work was part of Dawgs’ efforts to create new products that were distinct from

competing products. This logically would have included specifically Crocs' products. The above-noted correspondence satisfies me that Lee was significantly involved in the design of Dawgs Clogs for upcoming orders.

- Steve testified that in February of 2006 the Crocs' litigation started. This included a suit in the District Court of Colorado and proceedings before the United States International Trade Commission (ITC) alleging infringement of their claimed design and utility patents.
- Logic suggests that before such proceedings would have commenced Crocs would have been in contact with Dawgs demanding that they cease and desist such alleged infringements and the objectives of some of the design work being done was to differentiate Dawgs' products from Crocs' clogs. These inferences are support by Steve's January 12, 2006 email (Exhibit D-1, Tab 8) to Lee stating *inter alia* "THE RED SHOE NEEDS A SMALL CHANGE TO THE OPENING IN THE SIDE SO IT DOES NOT LOOK VERY SIMILAR TO THE COMPETITION (THE NILE)." Steve acknowledged the changes in question for the red shoe were to differentiate it from Crocs' "Nile". Lee testified that the "New Dawgs" design work was part of Dawgs' efforts to create new products that were distinct from competing products.

[31] Phase 2 of the documentary record, from January 30, 2006 forward, principally relates to Lee's efforts to obtain written acknowledgement of the agreement he claimed. During this phase the documentary evidence and other evidence at trial included the following:

- Jan. 28/06 – Exhibit P-1, Tab 14: In the second part of this email to Steve Lee writes:
  - “What is Dawgs Global Sales Inc.? Is this the holding company that you & I discussed to set up to preserve the ownership of the founding partners? Ie. Your 30%, my 15%, Angies percentage and the rest of the partners of the ownership of Dawgs Clogs? Or is this a different entity? Have you finalised the corporate structure as yet? I would like to get that paperwork done and out of the way as soon as possible, before I resign my position here.”
- Jan. 30/06 – Exhibit P-1, Tab 14: Steve responds:
  - “GLOBAL DAWGS IS THE DISTRIBUTOR FROM REGINA. I AM WORKING WITH A USA ACCOUNTANT AS WELL AS A CANADIAN ONE TO DETERMINE THE STRUCTURE. I WILL KEEP YOU POSTED ONCE WE GET CLOSER TO SOMETHING TO LOOK AT. WE WILL ALSO HAVE TO MAKE ROOM FOR BARRIE [SIC] AND THE ADDITIONAL \$ 125000 WE RAISED. BUT AT THE END OF THE DAY EVERYONE IS GOING TO BE INVOLVED IN A MUCH LARGER COMPANY THAN WAS FIRST ENVISIONED.”
- Steve testified that Dawgs’ Global Sales was someone in Regina that was selling Dawgs’ products but was not entitled to use the name Dawgs. Barrie is Barrie Mann, Steve’s brother and one of the defendants.
- Jan. 31/06 – Exhibit P-1, Tab 14: Lee responds:

- “Here is my underlying worry, Being in on the ground floor from day one, I dont [*sic*] want to end up (at the end of the process), to feel that i have been watered down by other partners who have invested time/money once they saw success happening . . . . just keep my beliefs/interests in mind as much as possible when you are sketching out the structure of the company.”
- Feb. 4/06 – Exhibit P-1, Tab 14: Steve responds:
  - “I UNDERSTAND WHERE YOU ARE COMING FROM AND AM WORKING TOWARDS A STRUCTURE WITH EVERYONES [*SIC*] CONCERNS IN MIND.”

[32] Lee testified that he took this as Steve confirming that their agreement would be honoured. It is clear from the correspondence that they had already discussed Lee’s shareholding being reduced from 1/3 by reason of other investors. See Exhibit P-1, Tab 14 where Lee is acknowledging his then percentage interest as being 15%. He also testified that at no point until December of 2007 did Steve state or suggest that he was in default of his part of the agreement by not paying the sum of \$35,000 US or by having failed to make sales in Europe.

[33] Subsequent correspondence includes:

- Feb. 10/06 – Exhibit P-1, Tab 15: This is correspondence between Lee and a Chinese mould producer to and from Lee’s DDD email address. Lee testified he was part of the efforts to obtain moulds for the Dawgs’ products they were working on.
- May 11/06 – Exhibit P-1, Tab 16: In this email Lee informs Steve he will be in town for the funeral of a friend and then continues:

It is obvious that Dawgs Clogs shareholding group has become more in-house/in-family, which is a good phase 1 growth strategy...

But I am concerned, it is now mid May and I have been expecting shareholders agreements from you for 6 months...eventually I want to receive the shareholders documentation, see the financial accounts, and in my opinion, as a shareholder in your company, I would like you to trust me enough so that you disseminate information and business news to me (and all shareholders for that matter) openly, without being asked or questioned.

I haven't been hearing from you on a regular basis and I am sorry to say that I am beginning to wonder what the delays are? MONTHS In [sic] March, I was supposed to have gotten those shareholders agreements and quit my job in order to come back to Canada, join Dawgs and help grow the company. I am unhappy that I have not been able to do that, as this was one of the key things we discussed and agreed upon when we started on this road together. This was one of MY fundamental reasons for investing in Dawgs.

As part of our "handshake agreement" in 2005, my investment for the startup capital Dawgs Clogs arrived without delay, and without proper paper documentation of our discussions. Sending this money on a handshake was a gesture and was a sign of faith in Dawgs Clogs and in you.. I know that you have preserved my investment as best you could and have been leading the effort to make Dawgs a success.

While I am here I would like to have those agreements in hand, so that I can take a look at them, so that I can move forward with this.

I would also like to know what is going on both strategically, and legally.

FYI Our competitors are now taking Europe by storm and the phenomena is growing rapidly and markets are beginning to move into the hot summer season...

Call me at AShley's [sic] place when you have a chance to hook up for a meeting or a beer. I would also like a complete sample set for my return to Stockholm.

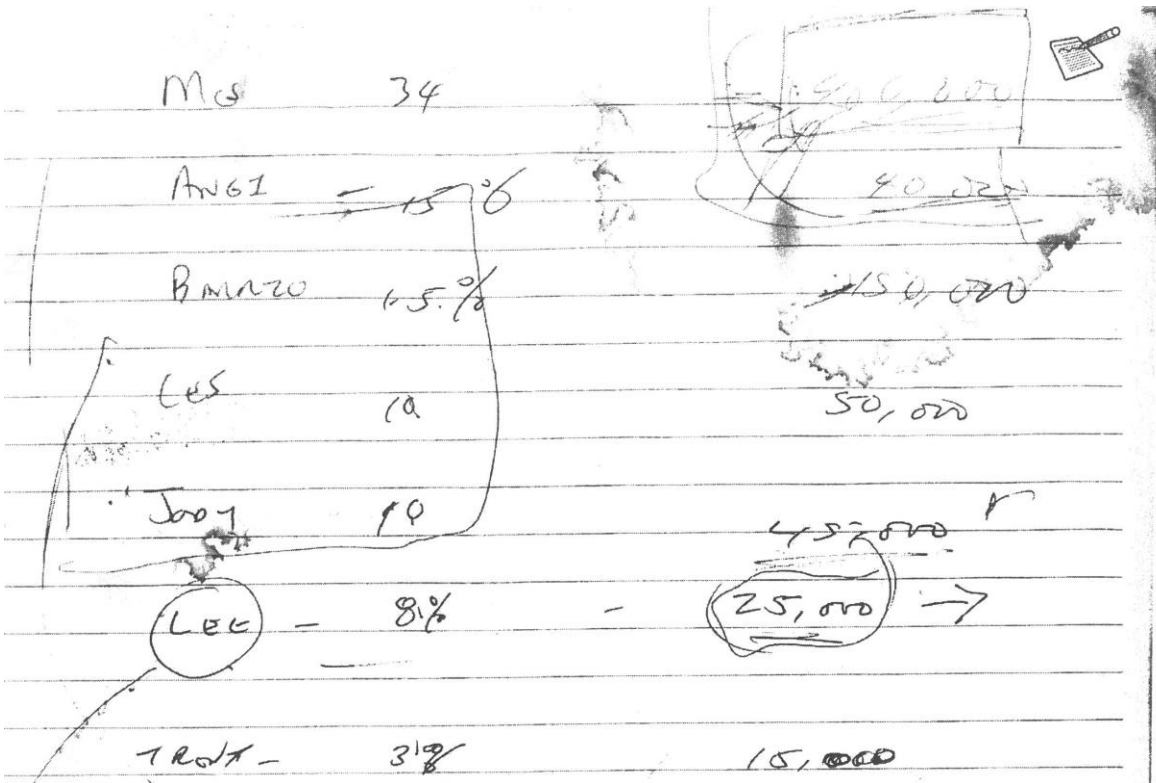
Thanks  
Lee

[34] In May 2006 Steve and Lee had a meeting in Saskatoon.

- May/06 meeting Steve and Lee – Exhibit P-2. Lee testified this is a photocopy of a document produced during the meeting with the top half (above the line) being in Steve’s handwriting which reflects a position Steve was advancing at the meeting which appears to read as follows:

M*?	34	\$400,000
Angl	15 %	40,000
BAM*?	15 %	150,000
Les	10	50,000
Jo*?	10	45,000
Lee	8%	25,000
Trent	31%	15,000

\*? indicates not clear



- Lee understood Steve was taking the position that, based upon the contributions or investments the identified individuals/entities had made into the Dawgs Clogs venture Lee's shareholding in the company created for the venture was 8%.
- The bottom half Lee testified is in his handwriting and was his attempt to summarize a proposal Steve was making at the time of a proposed agreement in which a Swedish entity would become the European distributor of Dawgs Clogs.

[35] After the May meeting the following correspondence and actions occurred:

- June 5/06 – Exhibit P-1, Tab 18: Lee sends an email to Steve stating “. . . I have found a couple of friendly investors from Hong Kong who are interested in starting up the sales agency for Sweden with me. Raising 50K is going to be tough but manageable i [sic] believe” and asks Steve to send detailed financial information “which will support my claims that we are doing well in canada [sic]!” Steve responds the same day stating he will try to get “something together for you” and goes on to say “I may also have another idea to help get things going in Sweden quickly”. Lee testified the financial information he sought was not provided.
- June 17/06 – Exhibit P-1, Tab 18: Lee emails Steve “I would consider reducing my percentage in Canada to 5%, if we could agree on a valuation of Dawgs Canada (you told me that you expect profits to be in the range of 1 to 5 million CDN).”

- June 30/06 – Exhibit 1, Tab 20: Lee writes Steve addressing him as “HI Chief” advising of certain marketing possibilities he has identified in Spain that, *inter alia*:

- “In these two meeting [*sic*] I have found us 24 accounts....but I need the product to create a foundation to move forward from. If we ship direct from the factory in china, I can get a buddies consolidation and shipping company to ship the order for me directly to here for Cactai Gear my swedish company.

Here is my problem.... I have sold 250 pairs in Stockholm a month ago, I have sold another 2000 pairs on one trip to spain, and I dont [*sic*] have any product. I find that we are doing alot of talking, and nothing really concrete is happening. Dont you think we can do the planning AFTER we land some shoes in Europe...

WHat [*sic*] do you think.... I can place the order to the factory, make the payment directly, have it shipped asap and I can lock up these accounts”.

- June 30/06 – Exhibit P-1, Tab 21: Barrie emails Lee stating he is responding to Lee’s email of earlier that day to Steve and encloses a letter of the same date under the DDD letterhead that reads as follows:

June 30, 2006

Dear Lee,

In reply to your e-mail of June 30<sup>th</sup> regarding the opportunity to sell product into Spain I think it’s important that we recognize a number of issues;

1. I think your enthusiasm is great.

2. There is no doubt that the Dawgs brand of comfort footwear will sell in a multitude of countries.
3. The fact that competitors are established in some of our current and future markets is a reality that we understand, however it is not reason to enter into sales arrangements until the proper systems have been put in place. These system [*sic*] include but are not limited to being registered as a corporate entity in the appropriate country (s), establishing an operational warehousing structure, developing detailed pricing grids, hiring and training all the required support staff, purchasing and installing inventory control computer systems, developing POP support material and above all ensuring that all legal processes have been followed. Import duties, liability insurance, banking arrangements and merchant service systems all have to be in place before the first shoe can be sold.
4. A formal business plan should be in place before approaching potential customers. Selling the shoes is the easy part. Design, shipping, customer support, hiring, training and developing all of the items mentioned above are the hard parts.
5. We could have thousands of accounts in the USA already but we are taking the proper steps to ensure we are not perceived as an organization operating out of the back of a garage.
6. Under no circumstances will anyone other than Steve have contact with our Chinese factories. To do otherwise opens the door for would be competitors to take advantage of our hard work and dedication to a superior product. To proceed in any fashion that would jeopardize our supply chain is highly irresponsible. There will be no direct shipments from our factories to customers. Period.
7. We discussed establishing a presence in Sweden and possibly the other Scandinavian countries. Spain or any other EU countries are not on the table at this time. We will get there, but when we're ready as per the items in point 3, 4 and 5.

We are awaiting a basic business plan for Sweden so that we can move forward in a professional manner using appropriate business acumen. I think it's important that you and I have an in-depth conversation on what's required. It's taken 6 months of dedicated work to create an Australian operation. We're working hard to ensure that we can launch in the USA with all the proper systems in place. The same has to happen in Sweden.

As mentioned I think your enthusiasm is great but we can't just ship shoes without having support systems in place. What do we do about

payments, re-orders (who would they phone?). Let's do it right Lee. As you mention we're doing a lot of talking but it's action that counts. Focus your action on Sweden. We have to walk before we can run!

Regards,

Barrie

V.P. International Sales  
Double Diamond Distribution Ltd.

Cc: Steve

- July 5/06 – Exhibit P-3. Barrie, designated as “VP International Sales Dawgs Double Diamond Distribution” sends to Lee a “Dawgs International Operations Set-Up Template”.
- Following this in July and August Lee is asking for a shareholder's agreement and details of the incorporated company. Not getting a response on September 5, 2006 (Exhibit P-1, Tab 26) he emails Steve advising “Been thinking more and more about selling out and the reinvesting in the franchise opportunity in Scandics” and asks for info on the new product lines that they have created and an outline of the offer.
- On September 12, 2006 (Exhibit P-1, Tab 27) Lee emails Barrie and Steve that his interest in selling his stake in Dawgs Clogs Canada is high but that if the deal cannot be completed by Christmas he will not be interested in selling and asks for an email outline of the “franchise opportunity”. On September 14, 2006 (Exhibit P-1, Tab 28) he emails Steve asking for a hardcopy of any buyout agreement and franchise agreement.
- In a September 20, 2006 (Exhibit P-1, Tab 29) email Lee advises Steve of steps he has taken to obtain financing for the franchise

opportunity. Email communications continue through October during which Steve is providing information or positions regarding the impact of the Dawgs/Crocs dispute. They appear to be working toward agreements pursuant to which Lee's interest in Dawgs Clogs Canada will be bought out and Lee Smith will obtain a Distribution Agreement from DDD for Sweden (See Exhibit P-1, Tab 35).

- Nov. 1/06 – Exhibit P-5: Steve and Barrie become directors of DDD along with Angie and the following shares were issued by DDD:
  - 20,000 to 101088342 Saskatchewan Ltd.;
  - 6,000 to 101117188 Saskatchewan Ltd.;
  - 20,000 to BAM Marketing Inc.; and
  - 60,000 to Top Dawg Management Inc.
- Nov. 16/06 – Exhibit P-1, Tab 36: Lee sends an email to Steve asking questions and Steve responds in an email with his responses in bold capital letters inserted in Lee's email as follows:

Hi Steve,

Will send this off to Ashley now. And see what she says about the legals! Do you have the official distributors agreement [*sic*] done yet?

Lee

Hi Steve,

She has some concerns with the agreement as it stands (it is rather loose from a legal standpoint) and will make the appropriate changes/suggestions for you/your lawyer to look at.

LEE. THIS IS A VERY BASIC INTERM AGREEMENT. ALL OF THE CLAUSES IN HERE ARE STANDARD WITH ALL OF OUR DISTRIBUTORS OTHER THAN THE PRICING. THE MAIN DISTRIBUTION AGREEMENT WILL SPELL OUT IN DETAIL ALL OF THE LEGAL TERMS BUT WILL NOT VARY FROM THE MAIN POINTS.

**Questions for Steve.**

**Does this buyout offer of \$67 500 CDN represent the COMPLETE buyout of Lee's 8% shareholding in Dawgs Clogs, and its international licensees/franchise?**

**Yes/No?**

**If yes, how have the shares been valued?**

**THIS IS A TOTAL BUYOUT OF ALL OF YOUR INTERESTS IN DAWGS CLOGS CANADA. YOU HAVE NO OTHER INTERESTS WHATSOEVER AS AGREED TO BEFORE. CLAUSE #1 IS JUST CLARIFYING THIS.**

**THE VALUATION CONSISTS OF THE CASH PORTION BUT THERE IS ALSO A HUGE BENEFIT [SIC] IN THE PRICING YOU ARE BEING OFFERED**

**IN COMPARISON TO ALL OTHER DISTRIBUTORS. FOR EXAMPLE THE AVERAGE DISTRIBUTOR IS PAYING APPROX \$50,000 USD MORE PER CONTAINER OF SHOES.**

STEVE

I couldn't speak for you in this, and will send your reply to her. She will then submit her docs back to you/your lawyer. Get back to me ASAP, Ashley said she would try to get everything done, by her managing partner, so that Friday morning it would be done.

Lee

- Nov. 17/06 – Exhibit P-1, Tab 39: Lee emails Steve asking that the sale of his interest and distributorship agreement be split into separate agreements. Steve's response is in capital letters.

Hi Steve,  
Ashley suggested the following:

1. Separate the sale of the my [sic] 8%, from the distributorship for Sweden as the two are not related activities. Obviously, as you stated previously, the advantageous pricing would be replaced by normal EU pricing, in the Swedish distributorship.

OK. WE WERE CONSIDERING DOING THIS FOR SIMPLICITY. I WILL RESEND YOU THE TWO SEPARATE AGREEMENTS ASAP.

2. A legal document drawn up by Dawgs Clogs lawyers forming the Swedish distributors agreement is required to determine exposure to possible litigation in Sweden. This document will clearly outline the legally binding process for dealing with a CROCS suit in Sweden. IE. When facing a court case, a lawyer has to be retained, paid up front and on an ongoing basis. At what point does Dawgs Clog's legal and financial responsibility occur.

THIS WILL BE SPELLED OUT IN THE DISTRIBUTION AGREEMENT. THE MAIN ISSUE FROM OUR SIDE THAT IS [S/C] LONG AS THE AGREEMENT IS FOLLOWED AND THERE IS NO VARIATIONS FROM ALL OF OUR REDISGNS [S/C] AND NEW DESIGNS THAT HAVE ALL BEEN DESIGNED TO PROTECT US AGAINST INFRINGEMENT LAWSUITS WE CAN INTERN [S/C] PROTECT YOU.

Something like this occurring in Sweden would kill the company. AS LONG AS WE STICK TO THE PRODUCT LINES AND MAINTAIN OUR DESIGNS AND MARKETING WE SHOULD BE FINE.

WE CAN DISCUSS IN DETAIL OVER THE PHONE.

This is sound advice and I will follow it. The chances that Crocs Sweden makes trouble is pretty high, as they have Peter Forsberg's family owning/running it.

IT REALLY DOESNT MATTER WHO OWNS IT. THE LAWS ARE THE LAWS AND WE HAVE JUST SPENT A LARGE AMOUNT OF MONEY AND TIME TO FIND OUT WHAT WE CAN AND CANT DO.

If you can hold off signing a Swedish distribution deal with the other guys, I would be very happy!! I want the distributorship for Sweden once the legals are taken care of.

IVE PUT THESE GUYS ON HOLD UNTIL WENESAY [SIC] OUR TIME. THIS WAY WE CAN SEND YOU A COPY OF THE FULL DISTRIBUTION AGREEMENT. THIS AGREEMENT WILL BE VERY STANDARD (OTHER THAN YOUR PRICING AND WE ARE NOT GOING TO BE WILLING TO VARY FROM IT AS WE NEED TO PROTECT OUR BRAND AND PROTECT OUR SELVES AS WELL AS THE DISTRIBUTORS. THIS IS ALL DONE WITH THE FULL INTENT OF PROTECTING BOTH US AND THE DISTRIBUTOR FROM LAWSUITS.

If not, I will be disappointed, but understand that Dawgs Canada has to move forward with distributors, who are big enough to take on CROCS.

WE WILL GET THE AGREEMENTS ASAP. KEEP IN MIND THE WHOLE AGREEMENT IS DESIGNED TO PROTECT EVERYONE FROM LAWSUITS.

Let me know what you think.

Lee  
STEVE

The proposed agreements are found at Tab 40 of Exhibit P-1.

- The agreements were not finalized. Lee was raising concerns about potential liabilities flowing from the Crocs' litigation. By email of Feb. 6/07 – Exhibit P-1, Tab 44 Steve advises that if they are successful in the Crocs litigation he does not think they (Crocs) will attempt to restart the Federal Case but states “I DO NOT WANT TO INCORPORATE ANYTHING NEW UNTIL THIS HAS PLAYED OUT. AS THIS HAS HAD A HUGE IMPACT ON OUR CASH FLOW.”

[36] The documentary record contained no further correspondence between them until December 20, 2007 when counsel for Lee sends a demand letter to the defendants on his behalf (December 20, 2007 – Exhibit P-1, Tab 47). From this the present action flowed.

[37] The action was commenced January 11, 2008. In his evidence at trial Steve acknowledged that prior to receiving the December 20, 2007 letter:

- He had never raised with Lee that he was in default of the agreement by virtue of not having paid the sum of \$35,000 US and at no point did he ask him to contribute more;
- That he did not know if he communicated to Lee that the \$23,000 CDN paid was booked by DDD as a loan;

- He had not told Lee that he was not doing his share and was in default by not selling shoes in Europe; and
- He had not confronted Lee with positions that Lee was planning or had carried on a competing business nor that he engaged in the tort of passing off or other actions harmful to the business of the defendant DDD for which it claims damages.

### **The counterclaim and credibility/reliability assessments arising therefrom**

[38] The evidence of Steve relating to allegations of breach of contract on the part of Lee and the tort of passing off are significant to my overall credibility and reliability assessments. Accordingly, I start my analysis with Steve's evidence of wrongdoing on the part of Lee; appreciating that the validity of these claims is subordinate to the issue of whether a contract was formed.

[39] Steve testified, *inter alia*, as follows:

- Within the first six months “we” (without specifying who) found out Lee was discussing a high level of interest to go to work for Crocs. He based this on things he said Angie pulled off the DDD email server, which he believed was sometime in 2006. This evidence was in relation to Exhibit D-1, Tab 1, Lee's October 5, 2005 email to one Patrick, and a statement therein “I am also interested to hear more details of your proposal to work with/represent Crocs in the region”. Steve stated he found this very disturbing and that he interpreted this as Lee expressing an interest in working for Crocs as well. Later in cross-examination he states the document showed Lee had no intention of ever going forward with “our deal” and he wanted to go

to work for Crocs. This acknowledgement of “our deal” supports an inference that a deal had been agreed upon.

- If Steve was very disturbed by what he believed Lee was doing, common sense suggests that he would have confronted Lee with this concern when he says he became aware of it. He acknowledged he did not do so.
- With reference to Lee’s evidence that he and Ruben were extensively involved with Steve in the design of “new Dawgs” for production and sale in 2006, Steve testified that he had the design pretty much completed and that he had in-house people to do the graphics and design. He acknowledged he prepared and sent to Lee Exhibit P-1, Tab 12 leading to Exhibit P-1, Tab 13 which related to a design for the bottom of the shoe. During his examination-in-chief, he testified that he was expecting from them a full-blown design to send to the mould factory.
- Steve presented no evidence to support his claim that he had in-house people to do the graphics and design and that he had the design pretty much completed. The only objective evidence I have is the email communications regarding design and moulds detailed above. The conclusions I draw from those communications are that Lee and Ruben were significantly involved in early 2006 in design work for “new Dawgs” and this design work was principally related to attempts to differentiate existing Dawgs’ designs from the Crocs’ design in light of the Crocs’ claims and litigation. It is clear that DDD was paying Ruben to do computer assisted design work and as per the

January 13, 2006 email, Exhibit D-1 Tab 8, his final designs were going to go to the mould manufacturer.

- Steve testified that the document Exhibit D-1, Tab 6 is a software design of a shoe that a mould manufacturer would use to create a mould. He testified this was found on the DDD server (not stating who found it or when, but suggests it was later 2006 or 2007) and when found he was flabbergasted, stating he had been trying to get design documents from Ruben and Lee for a year and then finds this on their server and that moulds had been produced. The general tenor of the evidence was that Dawgs was successful in selling clogs in Canada and the United States. This being so, they must have had product beyond the first shipment in November of 2005 and that product would have been product designed to counteract the Crocs' claims. Thus Steve's evidence that he had been trying to get design documents from Ruben and Lee for a year makes no sense. Designs must have been provided to produce the products sold in 2006 and 2007.
- He testified it looked to him that, and he believed that, Lee and Ruben were making their own line of shoes. He provided no evidence that they were in fact making their own line of shoes.
- At its highest and best such a belief is totally unsubstantiated speculation without supporting evidence. It is my conclusion that Steve did not believe what he said he believes; but is disingenuously using this document and the email to Patrick dated October 5, 2005 to base his position that Lee acted improperly.

- By his own testimony Steve was the individual dealing with the mould factories and passed on to DDD's mould manufacturers whatever Lee and Ruben provided to him. The illegible, undated, single page document, Exhibit D-1, Tab 6, is no basis for his stated belief. If Lee and Ruben were in fact taking actions to produce their own line of shoes it makes no sense they would use DDD's email server to maintain records of such efforts. The probability is that this document originated at some unknown time, perhaps at a very preliminary stage of discussions, with the mould manufacturers DDD was dealing with. In any event, this document and the evidence of Steve does not prove the alleged wrongdoing on the part of Lee.
- Steve buttressed his position that Lee was acting contrary to the best interests of Dawgs Clogs by reference to the document entitled "Dawgs Clogs Sweden Reseller Program" Exhibit D-1, Tab 37 and Exhibit P-1, Tab 42. He testified this document formed part of the basis for the counterclaim.
- He testified he found this document in November of 2006 when he searched the DDD server and that this document was not something DDD produced. He says when discovered he had many concerns; his general concern being that it was an entirely false document with huge legal implications, especially in light of the Crocs' litigation. He went on in his evidence to identify what he viewed as specific problems in the document.
- Regardless of whether or not the document had some of the problems testified to by Steve, the evidence of Lee and the correspondence generally satisfies me that in fact this document was a draft created by

Lee. The June 30, 2006 letter of Barrie Mann to Lee, Exhibit P-1, Tab 21, essentially instructed that he was to take no steps (including approaching customers) without a formal business plan being in place. Lee testified that it was a draft of a marketing document for Sweden as part of his effort to advance the interests of Dawgs Clogs. The document itself demonstrates it was intended as a Dawgs Clogs promotional piece and shoes shown in the document were shoes using designs Lee testified Steve, he and Ruben were working on. This document was clearly preliminary, and Lee testified it was never distributed to anyone outside of DDD. There is no basis in the evidence to conclude that this document is other than a draft of marketing materials circulated within DDD. When asked directly on cross-examination whether he had any evidence that this was ever distributed to the public or resellers, Steve responded he did not know if it was ever distributed. I find no evidence or basis for Steve's position that this draft caused any harm to the defendants.

- Exhibit P-1, Tab 42 was produced in the action by Lee Smith. Both Exhibit P-1, Tab 42 and D-1, Tab 37 bear the Lee Smith disclosure of documents number 197 whereas documents disclosed by the defendants bore a six-digit number starting with 00 such as Exhibit D-1, Tab 12 bearing the number 001585. Steve says he found it on the DDD server. If that is so, it logically follows that it arrived there by transmission by Lee. If Steve had any concerns, including that it was an entirely false document with huge legal implications when he discovered it in November of 2006, the question arises why did he not then address his concerns with Lee. He provided no evidence that he did.

- Steve went on to testify that while he felt betrayed by Lee in respect of the various matters he testified to, he nonetheless decided to give Lee another chance and so offered his money back, in fact to pay \$67,000, and offered a distributorship for the country of Sweden and to provide Lee product at just above factory cost. He described this as an exercise in damage control. I do not believe this evidence. Rather the conclusion that I draw from the evidence generally and the documents exhibited is that after their meeting in May of 2006 Steve's objective was first to reduce Lee's percentage ownership in Dawgs Clogs and later to eliminate it.
- There is nothing in the communication or exhibited documents that leads to a rational conclusion other than that the above referenced offer came about only because Lee was pressing for acknowledgement and an agreement in respect of his shares following the May 2006 meeting in Saskatoon. Following the May 2006 meeting Steve introduced the concept of a buyout of Lee's interest in Dawgs Clogs and the distributorship proposal in September of 2006. The proposal may indeed have been, from Steve's perspective, "damage control" in the sense of reducing Lee's claim to a shareholding position. If Steve believed Lee had betrayed him and harmed DDD why did he not confront Lee? He testified that he did not raise any of the matters he now relies upon until after the December 2007 demand letter from Lee's lawyer.
- During cross-examination Steve acknowledged there was nothing in writing until after the December 2007 letter that stated Lee's performance was unsatisfactory. Nonetheless he stated he had all

kinds of evidence that Lee was not making sales, stealing his designs, recklessly making marketing materials that created serious problems for Dawgs Clogs and that he did not trust him. He failed to provide evidence to provide any basis for such a belief, much less to prove any of these allegations.

- On the matter of not making sales, I am satisfied by the evidence that Lee was unable to make sales because there was no product destined for Europe for him to sell and by June of 2006 DDD expressly declined to provide product to him in Europe. In a June 30, 2006 email to Steve, Exhibit P-1, Tab 20, Lee reports on sales he has made but complains he does not have any product and asks for the ability to order direct from the factory. This email was promptly followed by the June 30, 2006 letter of Barrie to Lee, Exhibit P-1, Tab 21, which makes it patently clear that DDD was not then prepared to either provide stock or permit direct orders by Lee from the factory. It expressly states that all of Barrie's stated support systems "have to be in place before the first shoe can be sold" and that "there will be no direct shipments from our factories to customers. Period". Steve acknowledged in his testimony he knew Barrie was sending this letter.
- There is only speculation and no evidence to support Steve's allegations that Lee was stealing Dawgs Clogs' designs and dealing with factories to have clogs produced for himself. Indeed the lack of any basis for such speculation leads me to the conclusion that Steve did not, despite his testimony, believe this to be true. I find the evidence Steve gave to the court to not be credible.

- In his cross-examination Lee acknowledged that by the summer of 2007 he established with Ruben a kiosk in Stockholm that sold a variety of products including clogs. He stated he did this because he had been unemployed for several months, he saw no prospect of concluding an agreement with Steve, with whom his last communication had been in February of 2007, and he needed to generate income. He testified that the clogs, which he ordered from either Global Sources or Alibaba in China, bore no logos. In August or September of 2007, representatives of Crocs came to his kiosk, advised Ruben that the clogs he was selling were knockoffs of Crocs, told him to stop selling them and if they did not there would be consequences. There is no evidence they were a knockoff of Crocs' designs, only an allegation. In the circumstances they shut down the business with the inventory being disposed of under Swedish bankruptcy proceedings.
- Steve took the position Lee's actions in this respect were further evidence of self-dealing in breach of his obligations to Dawgs. I find nothing in the evidence to support this position. There is no evidence to support any conclusion that Lee was passing off clogs he sold as the products of DDD nor breached any design or trademark rights of either Dawgs or Crocs. I fail to see how in the circumstances Lee selling generic clogs was in breach of any duty he owed to Dawgs Clogs or DDD. Indeed the suggestion by Steve that Lee had an obligation to Dawgs Clogs or DDD implicitly acknowledges that Lee had an interest in Dawgs Clogs.

- While in the usual case of a contractual claim I express my decision in respect of the claim before I express my decision in respect of the counterclaim, I find it appropriate in this case to state my findings in respect of the counterclaim first largely because of the relevance of this evidence in relation to Steve’s credibility generally. I find that the defendants have not proven any of the allegations alleged in the counterclaim and I dismiss the counterclaim.

### **Analysis of whether an agreement has been proven**

[40] I have the testimony of each of Lee and Steve. Their evidence and positions are significantly conflicting. Nonetheless, I have to assess whose evidence is both credible and reliable, or if any of it is. I have significant documentary evidence that assists me in deciding what the facts are and whose evidence is credible and reliable and to what extent. This evidence is reviewed in detail at paragraphs 28 to 36 above. Having considered the evidence of both Steve and Lee in light of my detailed review of the correspondence between them, I find the evidence of Steve generally on issues of substance to not be credible or reliable. Where their evidence differs I prefer the evidence of Lee, which I find to be overall credible and reliable and supported by reasonable inferences to be drawn from the documentary evidence.

[41] An objective reading of the correspondence between August 10, 2005 through to the end of January 2006 shows communications between Steve and Lee that supports the inference that Lee was part of this new business venture. Steve is informing Lee of significant matters and asking for Lee’s views. Steve greets Lee in emails as “Lee Dawgs”, with multiple uses of inclusive language like “we”, “our products” “our line” which, in conjunction with all of the other evidence, supports the conclusion there was a deal or agreement that Lee was part of the venture.

[42] Lee was actively involved in doing things for the benefit of the business venture – attending the Madrid Shoe fair, communicating with a Swedish investment bank for the benefit of the venture, communicating with the Swedish Association of Agents in an attempt to identify retailers to sell shoes to, working with Steve and Ruben on design of shoes for the upcoming year (in part with specific focus on differentiating the Dawgs Clogs from the design of Crocs’ models) and transferring \$23,000 to DDD representing part of the cost of the first container of some 27,000 pairs of clogs imported by DDD.

[43] There is no logical explanation for what Lee was doing other than that he had “a deal” with Steve. It was never suggested by Steve that Lee was in any way compensated for any such efforts. During cross-examination in respect of the October 5, 2005 email of Lee to Patrick, Steve testified that the document showed Lee had no intention of ever going forward with “our deal” and he wanted to go to work for Crocs. As I have stated above, this acknowledgement of “our deal” supports an inference that a deal had in fact been agreed upon.

[44] I find there was a deal that went beyond an agreement to agree, and I find Steve’s evidence to not be credible or reliable in that specific respect. I have already concluded, as detailed above, that I do not find his evidence on the allegations of breach of contract, the tort of passing off and the counterclaim generally to be credible or reliable.

[45] I conclude Steve’s evidence is not credible or reliable as it relates to the issue of whether there was a contract or *consensus ad idem*. That aside, I must still decide the issue of whether the evidence as a whole establishes, on the balance of probabilities, there was *consensus ad idem*, i.e. a meeting of the minds of the parties on all essential matters relating to their agreement.

[46] In this respect I take guidance from the provisions of the *CED* contracts quoted above and in particular *CED §2 Consensus Ad Idem*, and the emphasized portions thereof.

[47] Recently the Court of Appeal for Saskatchewan said the following in *Curry v Athabasca Resources Inc.*, 2024 SKCA 7:

[36] A valid contract is only formed when three criteria are met from the perspective of an objective bystander: (i) the parties intended to contract; (ii) the parties reached an agreement on all essential terms; and (iii) the essential terms are sufficiently certain (*Jans Estate v Jans*, 2020 SKCA 61 at para 34 [*Jans*]; citing *Matic v Waldner*, 2016 MBCA 60 at para 57, [2017] 1 WWR 504 (leave to appeal to SCC refused, 2017 CanLII 1341)). Determining whether a contract has been formed and, if it has, on what terms, calls for the application of an objective test. In the absence of a written agreement, or some other clear and unequivocal communication respecting contractual terms, a court must determine whether a reasonable person in the position of one party would consider that the other party's conduct constituted an offer and, conversely, whether a reasonable person in the position of the latter would consider the former's conduct to have constituted an acceptance (*Owners, Strata Plan LMS 3905 v Crystal Square Parking Corp.*, 2020 SCC 29 at para 33, [2020] 3 SCR 247). Where it is alleged that a party has agreed to a proposed contractual term through conduct – including through silence or acquiescence – rather than through express acceptance, such conduct must be sufficiently clear, unambiguous, or absolute to objectively demonstrate an intention to create binding legal relations on those terms (*AlumaSafway Inc. v The International Association of Heat & Frost Insulators and Asbestos Workers Local 119*, 2022 SKCA 99 at para 49, [2023] 6 WWR 74).

[48] Steve testified and argued that it was never his intention to sell 1/3 of his company for \$23,000, that he was spending a lot of money getting websites, warehouses and employees set up and he said the suggestion that he would sell 1/3 of his company for \$23,000 is just not reasonable. Looked at from the perspective of the objective bystander, at the time of Steve and Lee's meeting in June/July of 2005 there was no company that had then done anything nor spent a lot of money. Steve had a potential product he liked and believed there was a market for it, notwithstanding there were significant competitors already in the market. He had invested some time in researching

the market potential for the product. He had the “Dawgs” trademark in mind; but not registered nor established through use. It could fairly be described as a speculative venture with no predictable outcome.

[49] The potential product was to be manufactured in China. Steve had no samples of what the Chinese manufacturers could produce, no pricing for such products, no website, no warehouses and no employees. He had an idea. Lee was a friend living in Stockholm, Sweden; whom he knew to have been involved in sales and had recently obtained some form of MBA (whether a degree or a diploma in an executive MBA type program was not clear on the evidence). Lee expressed an interest in being involved. If the venture was successful, marketing the product in Europe may be of benefit to the venture, and from an objective perspective having Lee as a co-venturer was reasonable. In addition he was prepared to invest money in the venture.

[50] I find that following the June/July 2005 discussions the evidence establishes a clear and unequivocal communication respecting the contractual terms that a reasonable person would consider to be the offer by Steve and acceptance by Lee that in return for his cash contribution to the first shipment of clogs and his other efforts to support Dawgs Clogs, he would receive a proportional (33%) shareholding interest in the corporation created by Steve for the Dawgs Clogs venture.

[51] In Exhibit D-1, Tab 36, his December 27, 2007 letter, Steve states in the first paragraph “Originally we discussed you putting in \$35,000.00 US and being responsible for initiating sales of Dawgs in Europe”. I accept the evidence of Lee that the agreement at the time was that he would pay for 1/3 of the cost of the first shipment of shoes and in return would have a proportionate interest in the venture. He forwarded \$23,0000 CDN to DDD on October 28, 2005, being 1/3 of the cost of that shipment before it arrived in Canada. At this stage the venture was speculative. The commercial prospects for the venture were going to depend on the success of marketing those initial

27,000 pairs. I reject the evidence of Steve that Lee breached an agreement to contribute \$35,000 US. The evidence satisfies me that at no point until December of 2007 did Steve even suggest to Lee that he was in default of an obligation to pay \$35,000 US. He acknowledged that DDD recorded the \$23,000 CDN received on its books as a loan and that it has had the use of such monies since.

[52] As for Steve's position that Lee was in breach of his obligations to initiate sales in Europe, I have already found no such breach. The evidence establishes that:

- a. Lee attended at his own cost the Madrid Shoe Fair in September of 2005, only had samples and no product available and was unable to book sales;
- b. On December 8, 2005 Lee was attempting to identify Swedish retailers to market to;
- c. The first shipment of shoes only arrived in Canada November of 2005 and the clogs were marketed within the Canadian market and perhaps in the United States. There was no evidence that the clogs were ever available for Lee to sell in Europe;
- d. By the end of 2005 Crocs had advanced its claim that Dawgs was breaching its design and other rights and litigation was commenced by them in February of 2006;
- e. Upon the Crocs' claims arising Lee was involved in developing shoe designs that would meet the Crocs' claim of design infringement; and
- f. Given the Crocs' litigation Dawgs Clogs or DDD was in no position to undertake selling product in Europe and in the June 30, 2006 letter

of Barrie to Lee, Exhibit P-1, Tab 21, he was expressly instructed that no shoes were to be sold in Europe.

[53] I am satisfied by the evidence that there was an agreement concluded between Steve and Lee that Lee would be a co-venturer in the Dawgs Clogs venture proportionate to his share of the cost of the first shipment of shoes. To use Steve's language, their deal was that Lee was to have skin in the game; but that agreed skin in the game was his contribution to the cost of the first shipment and understanding that he would contribute to the business by efforts to initiate sales in Europe. An obligation to extend efforts to initiate sales does not include an obligation to conclude sales, particularly when no shoes were made available for him to sell. The Crocs' position and litigation intervened, and Steve and Barrie decided no shoes were to be sold in Europe without their approval. Thus there could be no breach on Lee's part in that respect.

[54] The law is clear that:

- a. Consensus may be manifested by a combination of word and conduct, including silence;
- b. Where it is unclear whether or not the parties have in fact agreed, the court may resort to evidence beyond the contractual language including the factual matrix in existence at the relevant time and the genesis and aim of the transaction; and
- c. The conduct of parties during and subsequent to the purported making of a contract are admissible to determine whether the parties did in fact make a binding contract and what the contractual terms of the contract were.

[55] The following factual matrix and actions corroborate the evidence of Lee and lead me to the conclusions I reach:

- a. Lee's payment of \$23,000 and the fact that it was received and used by Steve and DDD without any comment or qualification. If it was not being accepted on the basis Lee testified to, Steve had an obligation to address the basis for the payment. Instead he was silent and used the funds for unspecified purposes for the benefit of DDD;
- b. Lee's contributions to the Dawgs Clogs venture outlined in paragraphs 42 and 43 above; and
- c. The tenor of and reasonable inferences to be drawn from the communications between Lee and Steve between August of 2005 and January of 2006

[56] I find that there was *consensus ad idem* that a company was to be incorporated to carry on the Dawgs Clogs venture. Steve's agreement with Lee was that Lee would be issued shares in that company proportionate to his contribution to the cost of the first shipment of shoes. The evidence satisfies me that DDD was the company that assumed the business and assets of the Dawgs Clogs venture.

[57] The bottom line is that I find the three criteria for a valid contract from the perspective of an objective bystander have been proven on the balance of probabilities, namely:

- a. The parties intended to contract;
- b. The parties reached an agreement on all essential terms; and
- c. The essential terms are sufficiently certain.

[58] Lee's agreement with Steve was that he was to receive 1/3 of the shares of DDD as he has claimed. However, this finding is not the end of their relationship, dealings and agreement.

[59] The combination of the apparent success of Dawgs in the clogs market place, the need to raise capital to finance continuing and expanded operation of Dawgs Clogs and the Crocs' challenge changed the situation that Dawgs Clogs was facing and perhaps other factors led to Steve and Lee modifying their original agreement.

[60] CED §168 states that Canadian courts have generally accepted that once a contract has been entered into, the parties must perform their respective obligations in good faith. It cites, *inter alia*, *Bhasin v Hrynew*, 2014 SCC 71, [2014] 3 SCR 494, where the Supreme Court created a new common law duty under the umbrella of good faith in the performance of contracts.

[61] The parties' communications following January 28, 2006 leading up to their May 2006 meeting of Steve and Lee in Saskatoon demonstrates that they were addressing the changed circumstances, the need for additional investment and the impact of this on their initial agreement. In the January 28, 2006 exchange of emails (Exhibit P-1, Tab 14) Steve is addressing the need to make room in the structure for Barrie and the additional \$125,000 they raised and telling Lee that "at the end of the day everyone is going to be involved in a much larger company than we first envisioned". In that same exchange Lee in reference to the ownership references "Your 30%, my 15%, Angies percentage and the rest of the partners of the ownership of Dawgs Clogs". This exchange makes it clear that Lee, consistent with his obligations of good faith in the performance of the contract, was recognizing that adjustments were required. At this point the evidence satisfies me that Lee is accepting a reduction of his ownership to 15% in light of additional investments that he has been advised have

occurred. This acceptance is consistent with his obligation of good faith in the performance of the contract or at a minimum reasonable reaction in the circumstances.

[62] For his part Steve is not disputing Lee's ownership position, but is stating that the respective ownerships should be adjusted to represent the investment of others. He, in effect, assures Lee that "everyone" (which clearly includes Lee) is going to be involved in a much larger company than was first envisioned. This representation, in my assessment, would have respected the obligation of good faith in the performance of their contract that Steve had. He again provides Lee assurances in his Feb. 4, 2006 email (Exhibit P-1, Tab 14) where he responds to Lee's expressed concerns by stating "I understand where you are coming from and am working towards a structure with everyones concerns in mind." The reasonable inference to draw from these exchanges is that Steve is acknowledging their original agreement but saying it needs to be modified.

[63] The May 2006 meeting and the document Exhibit P-2 that I find was created at that meeting by Steve and Lee is foundational. The top half of that document, in the handwriting of Steve, contains information provided by Steve with respect to the investments made by various individuals to that date in the Dawgs Clogs venture. In his evidence Steve provided no substantive evidence contradicting Lee's evidence respecting Exhibit P-2. Significantly he did not dispute Lee's evidence that the top half of Exhibit P-2 was in his handwriting. It is clear from that document that Steve is representing to Lee that his financial investment in the venture constitutes 8% of the total financial investment and that on that basis his shareholding in DDD would be 8%.

[64] I am satisfied that Lee accepted Steve's representations at face value and accepted his shareholding would be 8% in light of the representations Steve made with respect to additional investors. This acceptance by Lee, if not an obligation arising from his duty of good faith in the performance of his contract with Steve, was at a minimum

an appropriate or honourable thing to do in the circumstances. It was consistent with Lee's earlier acceptance of an ownership position reduced to 15% evidenced by their January 28 email exchange. Lee's acceptance of such a reduction was made accepting at face value Steve's representations with respect to the contributions of other investors. Beyond this document there was no evidence presented by the defendants that the additional investments recorded on Exhibit P-2 by Steve were accurate.

[65] I find that at this meeting, as proposed by Steve, Lee agreed his ownership interest would be reduced to 8%. This was an amendment to their initial agreement. I find from that point forward the agreement between them was that Lee's ownership of Dawgs Clogs and DDD was 8%. Steve expressly acknowledges in his response to Lee's November 16, 2006 email (Exhibit P-1, Tab 36) that Lee had an interest in Dawg Clogs and that they had an agreement. In response to Lee's reference to a "COMPLETE buy-out" of his 8% shareholding, Steve responds that it is, "AS AGREED TO BEFORE". Thus, the record is clear they had agreed Lee's interest was 8%. The follow-up proposal to buy this 8% out was never agreed to.

[66] The bottom half of Exhibit P-2, in the handwriting of Lee, I find were notes he made of a proposal being made by Steve of an additional or alternative agreement pursuant to which a Swedish Company would be the exclusive distributor of Dawgs Clogs in either Europe or Sweden. It was not clear on the evidence at trial which it was at the time of the May meeting. This never happened.

[67] In a follow-up email of June 17, 2006 (Exhibit P-1, Tab 18) Lee advises Steve that he would consider reducing his percentage to 5% if they could agree on a valuation of Dawgs Canada. Lee testified that his email was in response to another proposal of Steve's that Lee take on a Swedish distributorship of Dawgs, reduce his ownership of Dawgs Clogs and use the reduction funds to fund the suggested Swedish distributorship.

[68] Following the May 2006 meeting there were continuing negotiations and correspondence relating to the option of an exclusive distributorship agreement for Lee or a corporation formed by him as evidenced by the email correspondence between June 5, 2006 and February of 2007. This correspondence is detailed in paragraph 35 above. Those negotiations did not result in any new agreements.

[69] As noted above, on November 1, 2006 Steve and Barrie become directors of DDD along with Angie and the following shares were issued by DDD:

- 20,000 to 101088342 Saskatchewan Ltd.;
- 6,000 to 101117188 Saskatchewan Ltd.;
- 20,000 to BAM Marketing Inc.; and
- 60,000 to Top Dawg Management Inc.

The defendants admit in their defence that Steve is the sole director of Top Dawg Management Inc., Angie of 110088342 and Barrie of BAM Marketing Inc. The evidence did not reveal the individual related to 101117188.

[70] A possible explanation for this action is that Steve and the other defendants believed at that time that they were going to conclude an agreement with Lee in which he gave up his ownership interest in DDD in return for the distributorship agreement they were negotiating on with Lee at the time. However, no such agreement was concluded and the only extant agreement was Lee's agreement with Steve that his ownership position in DDD was 8% of the issued shares.

[71] Following February of 2007 there was no additional communication between Lee and Steve until December 20, 2007 when Lee's lawyers Stevenson and Company sent a letter on his behalf (Exhibit P-1, Tab 47) to Steve, Barrie, Angie, DDD and a company called Dawgs Canada Distribution Ltd. Steve testified that this last company while incorporated was struck from the corporate register on August 13, 2013.

## **Conclusion**

[72] It is my decision that the evidence establishes there was, by amendment of their initial agreement, an agreement between Steve and Lee that Lee would receive an 8% shareholder's ownership interest in DDD, being the corporation incorporated to hold and operate the Dawgs Clogs business. I find that Steve has breached his agreement with Lee, as I have above found the essential terms to be. Steve is personally liable for his breach of contract and the specific relief appropriate for that relief remains to be decided in future proceedings. DDD is also liable since on the basis of the evidence before me Steve was acting throughout as both the ostensible and actual agent of DDD.

[73] I also find that Lee has no liability to the defendants arising from their counterclaim.

[74] Lee's claim states that specific performance is the only manner to adequately address "the Defendants' breach of contract" but in the alternative claims damages for the breach. Under the terms of the bifurcation order my role is to determine the specified liability issues only. The remedy(s) to which Lee may be entitled, whether a form of specific performance or damages, is a matter that remains to be tried and determined.

[75] There was no evidence presented of any contractual agreement between Lee and Angie, Barrie or any of the corporate defendants other than DDD, nor of breaches of fiduciary duty or oppressive conduct on their parts. There was no evidence presented supporting nor claim made that Steve was an agent acting on their behalf and that they as principals are bound by his agreements as their agent. Thus Lee's claim against them is dismissed.

**Costs**

[76] Given my findings above I make the following awards of costs:

- a. As between Lee and the defendants other than Steve and DDD, they shall each bear their own costs. Lee was not successful in his claim against them, and they were not successful in their counterclaim against Lee. The participation of these defendants in the trial and the evidence of Lee directed against them was minor. Thus I find that it is appropriate that there be no award of costs among them.
- b. As between Lee and Steve and DDD, Lee has been successful in both his claim against Steve and DDD and defending their counterclaims. Accordingly, Lee shall be entitled to his taxable costs of both aspects from Steve and DDD. These costs shall be taxed at the Column 3 level.

\_\_\_\_\_  
J.  
B.J. SCHERMAN