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January 22, 2024 22 janvier 2024			
Maria-Karina Andone			
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Court File No. A-____ -__

FEDERAL COURT OF APPEAL

BETWEEN:

**USINAGE PRO-24 INC.
C/O/B AS NORDIK BLADES**

Appellant
(Plaintiff/Defendant by Counterclaim)

AND:

VALLEY BLADES LTD.

Respondent
(Defendant/Plaintiff by Counterclaim)

NOTICE OF APPEAL

TO THE RESPONDENT:

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

THIS APPEAL will be heard by the Federal Court of Appeal at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the Appellant. The Appellant requests that this appeal be heard at Ottawa or Montreal, whichever is most expeditious.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the

Federal Courts Rules and serve it on the Appellant's solicitor, or where the Appellant is self-represented, on the Appellant, **WITHIN 10 DAYS** of being served with this notice of appeal.

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

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-996-6795) or at any local office.

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

Issued by: _____

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APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the Judgment of The Honourable Madam Justice St-Louis (the “**Trial Judge**”) dated December 22, 2023, in Federal Court File No. T-416-19 (the “**Judgment**”).

THE APPELLANT ASKS THAT this Court:

1. Allow this appeal and reverse and/or set aside the Judgment;
2. Grant the Appellant’s action in file T-416-19 and declare that Claims 1,2,3,4,5,6,7,8,10,11,12,13,14,16,17,19,20,21,22,23,24,25,26,27,28,31,32 34,50,51,54,55,56,57,58,59,60,61,62 and 64 of patent 2,965,426 (**‘426**) are valid and infringed;
3. Grant the Appellant’s action in file T-416-19 and declare that Claims 1,2,4,5,7,9,10,11,12,13 and 14 of patent 2,992,233 (**‘233**) are valid and infringed;
4. Grant the Appellant its costs both in this Court and in the Court below;
5. Grant such further and other relief as this Honourable Court may find just.

THE GROUNDS OF APPEAL ARE AS FOLLOWS:

6. The Trial Judge erred in the application of the law of obviousness by performing a classic hindsight analysis.
7. The Trial Judge made an error of mixed fact and law and misapprehended the evidence of the expert Paonessa by accepting his **ex post facto** analysis and opinion based on prior art put to him by counsel without his own research. This is especially so given her own comments as to the expert’s attitude of *fulfilling his counsel’s agenda* on cross-examination.

8. The Trial Judge erred in the attribution of the burden of proving inventiveness and in reproaching the inventor for *inter alia*, not having opened the PolarFlex product or conducting a literature search.
9. The Trial Judge erred in law by excluding the teachings of relevant case law in her analysis as a result of an erroneous characterisation of the disputed claims on the basis of whether the patents did or did not constitute what the judgment refers to as combination patents.
10. The Trial Judge has ignored the principle that inventive ingenuity may be found in the combination of known parts and did not ask whether the combination of the disclosures to form the “mosaic” was obvious. This error is overriding and palpable since none of the prior art suggests / teaches to not only have a resilient material layer coated on the blade portion, which is integral with the compressible bushings, but also have them defined in the blade portion or extending through the blade portion. A key result of the inventive combination was a change in the location of the restorative or return force, as compared to the two prior art products.
11. The Trial Judge erred by making an improper and tainted analysis of the level of difficulty or ease of implementation of the invention and the adaptability of prior art to the invention, such as the attaining of integrality of rubber bushings or the ability of Plaintiff to fuse rubber to its prior art product.
12. The Trial Judge erred in failing to accept the admission that the PolarFlex blade is not integrated with the bushings and correctly apply this undisputed fact to the analysis instead of maintaining its relevance solely based on a response in Mr. Hunt’s his cross-examination that this could be done by fusing the bushings to only one side of the rubber housing of one of the prior art products. The fact is it was never done. Instead, Valley Blades simply copied the patented Nordik blade.

13. This error was further compounded by the fact that to fuse in this way runs contrary to one of the main features of the structure of the PolarFlex system set out in its own patent: the easy and partial replacement of the system components:

Due to the design and assembly each of the wearing edge attachment systems 10 are removable, thereby allowing for the easy replacement of worn parts such as the wearing edge 18 itself. Furthermore the instant invention allows for the ecologically safe disposal of the various elements, namely the wearing edge 18, the fastening means 24 and the flexible means 20 by way of example only.

Advantages of the present invention are the ability to isolate the wearing edge in a flexible means so as eliminate any metal on metal contact within the system, the ability to adapt to a wide variety of road surfaces while maintaining contact with the road surface, may be used with different types of edges so as accommodate different applications, design reduces the possibility of catastrophic failure as exhibited with excessive wear, easy installation and replacement, ecologically safe disposal of worn edges and flexible elements, customized motion control along independent vectors, does not require any modification to the vehicle it is mounted on and does not change the traditional operating parameters namely height of the snow plough.

14. The Court did not analyze or state how the skilled worker not only could, but would, based on the common general knowledge, have responded in the light of the prior art, or be motivated to make the patented combination. This was an error of law.
15. The Trial Judge lost sight of the wording of the claims in her obviousness analysis, and it impaired the inquiry. Claims 1, 20 and 50 of '426 and claims 1 and 10 of '233 all state that the blade portion has at least two bushing holes **extending therethrough** or **defined therein** while claim 35, in addition to allowing the presence of just one bushing hole, as pointed out in the Judgment, more importantly does not include the limitations of **extending therethrough or defined therein**. The Judgment is silent on this crucial distinction, which has an impact on restorative force.

16. The Trial Judge has ignored or misunderstood the distinction between claim 35 of '426 and the rest of the claims at issue and it has resulted in an error in the analysis of the distinctions between the prior art and the invention as claimed.
17. Ignoring the limitations of *extending therethrough* or *defined therein* which has an impact on restorative force, has also resulted in an error to the effect that the gap to be bridged was simply integrating two bushings instead of one.
18. The Trial Judge erred in stating that the issue was narrowed to determining whether the integration of two bushings rather than one was obvious. The issue was not to determine if the integration of two bushings rather than one is obvious, but to determine if the integrating of a bushing inserted in a bushing hole extending through/defined in a blade portion with a resilient material layer coated on the same blade portion, is obvious.
19. The Trial Judge has erred in the appreciation of the Joma prior art and provided an incorrect understanding of it. This finding is not based on expert opinion. A clear expression of this error is found in paragraph 118 in the last phrase. This error is palpable and overriding, since, *inter alia*, the claims of CA'426 and CA'233 recite that the bushing hole is part of the blade portion: it is *defined in* the blade portion, it *extends through* the blade portion.
20. In the Joma patent or product, any element even akin to a bushing hole is defined by the shape of the blade portion and, more particular, a section of its outside perimeter. It is not part of the blade portion. It does not extend through the blade. The restorative force comes from above, as is the case in the PolarFlex product and patent.

21. The Trial Judge erred by ignoring and failing to consider the presence and key role of the very distinctive upper flexible element of the PolarFlex prior art and related patent in the obviousness analysis.
22. The Trial Judge erred by providing no analysis and insufficient reasons on how the two main prior art systems function and no reasons are given as to how or why a POSITA would be motivated to combine what are, on their face, radically different structures.
23. The Trial Judge erred by failing to even remotely analyze, explore or comment on the differences in exactly how the prior art and the inventions as claimed control the vertical, angular and back and forth movement of the blade in order to evaluate inventiveness. Instead, the Court erred by improperly limiting its inquiry to searching for and identifying the presence of individual components of the claims in a mosaic of prior art and CGK without regard as to how they combine to achieve the desired functionality of the blade and system, especially as related to movement.
24. The Trial Judge erred in ignoring in the analysis that the inventions were not obvious to people with more knowledge or inventive imagination than the POSITA: Valley Blades never thought of combining its own patented product with Joma or fusing parts. Instead, it copied the Move. These same people with more knowledge and inventive imagination also presumed the inventions were not a good idea and would not work and the judge erred in importing the question as to whether POSITAs are risk adverse or not. The Trial Judge erred in her application of the Amgen jurisprudence and allowing it to impact on her decision since it concerned the self-evident factor in the obvious-to-try test, a test that was not applied in the present case. The other Amgen jurisprudence is not about being risk adverse and in Leo the Court corrected the expert's impression that they had to presume the POSITA is risk adverse.

25. The Trial Judge erred in referring to and considering the Quebec Superior Court Hamel litigation and Judgment in her appreciation of the evidence and credibility of the expert Bouchard given that the context of the case and the backdrop to his opinion was not taken under consideration or even explained: the Judgment is clear that the patentee in that case had taken the position that more than half of the elements in the alleged claim were not essential elements. Bouchard had opined in that specific context.
26. Furthermore, the Quebec Court of Appeal overturned the decision of the Superior Court on infringement while this matter was under advisement, holding all elements essential, and confirming Mr. Bouchard was correct all along on Claim construction and infringement (invalidity was a moot issue as the patent had expired).
27. In addition, both the Quebec Superior Court and Quebec Court of Appeal Hamel Judgments addressed the key issue of restorative force (*force de restitution*) in their analyses of the Hamel prior art patent and various other issues. The absence of consideration of restorative force in the Judgment, whether in connection with the Hamel patent or the other prior art and the claims at issue, impaired the obviousness inquiry.
28. It was also an error to impeach Bouchard's credibility simply because the Court found his views to be contrary to those he appeared to have put forth in Hamel. The contrary would have been troubling: his opinion on obviousness was rejected in Hamel. As to the negative inference drawn on the issue of claim 35, it is unduly harsh and erroneously presumes bad faith when good faith is presumed.
29. The Appellant proposes that the Appeal be heard in Montreal, Quebec.

MONTREAL, this 22nd day of January 2024



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Solicitors for the Appellant

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