

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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LINDSAY CORPORATION  
Petitioner

v.

VALMONT INDUSTRIES, INC.  
Patent Owner

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Case No. IPR2015-01039  
U.S. Patent No. 7,003,357

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**PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE**

## **I. INTRODUCTION**

Valmont Industries, Inc. (“Valmont”) requests that the Board exclude Exhibit 1019 (Design Patterns) and the identified paragraphs of Exhibit 1009 (Declaration of Dr. Craig Rosenberg) and Exhibit 1018 (Reply Declaration of Dr. Craig Rosenberg) (collectively, the “Challenged Evidence”) submitted by Lindsay Corporation (“Lindsay”), for the reasons stated below. Valmont also respectfully requests that the Board preclude Lindsay from using the Challenged Evidence at any hearing or in any paper in this proceeding.

## **II. STATEMENT OF MATERIAL FACTS**

Valmont timely objected to Exhibit 1009, based on the grounds asserted herein, in its Notice of Objections served on October 8, 2015. Lindsay relies on Exhibit 1009 in its Petition, filed on April 10, 2015, and in its Reply, filed April 22, 2016. Valmont timely objected to Exhibits 1018 and 1019 in its Notice of Objections to Petitioner’s Supplemental Evidence served on April 22, 2016. Lindsay relies on Exhibits 1018 and 1019 in its Reply, filed on April 22, 2016.

## **III. LEGAL STANDARD**

The admissibility of expert testimony in IPRs is governed by the Federal Rules of Evidence. *See* 37 C.F.R. § 42.62 (“[T]he Federal Rules of Evidence shall apply to [an IPR] proceeding.”). According to Rule 402, “[i]rrelevant evidence is not admissible.” Evidence is only relevant if it has a “tendency to make a fact more or

less probable than it would be without the evidence” and “the fact is of consequence in determining the action.” Fed. R. Evid. 401.

According to Rule 702, an expert witness must be “qualified as an expert by knowledge, skill, experience, training, or education,” and the testimony must “help the trier of fact to understand the evidence or to determine a fact in issue.” In addition, Rule 702 requires that the expert’s testimony be “based on sufficient facts or data” and “the product of reliable principles and methods”; and the expert must “reliably appl[y] the principles and methods to the facts of the case.” *Id.* Finally, “[e]xpert testimony that does not disclose the underlying facts or data on which the opinion is based is entitled to little or no weight,” 37 C.F.R. § 42.65(a).

In *Daubert*, the Supreme Court held that scientific expert testimony is admissible only if it is ***both relevant and reliable***. See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993); see also *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (stating that in *Daubert* “this Court focused upon the admissibility of scientific expert testimony. It pointed out that such testimony is admissible only if it is both relevant and reliable.”). In *Kumho*, the Supreme Court extended its holding in *Daubert* to apply “not only to testimony based on ‘scientific’ knowledge, but also to testimony based on ‘technical’ and ‘other specialized’ knowledge.” 526 U.S. at 141.

In determining whether an expert's testimony is admissible, the Board must determine whether: (1) the expert is qualified; (2) the expert's testimony is relevant; and (3) the expert's testimony is based on sufficient facts or data and is reliable. If any of these requirements is not met, the expert's proposed evidence and opinions should be excluded under Rule 702, Rule 402, 37 C.F.R. § 42.65(a), and the Supreme Court's holdings in *Daubert* and *Kumho*.

#### IV. ARGUMENTS

##### A. Numerous conclusory statements in Exhibits 1018 and 1009 should be excluded under FRE 702, 703, and 37 C.F.R. § 42.65(a).

Paragraphs 13-14, 43, and 46 in Exhibit 1009 and Paragraphs 3, 8, 12, 17-18, 26-27, and 29 in Exhibit 1019 should be excluded under at least FRE 702, 703, and 37 C.F.R. § 42.65(a), as they are conclusory and unsupported by additional evidence as explained below. Expert testimony that “does little more than repeat, without citation to additional evidence, the conclusory arguments of their respective counsel” will be accorded little or no weight. *Edmund Optics, Inc. v. Semrock, Inc.*, IPR2014-00583 (Paper No. 50) (emphasis added).

##### 1. Dr. Rosenberg fails to provide evidentiary support for his conclusory statements that a “handheld device” includes a “laptop.”

Dr. Rosenberg's statements that a “handheld device” includes a “laptop” merely parrot the conclusory arguments of Lindsay's counsel. *See e.g.*, Ex. 1009, ¶¶ 13, 14, 43, and 46; Ex. 1018, ¶ 3; Petition at 6; and Reply at 4. None of these

statements disclose the underlying facts or data on which the opinion is based and thus, should be excluded. FRE 702, 703; 37 C.F.R. § 42.65(a); *see also Infobionic, Inc.*, IPR2015-01704, 2016 WL 1081571 (Feb. 16, 2016) (“We do not find the testimony of Petitioner's expert to be persuasive or helpful as it repeats the Petitioner's arguments and offers little or no elaboration as to how one of ordinary skill in the art would understand the term ‘subset.’”).

For example, Dr. Rosenberg makes several presumptive statements that a “laptop” is a “handheld device” without explaining the underlying basis for that conclusion. *See* Ex. 1009, ¶¶ 13, 14; Ex. 1018, ¶ 3. In fact, Dr. Rosenberg acknowledged in his deposition that the only documentary evidence he relied for his conclusion was the Dictionary.com definition of “handheld” published more than a decade after the filing date of the ‘357 application. *See* Cross-Examination of Petitioner’s Reply witness, Craig Rosenberg, Ph.D. (Exhibit 2019), 15:12-25, 17:6-18:1.

**2. Dr. Rosenberg’s interpretation of numerous claim terms relate to legal issues for which Dr. Rosenberg is not an expert.**

The statements in Paragraph 43 of Exhibit 1009 implicate Dr. Rosenberg’s understanding of United States patent law and/or patent examination practice with respect to a person of ordinary skill in the art (POSITA), a subject on which he is not an expert. The paragraphs should thus be excluded under Rules 401 and 402 as

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