Appeal No. 2010-1163
(Serial No. 11/466,338)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

IN RE BILL J. BONNSTETTER AND SUSAN J. FRONK

Appeal from the United States Patent and Trademark Office,
Board of Patent Appeals and Interferences.

BRIEF FOR APPELLEE – DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE

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Representative Claim

1. A method of benchmarking a job comprising:

identifying subject matter experts for the job;

facilitating discussion with the subject matter experts to identify and prioritize key accountabilities of the job;

giving a survey to subject matter experts to determine soft skills necessary for superior performance in the job, the survey incorporating the key accountabilities;

combining responses to the survey from multiple subject matter experts into a composite report identifying and prioritizing skills for superior performance for the job; and

interviewing a job candidate relative to said prioritized skills.

A385.

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STATEMENT OF RELATED CASES

The Director is not aware of any other appeal in connection with this case that has previously been before this Court, or that is currently pending in any other court. The Director is also unaware of any other case pending in this or any other court that will directly affect, or be directly affected by, this Court's decision in this appeal.

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Appeal from the United States Patent and Trademark Office,
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I. STATEMENT OF THE ISSUE

Bonnstetter claims a method of (1) obtaining survey results from subject matter experts regarding competencies required for superior performance in a particular job; (2) combining the survey results into a composite report identifying and prioritizing those competencies; and (3) interviewing a candidate for the job relative to those competencies. Barney teaches a method of surveying subject matter experts regarding job-related competencies and compiling and prioritizing the results. Fuerst teaches a computer system for compiling survey results into a composite report. Nadkarni teaches selecting and interviewing job candidates

based on particular competencies. In view of that prior art, would Bonnstetter's claims have been obvious?

II. STATEMENT OF THE CASE

Appellants Bill J. Bonnstetter and Susan J. Fronk (collectively, "Bonnstetter") filed U.S. Patent Application Serial No. 11/466,338 (the "'338 application") on October 18, 2006. *See* A11.[1] The examiner rejected all six of the claims in the '338 application as obvious over prior art U.S. Patent No. 6,070,143 to Matthew F. Barney, et al. ("Barney") in view of prior art U.S. Patent No. 6,189,029 B1 to Carol Fuerst ("Fuerst") and U.S. Patent No. 6,266,659 B1 to Uday P. Nadkarni ("Nadkarni"). *See* A389-96. The Board affirmed the examiner's rejections, A1-8, and Bonnstetter appealed to this Court.

III. STATEMENT OF THE FACTS

A. The Claimed Invention: A Method Of Surveying Subject Matter Experts To Identify And Prioritize Key Competencies Of A Job, Compiling The Survey Results In A Composite Report, And Interviewing Job Candidates Based On Those Competencies

The '338 application claims a method of (1) obtaining survey results from subject matter experts regarding key competencies for superior performance in a particular job; (2) combining the survey results into a composite report identifying and prioritizing those competencies; and (3) interviewing a candidate for the job

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[1] Citations to "A___" refer to the Joint Appendix. Citations to "Br. at __" refer to Bonnstetter's brief.

relative to those competencies. Claim 1 of the '338 application – the only claim at issue in this appeal[2] – recites:

> 1. A method of benchmarking a job comprising:
>
> identifying subject matter experts for the job;
>
> facilitating discussion with the subject matter experts to identify and prioritize key accountabilities of the job;
>
> giving a survey to subject matter experts to determine soft skills necessary for superior performance in the job, the survey incorporating the key accountabilities;
>
> combining responses to the survey from multiple subject matter experts into a composite report identifying and prioritizing skills for superior performance for the job; and
>
> interviewing a job candidate relative to said prioritized skills.

A385.

Unlike the claim, the specification does not use the term "accountabilities." Instead, it uses the term "competency," which it defines in pertinent part as "a behaviorally-related observable characteristic in the workplace relative to a particular job." A166 (¶ [0110]).[3] The specification distinguishes between "hard

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[2] "Appellants do not rely upon the features of claims 2 through 6 independently of claim 1 for patentability." Br. at 29.

[3] Bonnstetter's brief uses the terms "accountability," "skill," and "competency" interchangeably. *See, e.g.*, Br. at 10 ("The survey incorporates the key accountabilities of a job and combines the responses to the survey from multiple subject matter experts into a composite report identifying, calibrating and prioritizing skills for superior performance in the job; thus, assessing an individual against the competency requirements for a particular job.") (emphases added); *id.*

skills" such as "technical competencies" and "soft skills," which are "more behavioral related." A163 (¶ [0017]). It focuses on soft skills and sets forth a "Set of Competencies," which is a "standardized set" of such skills, including "Team Work," "Inter-Personal Skills," and "Empathy." A167-68 (¶¶ [0121]-[0149]).

The specification describes giving a survey to people "who have knowledge about" the job at issue, i.e., the claimed "subject matter experts." A169 (¶ [0178]). The subject matter experts rate the importance of each competency to the relevant job, and points are assigned to the survey responses to identify whether a particular competency is "very important," "important," or "not important." A169-70 (¶¶ [0175], [0183]). The answers from each of the subject matter experts are combined into a comprehensive report, in which "only a few of the Competencies would normally be reported. It is believed that five to seven of the highest ranked competencies is [sic] all that is required to give a good characterization of the position." A170 (¶ [0186]).

Suggested interview questions can be created based on the competencies the subject matter experts deem most important, *id.* (¶ [0192]), but the specification repeatedly makes clear that the interviewer retains control of which questions to ask the job candidate, A52 (instructing the interviewer to "review the suggestions

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at 21 (referring to "competencies/accountabilities"). To avoid confusion, the USPTO uses the term "competency" except where the context requires a different term.

for behavioral interview questions and select the ones that seem most appropriate for the position" and noting that, "[f]or most positions, additional questions will need to be developed"); A75 (same); A91 (same); A107 (same); A123 (same).

B. The Prior Art

1. Barney: A Method Of Surveying Subject Matter Experts To Identify And Prioritize Key Competencies Of A Job

Barney[4] teaches a method and software tool for analyzing work competencies for particular jobs. A414 (Title). Barney refers to the work competencies as "dimensions," which can include both soft skills and hard skills. A429; col. 3, lines 51-55 (describing that the "worker-oriented dimensions" can include both soft skills such as "work styles (personality traits)" and hard skills such as "education," "certifications," and "languages"). Barney teaches that an analyst evaluating a particular job may use a program "to select work-oriented, worker-oriented and work context dimensions that are relevant to the job." A430, col. 6, lines 3-5. The analyst may determine which dimensions are relevant "through prior understanding, discussion with subject matter experts, or from observation of the job tasks." *Id.*, col. 6, lines 5-8.

The analyst sends preliminary surveys to "subject matter experts" who rate the job dimensions "on appropriate scales (e.g., difficulty, importance,

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[4] System and Method for Analyzing Work Requirements and Linking Human Resource Products to Jobs, U.S. Patent No. 6,070,143 (filed Dec. 5, 1997) (issued May 30, 2000). A414-34.

frequency)." A430, col. 6, lines 46-50. The analyst then uses a "job analysis wizard" to compile the preliminary survey results, "determine dimensions that are critical to the job," and filter out the dimensions that the subject matter experts deem "unimportant." A430-31, col. 6, line 55 – col. 7, line 9; *see also* A432, col. 10, lines 5-7 ("The analyst may filter out dimensions considered by the subject matter experts to be unimportant."). The analyst next sends a final survey to the subject matter experts, who "link critical work-oriented dimensions to critical worker-oriented dimensions." A431, col. 7, lines 10-15.

2. Fuerst: A Software Tool For Collecting And Compiling Survey Results Into A Composite Report

Fuerst[5] teaches a software tool for creating surveys and collecting and tabulating survey results. A491, col. 2, lines 19-21. Fuerst's survey tool allows the survey's creator to access the survey's results "with the results automatically tabulated as a composite result." A494, col. 7, line 65 – col. 8, line 4; *see also* A483 (Fig. 9). Specifically, Fuerst teaches that the survey tool "generates a composite survey result summary" from the results of a selected survey. A494, col. 8, lines 9-22; *see also* A483 (Fig. 9). Fuerst also provides "flow diagrams that illustrate the script for reviewing survey results," A495, col. 9, lines 9-10, including Figure 15, which shows display of "composite survey results," A489.

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[5] Web Survey Tool Builder and Result Compiler, U.S. Patent No. 6,189,029 B1 (filed Sep. 20, 1996) (issued Feb. 13, 2001). A474-97.

The examiner concluded that it would have been obvious to modify Barney's disclosure "to include the teachings of Fuerst in order to ensure that users will have access to the survey data." A392.

3. Nadkarni: A Method Of Selecting And Interviewing Job Candidates Based On Their Competencies

Nadkarni[6] teaches a method of using a database to select job candidates to be interviewed, based on the candidates' competencies. An employer specifies certain competencies desired in a worker for a given job and searches the database for candidates with those competencies. A472, col. 9, lines 8-24. "Once a preferred candidate is identified, the system may provide means for scheduling an interview with the candidate." *Id.*, col. 10, lines 10-12. The examiner determined that it would have been obvious to use Nadkarni's interview to "assess work requirements relating to jobs." A392.

C. The Board Found The Claims Obvious In View Of The Prior Art

The Board affirmed the examiner's rejection of claims 1-6 as unpatentable for obviousness over Barney, Fuerst, and Nadkarni. A3, A8. The Board found that Barney's teachings that the subject matter experts both (1) "rate the job dimensions on a scale of importance" and (2) "decide which job dimensions are critical dimensions" disclosed "that the experts prioritize job dimensions or

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[6] Skills Database Management System and Method, U.S. Patent No. 6,266,659 B1 (filed Aug. 7, 1998) (issued Jul. 24, 2001). A435-73.

accountabilities." A4. The Board also concluded that Barney's disclosure of compiling survey responses from subject matter experts "is a disclosure that the responses are combined into a composite report as broadly claimed." A7. The Board also found that Fuerst's disclosure of a survey tool that generates a composite survey report satisfies that limitation of Bonnstetter's claim. A7. Finally, the Board rejected Bonnstetter's argument that Nadkarni teaches away from the claimed invention because nothing in Nadkarni "would have discouraged a person of ordinary skill in the art from identifying skills by experts." *Id.* Having rejected all of the arguments Bonnstetter raised in his appeal, the Board affirmed the examiner's obviousness rejection. A7-8.

IV. SUMMARY OF THE ARGUMENT

Bonnstetter claims a method of (1) obtaining survey results from subject matter experts regarding competencies required for superior performance in a particular job; (2) combining the survey results into a composite report identifying and prioritizing those competencies; and (3) interviewing a candidate for the job relative to those competencies. The examiner and the Board correctly concluded that Bonnstetter's claim would have been obvious in view of the prior art, which teaches all three of those features.

Bonnstetter's brief essentially makes only two arguments: (1) that Barney does not teach that subject matter experts prioritize competencies; and (2) that

Nadkarni teaches away from the claimed invention. Neither argument has merit. Barney teaches giving surveys to subject matter experts, who rate competencies based on their "importance" in a particular job, and filtering out the competencies the experts deem "unimportant," thereby prioritizing those competencies. Nadkarni teaches that a job candidate with desired competencies can be interviewed relative to those competencies, and it says nothing to discourage the involvement of subject matter experts in determining which competencies are desirable for a particular job. Bonnstetter thus fails to show that the Board lacked substantial evidence for its obviousness ruling, and the Board's judgment should be affirmed.

V. ARGUMENT

A. Standard of Review

Bonnstetter only challenges the Board's judgment as lacking substantial evidence to support certain of its findings. *See* Br. at 2. "Substantial evidence is something less than the weight of the evidence but more than a mere scintilla of evidence," *In re Kotzab*, 217 F.3d 1365, 1369 (Fed. Cir. 2000), and "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consol. Edison Co. v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 229 (1938). "If the evidence in record will support several reasonable but contradictory conclusions," this Court "will not find the Board's decision unsupported by

substantial evidence simply because the Board chose one conclusion over another plausible alternative." *In re Jolley*, 308 F.3d 1317, 1320 (Fed. Cir. 2002).

B. Bonnstetter's Claims Would Have Been Obvious

1. The Prior Art Teaches All Of The Limitations Of The Claimed Method, Including Prioritizing Key Job Competencies

The examiner correctly rejected Bonnstetter's claims as obvious in view of Barney, Fuerst, and Nadkarni, and substantial evidence supports the Board's decision affirming that rejection. Barney teaches all but one of the limitations of the claimed method, including prioritizing key job competencies. A4, A6-7. Barney does not teach interviewing a job candidate relative to the prioritized competencies, but Nadkarni teaches that limitation. A4, A7. Fuerst clarifies that compiled survey results like those in Barney can be reported in a "composite" report, as claimed. *Id.* The examiner explained the reasons for combining the references as claimed. A392.[7]

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[7] The claims in the '338 application appear not to satisfy the machine-or-transformation test for patent eligibility of a method claim pursuant to 35 U.S.C. § 101. *See In re Bilski*, 545 F.3d 943, 954 (Fed. Cir. 2008) (en banc), *cert. granted sub nom. Bilski v. Kappos*, 129 S. Ct. 2735 (2009). Indeed, the specification states that one of the "objects, features and advantages of the present invention" is that it "[c]an be implemented using paper and pencil" as well as by "Intranet or Internet." A164 (¶¶ [0025], [0048]); *see also* A169 (¶ [0164]) (stating that the survey "could be manually filled out").

The examiner entered the final rejection in the '338 application on July 25, 2007, A350, before this Court issued its decisions in *Bilski* and *In re Comiskey*, 499 F.3d 1365 (Fed. Cir. 2007), *vacated*, 554 F.3d 967 (Fed. Cir. 2009). For the sake of efficiency, and to avoid entering a new ground of rejection, the USPTO has

Bonnstetter alleges that the Board lacks substantial evidence for three findings, *see* Br. at 2, but each of those allegations rests on the same argument: Bonnstetter argues that Barney does not teach a method in which subject matter experts prioritize key competencies of a job. But, as the Board found, A4, Barney does teach such a method: (1) subject matter experts "rate" job competencies (which Barney calls "dimensions") by "importance" in a survey, A430, col. 6, lines 47-48; (2) based on these ratings by the subject matter experts, a job analyst may "determine dimensions that are critical to the job" using a "job analysis wizard," *id.*, col. 6, lines 55-58; and (3) "unimportant dimensions may then be filtered from the temporary job analysis database," A430-31, col. 6, line 66 – col. 7, line 1; *see also* A432, col. 10, lines 5-7 ("The analyst may filter out dimensions considered by the subject matter experts to be unimportant.").

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not addressed whether the claims satisfy § 101. *See Bilski*, 545 F.3d at 950 n.1 ("Although our decision in *Comiskey* may be misread by some as requiring in every case that the examiner conduct a § 101 analysis before assessing any other issue of patentability, we did not so hold. As with any other patentability requirement, an examiner may reject a claim solely on the basis of § 101. Or, if the examiner deems it appropriate, she may reject the claim on any other ground(s) without addressing § 101."); *see also Dann v. Johnston*, 425 U.S. 219, 220 (1976) ("Petitioner and respondent, as well as various Amici, have presented lengthy arguments addressed to [patent eligibility pursuant to § 101]. We find no need to treat that question in this case, however, because we conclude that in any event respondent's system is unpatentable on grounds of obviousness.") (citations omitted).

Notably, Barney teaches prioritization of key competencies by subject matter experts even under Bonnstetter's analysis in his specification.[8] Bonnstetter's specification states that subject matter experts use a survey to identify the value of job "competencies" as "very important," "important," or "not important," A169-70 (¶¶ [0175], [0183]), and unimportant competencies are filtered out so that "only a few" – such as "five to seven of the highest ranked competencies" – remain. A170 (¶ [0186]). Thus, the prioritizing described in Bonnstetter's specification – and relied upon in Bonnstetter's brief, Br. at 20-21 – is virtually identical to Barney's method.[9]

Regarding the combination of Barney and Fuerst, Bonnstetter essentially concedes that those references teach compiling "composite reports." Although he cannot quite bring himself to say so, *see* Br. at 23 ("Even if Appellants concede . . . ."); *see also* Br. at 24 (same), Bonnstetter offers no argument to the contrary.

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[8] Bonnstetter argues that the "Generalized Work Behaviors" and "Generalized Work Activities" mentioned in Barney cannot constitute "prioritized key accountabilities," Br. at 19-21, but those terms appear only in one of Barney's embodiments, A430, col. 5, lines 50-53. The examiner did not rely solely on that embodiment, *see* A392; the portion of Barney cited by the examiner also includes another embodiment that describes "30 skills arranged within four hierarchical levels," which necessarily involve prioritization. A430, col. 5, lines 56-57.

[9] Bonnstetter does not argue that the steps of "facilitating discussion with the subject matter experts" and "giving a survey to subject matter experts" must occur separately. Barney nevertheless satisfies such an interpretation of the claim because it teaches an "iterative process" involving responses by subject matter experts to two separate surveys, one of which would constitute "facilitating discussion." *See, e.g.*, A429, col. 3, lines 13-25.

Instead, he argues that Figure 15 of Fuerst does not sufficiently disclose compiling responses from survey questions in a composite survey and that the examiner failed "to identify any written disclosure in the Fuerst specification which supports this contention." Br. at 23. But Bonnstetter overlooks the examiner's citation – at the end of the very language quoted in Bonnstetter's brief – to column 8, lines 11-22 of Fuerst, which does support the examiner's contention. A392.[10] That paragraph describes the information the reports contain, which comes from the "actual survey submissions." A494, col. 8, lines 11-18; *see also* A494, col. 8, lines 9-10 (teaching that the survey tool "generates a composite survey result summary" from the results of a selected survey).

Bonnstetter also argues that neither Barney nor Fuerst discloses "prioritizing responses from subject matter experts and using these prioritized responses to interview applicants for a job." Br. at 24 (emphasis in original). But, as the examiner found, this claim does not include such a limitation; the claim requires only prioritizing skills as chosen by subject matter experts in their survey responses, not prioritizing the responses themselves. A394 ("[T]he claim only

[10] Although Bonnstetter cites pages A393-94, Br. at 23, the quoted language appears at A392.

recites prioritizing skills for superior performance, not ***prioritizing responses***.") (emphasis in original).[11]

2. Nadkarni Does Not Teach Away

Bonnstetter's argument that Nadkarni "teaches away" from the claimed invention likewise fails. The examiner relied on Nadkarni only for the rather mundane teaching that job candidates can be interviewed to determine whether they have the competencies required for the job. Bonnstetter argues that the employer in Nadkarni's system, rather than subject matter experts as claimed, selects all of the competencies addressed in the interview. Br. at 24-27. But this interpretation of Nadkarni is overly narrow. Nadkarni merely teaches that the employer "specifies" competencies desired in job candidates, i.e., the employer enters the desired competencies into the database from which interview candidates are selected. A472, col. 9, lines 8-13. Nadkarni does not prohibit the employer from consulting with subject matter experts to determine which competencies are desired, as the Board noted. A7. Nor does Nadkarni place any limitation on the competencies addressed in the interview.

Moreover, the employer ordinarily qualifies as a subject matter expert under Bonnstetter's broad definition of the term. Bonnstetter's specification refers to

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[11] Bonnstetter argues that neither Barney nor Fuerst teaches "assessing an individual's performance against [prioritized] benchmarks," Br. at 24, but the claim does not contain that limitation, either, *see* A385.

subject matter experts merely as people "who know the job at issue," A166 (¶ [0093]), a standard the employer satisfies in almost all situations. Even if the employer did not "know the job at issue," Nadkarni does nothing to discourage employers from consulting a person who does to determine the desired competencies for the job.

Bonnstetter also argues that "the claimed invention removes the bias of an employer's preference for certain job competencies which may or may not predict successful job performance," Br. at 26, but he offers no support for that argument. Nor can he. Most importantly, the claim does not require "removing employer bias"; it only recites a method comprising interviewing a job candidate relative to competencies prioritized by subject matter experts. A385. Nothing in the claim excludes interviewing the candidate relative to competencies prioritized by the employer in addition to those prioritized by subject matter experts.

Indeed, Bonnstetter's specification repeatedly makes clear that interviewers, who may be the employers, decide which questions to ask job candidates, not subject matter experts. *See* A52; A75; A91; A107; A123. The Position Report provided to the interviewer includes suggested questions based on the prioritized competencies, but the interviewer must "review the suggestions for behavioral interview questions and select the ones that seem most appropriate for the position." A52; A75; A91; A107; A123. The Report also notes that, "[f]or most

positions, additional questions will need to be developed." *Id.* The interviewer's selection among the suggested questions and addition of questions may inject bias into the analysis, so Bonnstetter's method is no more "free of bias" than Nadkarni's.[12] Br. at 25.

In short, Nadkarni does not "teach away" from a method of evaluating job candidates' competencies that involves subject matter experts. "A reference does not teach away . . . if it merely expresses a general preference for an alternative invention but does not 'criticize, discredit, or otherwise discourage' investigation into the invention claimed." *DePuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.*, 567 F.3d 1314, 1327 (Fed. Cir. 2009) (quoting *In re Fulton*, 391 F.3d 1195, 1201 (Fed. Cir. 2004)). Although Nadkarni primarily focuses on the employer's involvement in the process, it does not "criticize, discredit, or otherwise discourage" any involvement in the process by subject matter experts.

This case is thus very different from the cases where this Court or the Supreme Court has determined that a reference "teaches away." In *DePuy Spine*,

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[12] Bonnstetter also argues that the inclusion of a "job analysis wizard" in Barney's system "teaches away" from the claimed invention because it does not "remove bias." Br. at 22. But Bonnstetter's citation to Barney skips over a key paragraph that explains that the job analysis wizard "compiles the preliminary surveys" from subject matter experts and merely "allows the analyst [evaluating a particular job] to set limits on the standard deviation and mean for each dimension, thereby filtering dimensions that are either unimportant or are subject to disagreement among the subject matter experts." A431, col. 7, lines 1-9. Thus, the subject matter experts' ratings remain paramount; the job analysis wizard merely permits the analyst to set the parameters used to filter the experts' ratings.

the prior art reference "warn[ed]" that the claimed device would "fail within the human body, rendering the device inoperative for its intended purpose." 567 F.3d at 1326-27; *see also In re ICON Health & Fitness, Inc.*, 496 F.3d 1374, 1382 (Fed. Cir. 2007) ("[A] reference teaches away from a combination when using it in that combination would produce an inoperative result."). Nadkarni did not warn that involving subject matter experts in the process would render it "inoperative." Nor did Nadkarni "deter any investigation into" a process that includes input from subject matter experts. *United States v. Adams*, 383 U.S. 39, 52 (1966).

Thus, as in *KSR International Co. v. Teleflex, Inc.*, and unlike in *DePuy Spine*, *ICON Health & Fitness*, and *Adams*, Bonnstetter's claims would have been obvious because they "'simply arrange[] old elements with each *performing the same function* it had been known to perform' and yield[] no more than one would expect from such an arrangement." 550 U.S. 398, 417 (2007) (quoting *Sakraida v. Ag Pro, Inc.*, 425 U.S. 273, 282 (1976)) (emphasis in original). *KSR* thus supports the Board's conclusion that the claims at issue would have been obvious at the time the '338 application was filed; it does not undermine it, as Bonnstetter argues, Br. at 17-19. Nothing in *KSR* suggests that the examiner's and the Board's reliance on the relevant prior art in their obviousness analysis was inappropriate.

VI. CONCLUSION

Substantial evidence supports the Board's findings, and the Board properly concluded that the claims would have been obvious in view of the prior art. This Court therefore should affirm the Board's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2010, I caused two copies of the foregoing BRIEF FOR APPELLEE – DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE to be sent by first-class mail to:

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