

No. 19-1803

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**United States Court of Appeals  
for the  
Federal Circuit**

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AIRBUS S.A.S.,

*Appellant,*

– v. –

FIREPASS CORPORATION,

*Appellee.*

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ON APPEAL FROM THE UNITED STATES PATENT AND TRADEMARK OFFICE,  
PATENT TRIAL AND APPEAL BOARD, IN PTAB APPEAL NO. 2018-004837,  
INTER PARTES REEXAMINATION CONTROL NO. 95/001,555

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**RESPONSE OF APPELLANT AIRBUS S.A.S.  
TO COMBINED PETITION FOR PANEL REHEARING  
AND REHEARING *EN BANC***

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January 24, 2020

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**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

Airbus S.A.S. v. Firepass Corporation

Case No. 2019-1803

**CERTIFICATE OF INTEREST**

Counsel for the:

(petitioner)  (appellant)  (respondent)  (appellee)  (amicus)  (name of party)

Counsel for Appellant Airbus S.A.S.

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Airbus S.A.S.	N/A	Airbus SE

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

Walter E. Hanley, Jr.,  
Aloysius Antony Pfeffer,  
Matthew Berkowitz.

Kenyon & Kenyon LLP,  
Andrews Kurth Kenyon LLP.

FORM 9. Certificate of Interest

Form 9  
Rev. 10/17

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47.4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).  
None.

1/24/20

Date

*/s/ Mark A. Chapman*

Signature of counsel

Mark A. Chapman

Printed name of counsel

Please Note: All questions must be answered

Counsel of Record

cc: \_\_\_\_\_

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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iii
ARGUMENT .....	1
I. Introduction.....	1
II. The Panel Correctly Vacated the Board’s Decision and Remanded for It to Consider Relevant Evidence It Erroneously Refused to Consider .....	3
A. The Examiner Correctly Rejected the Claims after Meeting the Burden to Establish a Prima Facie Case and Considering Firepass’s Arguments in Response .....	3
1. The Rejections Met the Burden of Presenting a Prima Facie Case Because They Provided the Required Statutory Notice of the Basis and Reasons for the Rejections.....	4
2. The Rejections Shifted the Burden to Firepass to Respond But Firepass Never Argued to the Examiner that Kotliar Is Not Analogous Art.....	8
3. The Examiner Considered the Arguments Firepass Made and Correctly Maintained the Rejections.....	8
B. The Panel Correctly Held the Board Erred by Failing to Consider Relevant Evidence of a POSA’s Knowledge and Correctly Vacated and Remanded for the Board to Consider It .....	9
III. The Panel’s Decision and <i>Randall</i> Are Consistent with the APA and Precedent.....	11
A. Firepass Waived Its Arguments Challenging <i>Randall</i> .....	11
B. The Panel’s Decision and <i>Randall</i> Are Consistent with the APA.....	12
C. The Panel’s Decision and <i>Randall</i> Are Consistent with Administrative Law Precedent .....	14
D. The Panel’s Decision and <i>Randall</i> Are Consistent with <i>KSR</i> .....	16

E. *Randall* Was Correctly Decided.....17  
CONCLUSION.....18

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>AFGE Local 3599 v. E.E.O.C.</i> , 920 F.3d 794 (Fed. Cir. 2019) .....	15
<i>In re Dembiczak</i> , 175 F.3d 994 (Fed. Cir. 1999) .....	15
<i>In re Jung</i> , 637 F.3d 1356 (Fed. Cir. 2011) .....	4, 5, 7, 8
<i>In re Lee</i> , 277 F.3d 1338 (Fed. Cir. 2002) .....	13
<i>In re Leithem</i> , 661 F.3d 1316 (Fed. Cir. 2011) .....	10, 12
<i>In re Lowry</i> , 32 F.3d 1579 (Fed. Cir. 1994) .....	7
<i>In re Oetiker</i> , 977 F.2d 1443 (Fed. Cir. 1992) .....	<i>passim</i>
<i>In re Piasecki</i> , 745 F.2d 1468 (Fed. Cir. 1984) .....	4, 8
<i>KSR Int’l Co. v. Teleflex, Inc.</i> , 550 U.S. 398 (2007).....	<i>passim</i>
<i>Motor Vehicle Mfgs. Ass’n v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983).....	15
<i>Randall Mfg. v. FG Prods., Inc.</i> , Appeal 2012-005371, Decision After Remand (P.T.A.B. Aug. 8, 2014) .....	12
<i>Randall Mfg. v. Rea</i> , 733 F.3d 1355 (Fed. Cir. 2013) .....	<i>passim</i>

*Rexnord Indus., LLC v. Kappos*,  
705 F.3d 1347 (Fed. Cir. 2013) ..... 17, 18

*S.E.C. v. Chenery Corp.*,  
332 U.S. 194 (1947)..... 14, 15, 17

*SmithKline Beecham Corp. v. Apotex Corp.*,  
439 F.3d 1312 (Fed. Cir. 2006) .....11

**Statutes**

5 U.S.C. § 554(b)(3).....12

5 U.S.C. § 706(2)(E) ..... 12-13

35 U.S.C. § 132 .....4, 5, 7

**Regulations**

37 C.F.R. § 41.77(a).....12

37 C.F.R. § 41.77(b) .....12

**Other Authorities**

M.P.E.P. § 2141.01(a).....8

M.P.E.P. § 2682(III).....12

## ARGUMENT

### I. Introduction

The Court should deny Firepass's rehearing petition. The Panel did not overlook or misapprehend any points of fact or law and its decision does not conflict with precedent or involve any question of exceptional importance. The Panel's decision to vacate the Board's decision and remand for the Board to consider relevant evidence of a POSA's knowledge, which the Board erroneously refused to consider, was correct and consistent with precedent, including *KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398 (2007), which emphasized the importance of this knowledge in evaluating obviousness.

Firepass's rehearing arguments are based on the premise that the examiner's rejections did not meet the burden to present a prima facie case because they did not explain why Kotliar is analogous art.

This is incorrect. The rejections met the burden because they provided the required statutory notice of the basis and reasons for the rejections. At that point, the burden shifted to Firepass to respond, but Firepass never argued to the examiner that Kotliar is not analogous art. Therefore, the examiner had no reason to explain why Kotliar is analogous art because this issue was undisputed.

Even though Firepass first disputed that Kotliar is analogous art in its Board appeal, Firepass argues the Board could not consider record evidence of a POSA's



knowledge that demonstrated Kotliar is analogous art, which Airbus presented to the Board in response to Firepass's new argument.

This also is incorrect. In reviewing a rejection, the Board must consider all the evidence and arguments and determine patentability based on the entire record. Therefore, the Board should have considered four additional references presented by Airbus, which demonstrated that a POSA would have known the breathable hypoxic air produced by Kotliar would prevent and suppress fires, and therefore would have considered Kotliar reasonably pertinent to the problem of preventing and suppressing fires. The Board's refusal to consider this evidence is precisely why the Panel correctly vacated and remanded.

Firepass's arguments that the Panel's decision and *Randall Mfg. v. Rea*, 733 F.3d 1355 (Fed. Cir. 2013) are inconsistent with the APA and precedent cited by Firepass should be rejected.

First, Firepass waived these arguments challenging *Randall* because it did not present them when it addressed *Randall* in its principal brief.

Second, the Panel's decision and *Randall* are consistent with the APA. Firepass's procedural rights will be protected during the remand because Firepass will be able to respond to any subsequent action by the Board or the examiner. For example, if the Board designates a new ground of rejection because it relies on new

findings or reasons, Firepass can request rehearing or reopen prosecution, as happened in the remand in *Randall*.

Third, the Panel's decision and *Randall* are consistent with administrative law precedent. This precedent limits a court's ability to affirm an agency's decision on a different ground than the ground adopted by the agency. However, the Panel and the Court in *Randall* did not affirm the Board's decision, much less do so on a different ground. Instead, the Court vacated and remanded for the Board to reconsider its decision, consistent with this precedent.

Finally, the Panel's decision and *Randall* are consistent with *KSR*. In both cases, the Board erroneously refused to consider evidence of a POSA's knowledge that supported the rejections, so the Court correctly vacated and remanded for the Board to do so. Moreover, in both cases, the Court followed *KSR*'s directive that a POSA's knowledge should be considered in evaluating obviousness.

## **II. The Panel Correctly Vacated the Board's Decision and Remanded for It to Consider Relevant Evidence It Erroneously Refused to Consider**

### **A. The Examiner Correctly Rejected the Claims after Meeting the Burden to Establish a Prima Facie Case and Considering Firepass's Arguments in Response**

The central premise of Firepass's petition is that the examiner did not meet the burden of presenting a prima facie case because the rejections did not explain why Kotliar is analogous art. Petition at 2-6, 10-12.

This premise is incorrect. As explained below, the rejections met the burden because they provided the required statutory notice of the basis and reasons for the rejections so that Firepass could respond. Therefore, the burden shifted to Firepass to argue that Kotliar is not analogous art, but Firepass never did so. As a result, the examiner had no reason to explain why Kotliar is analogous art because this issue was undisputed.

**1. The Rejections Met the Burden of Presenting a Prima Facie Case Because They Provided the Required Statutory Notice of the Basis and Reasons for the Rejections**

“The prima facie case is a procedural tool of patent examination, allocating the burdens of going forward as between examiner and applicant.” *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992); *In re Piasecki*, 745 F.2d 1468, 1471 (Fed. Cir. 1984) (“the examiner’s prima facie case” is “purely [a] procedural device[]”). “The term ‘prima facie’ case refers only to the initial examination step.” *Oetiker*, 977 F.2d at 1443. “[T]he examiner bears the initial burden, on review of the prior art or on any other ground, of presenting a prima facie case of unpatentability.” *Id.*

“[A]ll that is required of the office to meet its prima facie burden of production is to set forth the statutory basis of the rejection and the reference or references relied upon in a sufficiently articulate and informative manner to meet the notice requirement of § 132.” *In re Jung*, 637 F.3d 1356, 1363 (Fed. Cir. 2011) (citing 35 U.S.C. § 132). “[T]he PTO carries its procedural burden of establishing

a prima facie case when its rejection satisfies 35 U.S.C. § 132, in ‘notify[ing] the applicant ... [by] stating the reasons for its rejection, or objection or requirement, together with such information and references as may be useful in judging of the propriety of continuing the prosecution of [the] application.’” *Id.* at 1362 (quoting 35 U.S.C. § 132). The examiner need not “explicitly preempt every possible response” to the rejection. *Id.* at 1363. “Section 132 merely ensures that an applicant at least be informed of the broad statutory basis for the rejection of his claims, so that he may determine what the issues are on which he can or should produce evidence.” *Id.* (citation omitted). Accordingly, section 132 “is violated when a rejection is so uninformative that it prevents the applicant from recognizing and seeking to counter the grounds for rejection.” *Id.* at 1362 (citation omitted).

Applying this standard, the Court in *Jung* held that a rejection “was more than sufficient to meet this burden” because it explained “the theory of invalidity (anticipation),” it identified the prior art, and it explained where the reference disclosed each limitation. *Id.* at 1363.

As explained below, the initial rejections of claims 91-94 based on Kotliar, AFWAL and Knight in the Action Closing Prosecution met the burden of establishing a prima facie case under the standard explained in *Jung*.

Both rejections explained their basis was obviousness and identified the prior art. Ground 34 stated that claims 91-93 were rejected as obvious over Kotliar

in view of AFWAL. Appx4002-4003. Ground 35 stated that claim 94 was rejected as obvious over Kotliar in view of AFWAL and Knight. Appx4003.

Both rejections explained where the references disclosed each disputed limitation. Since it was no longer disputed that Kotliar disclosed all the limitations of original claim 1,<sup>1</sup> the examiner focused on where the references disclosed the additional limitations in new claims 91-94 that are not in claim 1 and therefore were not previously addressed. Appx4002-4003; Appx73-78. The examiner explained where Kotliar disclosed a “nitrogen generator” and a “computer control for regulating the oxygen content,” where AFWAL disclosed a “filter” and “intake gas ... with a reduced humidity,” and where Knight disclosed a “computer control turns the nitrogen generator on and off.” Appx4002-4003.

Both rejections also explained the reasons for combining the references. The rejection of claims 91-93 explained why it was obvious given AFWAL to use a filter and dehumidifier in Kotliar. *Id.* The rejection of claim 94 further explained why it was obvious given Knight to use a computer control to turn the nitrogen generator on and off. Appx4003.

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<sup>1</sup> The examiner rejected claims 91-94 on remand from the Court’s previous decision. Before that appeal, the examiner had rejected claim 1 as anticipated by Kotliar and obvious based on Kotliar and the 1167 Report, the Board had affirmed the anticipation rejection (without reaching the obviousness rejection), and claim 1 had been canceled. Airbus Br. (Dkt. 18) at 19-24.

Finally, both rejections implicitly conveyed that the examiner considered Kotliar analogous art available for obviousness. This is clear from the fact that the examiner applied Kotliar as the primary reference in both rejections. Appx4002-4003.<sup>2</sup>

In sum, the rejections met the burden because they explained the basis and reasons for finding the claims obvious “in a sufficiently articulate and informative matter to meet the notice requirement of § 132,” so that Firepass could respond. *Jung*, 637 F.3d at 1362. The rejections “put [Firepass] on notice that the examiner considered” Kotliar available for obviousness, and the rejections plainly were not “so uninformative that [they] prevent[ed] [Firepass] from recognizing and seeking to counter the grounds for rejection.” *Id.*<sup>3,4</sup>

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<sup>2</sup> The examiner also previously applied Kotliar in seven other obviousness rejections of 46 other claims. Airbus Reply Br. (Dkt. 22) at 19-20.

<sup>3</sup> Because the burden was met, the principle in *In re Lowry*, 32 F.3d 1579, 1584 (Fed. Cir. 1994) that “the applicant is entitled to grant of the patent” if the burden is not met (Petition at 5-6) does not apply.

<sup>4</sup> Firepass relies (Petition at 5) on the statement in *Oetiker* that “[i]t ha[d] not been shown” that a POSA “seeking to solve a problem of fastening a hose clamp, would reasonably be expected or motivated to look to fasteners for garments.” 977 F.2d at 1447. This statement does not support Firepass because it referred to a failure by the Board, not the examiner. *Id.* at 1446-47.

**2. The Rejections Shifted the Burden to Firepass to Respond But Firepass Never Argued to the Examiner that Kotliar Is Not Analogous Art**

Because the rejections met the examiner's burden, the burden shifted to Firepass to respond. *Id.* at 1365; *Oetiker*, 977 F.2d at 1445 (“If th[e] [examiner's] burden is met, the burden of coming forward with evidence or argument shifts to the applicant).

The applicant's response to the prima facie case “may relate to any of the *Graham* factors,” *Piasecki*, 745 F.2d at 1472, which include whether a reference is analogous art within the scope and content of the prior art. M.P.E.P. § 2141.01(a). Therefore, if Firepass considered the rejections deficient because Kotliar is not analogous art, Firepass had the burden to argue this in response, but it did not.

As the Panel and the Board found, Firepass never argued to the examiner that Kotliar is not analogous art. Decision at 7-8; Appx20. Instead, Firepass argued the references did not disclose certain limitations and there was no motivation to combine AFWAL and Knight with Kotliar. Appx4023-4029. Airbus responded to Firepass's arguments. Appx4035-4045.

**3. The Examiner Considered the Arguments Firepass Made and Correctly Maintained the Rejections**

“After evidence or argument is submitted by the applicant in response [to the rejection], patentability is determined [by the examiner] on the totality of the

record, by a preponderance of the evidence with due consideration to persuasiveness of argument.” *Oetiker*, 977 F.2d at 1445.

This is what happened here. After considering Firepass’s and Airbus’s responses to the ACP, the examiner issued a Right of Appeal Notice that maintained both rejections and responded to Firepass’s arguments. Appx4053-4057. The examiner did not explain why Kotliar is analogous art because Firepass had not disputed this issue.

**B. The Panel Correctly Held the Board Erred by Failing to Consider Relevant Evidence of a POSA’s Knowledge and Correctly Vacated and Remanded for the Board to Consider It**

After the RAN, Firepass appointed new counsel, appealed the rejections to the Board, and argued for the first time that Kotliar is not analogous art. Decision at 8.

Airbus responded to Firepass’s new argument by explaining the examiner had made undisputed findings that: (1) the breathable hypoxic air produced by Kotliar would prevent and suppress fires; and (2) four references applied in other rejections—Gustafsson, the 1167 Report, Luria and Carhart—demonstrated it was well-known that breathable hypoxic air prevents and suppresses fires. Appx4296-4299, Appx4301-4304. Based on the foregoing, Airbus argued a POSA would have known the breathable hypoxic air produced by Kotliar would prevent and



suppress fires, and therefore would have considered Kotliar reasonably pertinent to the problem of preventing and suppressing fires. Appx4603-4611.

The Board refused to consider these four references presented by Airbus because they were not cited by the examiner in the appealed rejections, and the Board reversed the rejections on the ground that the examiner failed to explain why Kotliar is analogous art. Appx13-14; Appx28-32.

Firepass argues the Board correctly refused to consider these references because the Board can only review the rejections as stated by the examiner and nothing else. Petition at 13 (the Board “review[s] the rejection and nothing which was not contained in the rejection”).

Firepass is incorrect. In reviewing a rejection on appeal, the Board is not limited to considering only the rejection. Instead, the Board must “weigh all of the evidence and argument” and its “ultimate determination of patentability” must be “made on the entire record.” *Oetiker*, 977 F.2d at 1445 (citations omitted). Moreover, the Board may “make additional findings of fact based on the Board’s own knowledge and experience to ‘fill in the gaps’ that might exist in the examiner’s evidentiary showing.” *In re Leithem*, 661 F.3d 1316, 1319 (Fed. Cir. 2011) (citations omitted).

Therefore, contrary to Firepass’s argument, the Board should have considered the additional evidence presented by Airbus and could have made its

own findings about whether Kotliar is analogous art.<sup>5</sup> Thus, the Panel correctly held the Board erred by refusing to consider this evidence, and correctly vacated and remanded for the Board to consider it and determine whether Kotliar is analogous art. Decision at 16-17.

Similarly, the Court in *Randall* correctly held the Board erred by failing to consider record evidence of a POSA's knowledge not cited in the appealed rejections, and correctly vacated and remanded for the Board to consider this evidence and determine whether the claims were obvious. 733 F.3d at 1362-64.

### **III. The Panel's Decision and *Randall* Are Consistent with the APA and Precedent**

#### **A. Firepass Waived Its Arguments Challenging *Randall***

Firepass argues that *Randall* was incorrectly decided and should be overruled because *Randall* did not address the APA, the administrative law precedent cited by Firepass, and *KSR*. Petition at 14-15.

Airbus responds to these arguments in Sections III.B-E below.

However, Firepass waived these arguments because it did not present them when it addressed *Randall* in its principal brief. Firepass Br. (Dkt. 20) at 31-32; *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006) (“[A]rguments not raised in the opening brief are waived.”).

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<sup>5</sup> Firepass previously acknowledged that the Board “is free to reach its own conclusions as to the facts.” Firepass Br. (Dkt. 20) at 17.

**B. The Panel’s Decision and *Randall* Are Consistent with the APA**

Firepass incorrectly argues the examiner’s failure to explain why Kotliar is analogous art violates the APA requirement of notice of “the matters of fact and law asserted” under 5 U.S.C. § 554(b)(3). Petition at 6, 12.

Firepass’s APA notice rights will be respected during the remand because Firepass will be able to respond to any subsequent action by the Board or the examiner. For example, if the Board designates a new ground of rejection because it “relies on new facts and rationales not previously raised to the applicant by the examiner,” Firepass will be entitled to request rehearing or reopen prosecution, which satisfies the requirement in § 554(b)(3) to provide “notice of the factual and legal basis upon which the rejection is based.” *Leithem*, 661 F.3d at 1319 (citations omitted); 37 C.F.R. § 41.77(b).<sup>6</sup>

Indeed, this happened on remand in *Randall*, where the Board considered the additional references, concluded the claims were obvious, and designated a new ground of rejection. *Randall Mfg. v. FG Prods., Inc.*, Appeal 2012-005371, Decision After Remand, 15 (P.T.A.B. Aug. 8, 2014).

Firepass also incorrectly argues the Panel violated the APA requirement to “set aside” agency findings that are “unsupported by substantial evidence” under 5

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<sup>6</sup> The Board also could request briefs and/or remand to the examiner to consider the analogous art issue and evidence. 37 C.F.R. § 41.77(a); M.P.E.P. § 2682(III).

U.S.C. § 706(2)(E). According to Firepass, the rejections were not supported by evidence that Kotliar is analogous art and the Court cannot “supplement” the rejections. Petition at 7.

Firepass improperly focuses solely on the rejections instead of the entire record the Board was required to consider. As explained above, Airbus presented to the Board additional prior art evidence that demonstrated a POSA would have considered Kotliar reasonably pertinent. However, the Board erroneously refused to consider this evidence even though it supports a finding by the Board that Kotliar is analogous art. Therefore, the Panel correctly vacated and remanded for the Board to consider this evidence. Decision at 16-17. Similarly, the Court in *Randall* correctly vacated and remanded because the Board erroneously refused to consider evidence of a POSA’s knowledge that supported the rejections. 733 F.3d at 1362-64.

Firepass also incorrectly argues that *In re Lee*, 277 F.3d 1338 (Fed. Cir. 2002) requires “striking down the rejection.” Petition at 7. In *Lee*, the Court held the Board erred by failing to adequately explain why there was a motivation to combine. 277 F.3d at 1343-45. However, the Court did not “strik[e] down the rejection.” The Court vacated and remanded for the Board to provide the required explanation. *Id.* at 1346. Thus, *Lee* is consistent with the Panel’s decision and *Randall*, where the Court also vacated and remanded.

Finally, on remand the Board will not face the “daunting task” of reviewing “fifteen possible” “unidentified and undescribed” “permutations of references combined in an unknown fashion with unknown and undisclosed support in the applied references.” Petition at 13-14. As Airbus explained, the cited excerpts of the four references clearly document a straightforward fact: it was well-known that breathable hypoxic air prevents and suppresses fires. Airbus Br. (Dkt. 18) at 16-19; Decision at 5-7, 14-17. Firepass has not disputed this. Therefore, the Board must merely determine whether this undisputed fact means, as Airbus argues, that a POSA would have considered Kotliar, which discloses equipment that produces breathable hypoxic air, reasonably pertinent to the problem of preventing and suppressing fires.

**C. The Panel’s Decision and *Randall* Are Consistent with Administrative Law Precedent**

Firepass incorrectly argues the Panel’s decision and *Randall* are inconsistent with administrative law precedent that Firepass asserts precludes providing an “ex post justification” for the rejections. Petition at 8-9, 14-15.

The cited administrative law precedent limits a court’s ability to affirm an agency’s decision on a different ground than the ground adopted by the agency. *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (a court “must judge the propriety of [an agency’s decision] solely by the grounds invoked by the agency” and should not “affirm the administrative action by substituting what it considers

to be a more adequate or proper basis”); *Motor Vehicle Mfgs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *AFGE Local 3599 v. E.E.O.C.*, 920 F.3d 794, 799 (Fed. Cir. 2019).

The Panel’s decision and *Randall* did not violate this precedent. In both cases, the Court did not affirm the Board’s decision to reverse the rejections, much less do so on a different ground than the Board. Instead, the Court vacated and remanded for the Board to consider evidence it had erroneously refused to consider. Decision at 17; *Randall*, 733 F.3d at 1362-64. This is consistent with the above precedent, in which the court vacated and remanded for the agency to reconsider its decision. *Chenery*, 332 U.S. at 196 (“In [a prior appeal], we held that an order of the [SEC] could not be sustained on the grounds upon which that agency acted. We therefore directed that the case be remanded to the [SEC].”); *Motor Vehicle*, 463 U.S. at 57 (vacating and remanding “to the NHTSA for further consideration”); *AFGE*, 920 F.3d at 801 (vacating and remanding “for the arbitrator to reconsider”).

Moreover, contrary to Firepass’s argument, this case is distinguishable from *In re Dembiczak*, 175 F.3d 994 (Fed. Cir. 1999). Petition at 9-10. In *Dembiczak*, the Court refused to consider alternative grounds for affirmance because the Board had not relied on them. 175 F.3d at 1000-01. Here Airbus sought reversal or

vacatur of the Board's decision and presented consistent arguments and evidence to the Board and the Court.

**D. The Panel's Decision and *Randall* Are Consistent with *KSR***

Firepass's argument that the examiner's failure to explain why Kotliar is analogous art violated the requirement in *KSR* "that an obviousness analysis 'should be made explicit'" should be rejected. Petition at 7-8 (quoting *KSR*, 550 U.S. at 418).

Once again, Firepass improperly focuses solely on the rejections instead of the entire record the Board was required to consider. As explained above, Airbus presented additional prior art evidence that demonstrated a POSA would have considered Kotliar reasonably pertinent, which the Board erroneously refused to consider even though it supports a finding that Kotliar is analogous art. Therefore, the Panel correctly vacated and remanded for the Board to consider it. Decision at 16-17. Similarly, the Court in *Randall* correctly vacated and remanded because the Board erroneously refused to consider evidence of a POSA's knowledge that supported the rejections. 733 F.3d at 1362-64.

Moreover, in both cases, the Court followed *KSR*'s directive that a POSA's knowledge should be considered in evaluating obviousness. Decision at 16; *Randall*, 733 F.3d at 1362-63.

**E. *Randall* Was Correctly Decided**

Firepass's argument that *Randall* was incorrectly decided and should be overruled because *Randall* did not address the APA and precedent discussed above (Petition at 14-15) should be rejected for several reasons.

First, as explained in Section III.A, Firepass waived these arguments.

Second, as explained in Sections III.B-D, *Randall* was correctly decided and is consistent with the APA and precedent for the same reasons as the Panel's decision.

Third, contrary to Firepass's argument, the citation in *Randall* of *Rexnord Indus., LLC v. Kappos*, 705 F.3d 1347 (Fed. Cir. 2013), "for the proposition that an appellee may support a finding below on any basis supported by the record," is not inconsistent with administrative law precedent. Petition at 15.

As explained above, this precedent limits the grounds on which a court can affirm an agency's decision. However, the Court in *Rexnord* and *Randall* did not permit the appellee before the Court to support the Board's decision on a different ground. The Court merely held that the appellee before the Board could defend the rejection on another ground supported by the record. *Rexnord*, 705 F.3d at 1355-56 (citations omitted); *Randall*, 733 F.3d at 1363 n.3 (citing *Rexnord*, 705 F.3d at 1355-56).



Finally, *Rexnord* contradicts Firepass's argument that this principle does not apply in administrative appeals. Petition at 15. *Rexnord* applied the principle to a Board appeal in an inter partes reexamination. Therefore, *Rexnord* is controlling precedent on this point. Firepass has not argued *Rexnord* should be overruled.

### CONCLUSION

For the foregoing reasons, Airbus respectfully requests that the Court deny Firepass's rehearing petition.

Dated: January 24, 2020

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned certifies that this response complies with the type-volume limitation of Federal Circuit Rule 32(a). This response contains 3,899 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b), as calculated by the Microsoft Word software used to prepare the response.

This response also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Federal Rule Circuit 32(a), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This response has been prepared in a proportionally spaced typeface using the Microsoft Word software in 14 point New Times Roman.

Dated: January 24, 2020

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**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing RESPONSE OF APPELLANT AIRBUS S.A.S. TO COMBINED PETITION FOR PANEL REHEARING AND REHEARING *EN BANC* was filed electronically using the CM/ECF system and served upon registered counsel by operation of the Court's CM/ECF system on January 24, 2020.

Dated: January 24, 2020

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