

No. 22-1127

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

KEYNETIK, INC.,

Appellant,

v.

SAMSUNG ELECTRONICS CO., LTD,

Appellee.

*On Appeal From The Final Written Decision On Remand
Of The Patent Trial And Appeal Board Of The U.S. Patent And Trademark Office,
IPR2018-00986*

**COMBINED PETITION FOR PANEL REHEARING AND
REHEARING *EN BANC* ON BEHALF OF
APPELLANT KEYNETIK, INC.**

Marlon J. Weiss
Armstrong Teasdale LLP
355 Alhambra Circle, Suite 1250
Coral Gables, FL 33134
mweiss@atllp.com
Tel.: 305-371-8809
Fax.: 305-448-4155

Edward F. Behm, Jr. (Reg. No. 52,606)
Mark W. Halderman
Armstrong Teasdale LLP
One Commerce Square
2005 Market Street, 29th Floor
Philadelphia, PA 19103
ebehm@atllp.com
mhalderman@atllp.com
Tel.: 267-780-2000
Fax.: 215-405-9070

Counsel for Appellant, Keynetik, Inc.

CERTIFICATE OF INTEREST

Counsel for Appellant KEYnetik, Inc. certifies the following:

1. Represented Entities. The full name of every party or amicus represented by me is: **KEYnetik, Inc.**
2. Real Party in Interest. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: **Not applicable**
3. Parent Corporations and Stockholders. All parent corporations and any publicly held companies that own 10 percent of the stock of the party or amicus curiae represented by me are: **None**
4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

None

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

KEYnetik, Inc. v. Samsung Electronics Co. LTD. and Samsung Electronics America, Inc., 2:17-cv-02794-JLL-JAD (D.N.J.)

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

Not Applicable

April 17, 2023

/s/ Edward F. Behm, Jr.
Edward F. Behm, Jr.

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STATEMENT OF COUNSEL PURSUANT TO FED. CIR. R. 35(b)(2)

Based on my professional judgment, I believe this appeal requires an answer to the following precedent-setting question of exceptional importance: Whether an obviousness determination can be sustained as legally sufficient based solely on a statement describing a modification to prior art, as already described in the invention itself, as “simple” and “straightforward.”

Based on my professional judgment, I believe the panel opinion is contrary to the following decision of the Supreme Court of the United States: *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007).

/s/ Edward F. Behm, Jr.
Edward F. Behm, Jr.

POINTS OF LAW OR FACT MISAPPREHENDED BY THE PANEL

While acknowledging at oral argument that an expert's testimony describing a software modification of prior art as being simple and straightforward, without more, was "problematic," the panel went on to justify the sufficiency of this expert's testimony because it was coupled with other brief testimony "detailing the modified function" of the software. Op. 4. But that brief testimony merely paraphrased the disclosures in the challenged claim.

KEYnetik respectfully submits that the factual predicate for the panel's sufficiency determination was entirely circular insofar as the expert's testimony "detailing the modified function" was nothing more than a one-sentence repetition of the function already described in the invention itself. The expert's testimony added nothing to evidentiary weight. Because the panel decision has no parallel in circuit precedent and threatens to upend the uniform body of law governing the sufficiency of obviousness determinations, with potentially wide-ranging ramifications, this petition should be granted.

BACKGROUND

This is KEYnetik’s second appeal of obviousness determinations made by the Patent Trial and Appeal Board in *inter partes* review concerning U.S. Patent No. 8,370,106. The ’106 patent, in a nutshell, enables a user to perform certain functions on a mobile phone or other device (e.g., placing or answering a phone call) with only hand gestures (e.g., moving the phone to the user’s ear), rather than requiring the use of a touchscreen or button press. The inventors realized that the prior art could only recognize “patterns” in continuous streams of data received from motion sensors. (Appx36, 1:29–33). As a result, the prior art could not accurately predict user intention during complex gesturing because the techniques did not ignore unreliable fast motion data embedded in the patterns. (*See id.* at 1:36–38). The inventors recognized “a need for a motion-based system which utilizes gravitational reference to classify disparate sequential data sets from one or more inertial motion sensors” so that user intention could be inferred from reliable data sets. (*Id.* at 1:46–48).

Thus, the ’106 patent outputs “events” based on a “sequence of the detected orientations”—with the orientations in the sequence detected “for each slow-*motion* phase,” while avoiding contamination that would result from the use of less reliable fast motion data. (Appx39, 7:25–27). The Board invalidated this patent on obviousness grounds in March 2020, and an appeal followed.

In *KEYnetik, Inc. v. Samsung Elecs. Co.*, 841 F. App'x 219, 228 (Fed. Cir. 2021), this Court agreed with KEYnetik that the Board utilized the wrong standard in evaluating obviousness and vacated the Board's final written decision in part, remanding Claims 4, 7, 15, and 18 to the Board to make a finding of a reasonable expectation of success as to those claims. On remand, the Board found a reasonable expectation of success based on the combination of Linjama (U.S. Pat. App. No. 2008/022955), Lehrman (U.S. Pat. No. 6,703,939), and Tosaki (U.S. Pat. No. 6,312,335) and again invalidated the '106 Patent as obvious under 35 U.S.C. §103.

The evidence relied upon by the Board to sustain the obviousness of the '106 patent consisted of skeletal testimony from Samsung's expert, Dr. Abowd, who stated that "such a modification of the combined Linjama-Lehrman system based on Tosaki would have been straightforward for a POSITA to implement" because "simple modifications would have been made to the software code for gesture detector 16 such that the orientation of mobile terminal 10 is only detected when the mobile terminal 10 is substantially stationary." (Appx812 ¶ 154). However, as readily apparent from the '106 patent, (Appx36, 1:61-67), Dr. Abowd's brief explanation of function merely parroted the summary of the invention set forth in the patent itself.

KEYnetik took an appeal of the Board's final written decision, which this Court affirmed in an opinion entered February 15, 2023. The panel disagreed with

KEYnetik that Dr. Abowd's testimony was insufficient, reasoning that "Dr. Abowd's testimony, while brief, was not conclusory" since he not only testified that the software modifications needed to combine the prior art references were "simple" and "straightforward," but because he also "described the function those modifications would need to achieve, stating that the gesture detector would be modified 'such that the orientation of mobile terminal 10 [would] only [be] detected when the mobile terminal [was] substantially stationary.'" Op. 3 (quoting Appx812 ¶ 154). During oral argument and in the opinion that followed, the panel emphasized the importance of Dr. Abowd's reference to function to rescue the otherwise conclusory nature of the testimony. The panel opinion reasoned that writing software to achieve a function is normally within the skill of the art. Op. 4 (citing *Fonar Corp. v. Gen. Elec. Co.*, 107 F.3d 1543 (Fed. Cir. 1997)).

The panel opinion is an anomaly in circuit precedent and will cause unintended mischief in patent enforcement. Rehearing is accordingly warranted.

ARGUMENT

I. The Panel Incorrectly Utilized Best-Mode Sufficiency as a Proxy for Obviousness

As previously set forth, Dr. Abowd's testimony was entirely circular: he opined, in effect, that the '106 patent was simple and straightforward because it functioned just like the inventors said it functioned. That contributes nothing to evidentiary weight. *See, e.g., Transtex Inc. v. Vidal*, 2023 WL 1487425, at *6 (Fed. Cir. Feb. 3, 2023) (Schall, J., dissenting) (recognizing that opinions regarding reasonable likelihood of success that "merely paraphrase the claim language" do not contribute to evidentiary weight); *TQ Delta, LLC v. CISCO Sys., Inc.*, 942 F.3d 1352, 1362 (Fed. Cir. 2019) (rendering expert testimony insufficient, which was "unsupported by any evidence other than the disclosure of the invention in the patents-in-suit"); *InTouch Techs., Inc. v. VGO Commc'ns, Inc.*, 751 F.3d 1327, 1351 (Fed. Cir. 2014) (admonishing expert for using the challenged "patent itself as her roadmap" regarding obviousness determination). The panel erred in affording Dr. Abowd's remarks any legal significance whatsoever.

Properly considered, the panel opinion is reducible to the unexpected and far-reaching principle that a software-based modification, in effect, eliminates the need to prove the reasonable expectation of success, based on its citation to *Fonar*, because after function has been identified, "writing code to achieve that function is within the skill of the art." Op. 3. KEYnetik urges the Court to reconsider its holding

because it permits patent challengers to leap over complex computer engineering problems, of whatever magnitude, by merely pointing out that a patent relies on software modifications. Respectfully, this will wreak havoc on patent enforcement by removing a key guardrail against hindsight bias, and simultaneously shifting the burden to the patent owner to refute presumptive obviousness.¹

More significantly, the panel decision lacked support. It must be emphasized that *Fonar* was decided in a best-mode context, implicating significantly different policy considerations not applicable here. As this Court has recognized, the purpose of the best mode requirement is to ensure that the public, in exchange for the rights given the inventor under the patent laws, obtains from the inventor a full disclosure of the preferred embodiment of the invention. *E.g.*, *Amgen, Inc. v. Chugai Pharmaceutical Co., Ltd.*, 927 F.2d 1200, 1209–10 (Fed. Cir. 1991); *Dana Corp. v. IPC Ltd. Partnership*, 860 F.2d 415, 418 (Fed. Cir. 1988). To meet that requirement, it is not necessary to describe software code (as noted by the expert in *Fonar*, 107 F.3d at 1548-1549); the disclosure must only be sufficient, broadly speaking, to enable a skilled artisan to replicate the invention. *See Green Edge Enterprises, LLC*

¹ Indeed, this is precisely what happened in this appeal, where, to support its sufficiency determination, the panel repeatedly highlighted the apparent lack of rebuttal evidence from KEYnetik. *See Op. 4* (holding that “[w]hile Dr. Abowd’s testimony is brief, in the absence of contradictory evidence, it constitutes substantial evidence”). But discrepancies in evidence are irrelevant to sufficiency. *See TransWeb, LLC v. 3M Innovative Properties Co.*, 812 F.3d 1295, 1307-1308 (Fed. Cir. 2016).

v. Rubber Mulch Etc., LLC, 620 F.3d 1287, 1296-1297 (Fed. Cir. 2010). Sufficiency inquiries regarding best mode go to the concept of enablement. *Id.*

In contrast, while obviousness presents another facet of the *quid pro quo* between the inventor and the public, it further functions to protect the inventor against hindsight bias. See *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 406–07 (2007). The evidence needed to make this showing is qualitatively and quantitatively different than a best mode disclosure under §112(a). See *TQ Delta, LLC v. CISCO Sys., Inc.*, 942 F.3d 1352, 1361 (Fed. Cir. 2019) (citing cases, cautioning that “conclusory and unsupported expert testimony . . . risks allowing the challenger to use the challenged patent as a roadmap to reconstruct the claimed invention using disparate elements from the prior art—i.e., the impermissible *ex post* reasoning and hindsight bias that *KSR* warned against”).

Sufficiency in one context is not a proxy for sufficiency in the other. Indeed, this is crystal clear from the Court’s own §112(f) jurisprudence, in which this Court has repeatedly held that mere disclosure of function is insufficient to satisfy the definiteness requirements of that section. *E.g., Function Media, L.L.C. v. Google, Inc.*, 708 F.3d 1310, 1319 (Fed. Cir. 2013) (affirming summary judgment concluding that a claim on a computerized method for transmitting advertising copy to different types of media was invalid for indefiniteness, where the specifications failed to adequately identify an algorithm to accomplish the claimed function, even though a

skilled artisan may have been able to readily develop a satisfactory software program, reasoning that “proving that a person of ordinary skill could devise some method to perform the function is not the proper inquiry as to definiteness—that inquiry goes to enablement”).

Thus, *Fonar* has no application to obviousness because how-and-why considerations in best mode disclosures, to the extent relevant, are only directed to enablement. And this Court has recognized time and again that evidence deemed sufficient to establish enablement cannot be shoehorned to satisfy sufficiency concerns in other contexts—not even within §112. *E.g.*, *Function Media, supra*. Accordingly, the panel decision concluding that Dr. Abowd’s disclosure of a software function could be utilized as an evidentiary gap-filler to invalidate a patent on obviousness grounds—where all the testimony is otherwise conclusory or circular—lacks a sound legal predicate. It must be corrected accordingly.

II. The Panel Decision Conflicts with Circuit Precedent Regarding Sufficiency

Removed of *Fonar*, which cannot supply the requisite evidentiary link between the prior art and the ’106 patent, all that’s left of the panel’s sufficiency determination is expert testimony that paraphrases the invention and then goes on to label it simple and straightforward. The panel’s approval of that conclusory testimony is an outlier in existing precedent and threatens the uniformity of patent enforcement.

On similar facts, this Court has held such conclusory testimony inadequate to support a finding of obviousness on substantial evidence review. *See, e.g., TQ Delta, LLC*, 942 F.3d at 1360–62. The testimony this Court found insufficient in *TQ Delta* is, in relevant respects, virtually indistinguishable from Dr. Abowd’s testimony here. In that case, the challenged patent involved certain improvements to electronic communications systems that lower the peak-to-average power ratio (PAR) of transmitted signals using a new scrambling algorithm targeting the phases of parallel frequency bands so they will not peak at the same time, thereby reducing PAR. *Id.* at 1356.

The expert, Dr. Tellado, merely echoed disclosures in the patents-in-suit, stating as follows:

A POSITA would have recognized that by randomizing the phase of each subcarrier, Stopler provides a technique that allows two or more subcarriers in Shively’s system to transmit the same one or more bits, but without those two or more subcarriers having the same phase. Since the two subcarriers are out-of-phase with one another, the subcarriers will not add up coherently at the same time, and thus the peak-to-average power ratio for the overall system will be less than in Shively’s original system.

Id. at 1361. Then the expert went on to say that “[c]ombining Stopler’s phase scrambler into Shively’s transmitter would have been a relatively simple and obvious solution to reduce Shively’s PAR.” *Id.*

This Court flatly rejected Dr. Tellado’s testimony, reasoning that the expert “first provide[d] a brief, high-level explanation . . . but that explanation [was]

unsupported by any evidence other than the disclosure of the invention in the patents-in-suit.” *Id.* at 1362. The Court explained that the expert further “fail[ed] to identify any other evidence that provides this necessary link” between the combination of prior art references and the patent-in-suit, and then “state[d] in conclusory fashion—again without any support—that the combination ‘would have been a relatively simple and obvious solution’” *Id.* This Court concluded that the expert’s *ipse dixit* was insufficient to sustain the Board’s obviousness determination in the IPRs and reversed. *Id.* The same result should hold here.

Furthermore, in reversing the Board’s determination in *TQ Delta*, the Court reaffirmed its longstanding caselaw holding conclusory expert testimony insufficient to sustain a finding of obviousness. For example, in *ActiveVideo Networks, Inc. v. Verizon Commc’ns, Inc.*, 694 F.3d 1312 (Fed. Cir. 2012), the Court disapproved expert testimony where

[t]he expert failed to explain **how specific references could be combined**, which combination(s) of elements in the specific references could be combined, which combination(s) of elements in specific references would yield a predictable result, or **how any specific combination would operate** or read on the asserted claims. Rather, the expert’s testimony on obviousness was essentially a conclusory statement that a person of ordinary skill in the art would have known, based on the ‘modular’ nature of the claimed components, how to combine any of a number of references to achieve the claimed inventions.

694 F.3d at 1327 (holding that testimony was “not sufficient and is fraught with hindsight bias”) (emphasis added) (citing *KSR*, 550 U.S. at 418).

Similarly, in *DSS Tech. Mgmt., Inc. v. Apple Inc.*, 885 F.3d 1367, 1376 (Fed. Cir. 2018), the Court reversed the Board’s obviousness determination as legally insufficient in *inter partes* review proceedings. *Id.* at 1374–77. The issue in that case was whether it would have been obvious to modify the base station transmitter of an asserted prior art reference in the manner required by the challenged claims. *Id.* at 1374. The expert opined that “it would have been obvious to a [person of ordinary skill in the art] to have the base station [in the prior art reference] operate in an analogous manner” as the challenged claims because the base station and mobile stations of the prior art had systems with the same physical structure, notwithstanding the different transmission requirements, techniques, and complex communication protocols involved in the challenged claim. *Id.* at 1375-76.

In reversing, the Court reasoned that “[t]he similarities in transmission hardware cannot close these [technical] gaps without additional, reasoned analysis,” *id.* at 1376–77. The Court emphasized that the expert’s “conclusory statements and unspecific expert testimony” did not qualify as substantial evidence that could support the Board’s conclusions regarding obviousness. *Id.* at 1376 (quoting *Arendi S.A.R.L. v. Apple Inc.*, 832 F.3d 1355, 1366 (Fed. Cir. 2016)); *see also In re Giannelli*, 739 F.3d 1375, 1380–81 (Fed. Cir. 2014) (reversing the Board’s obviousness determination where examiner’s rejection “contained no explanation why or how a person having ordinary skill in the art would modify the prior art . . .

to arrive at the [claimed] apparatus” (emphasis added)); *InTouch Techs., Inc. v. VGO Commc'ns, Inc.*, 751 F.3d 1327, 1348 (Fed. Cir. 2014) (rejecting expert testimony as vague and conclusory which “opined that all of the elements of the claims disparately existed in the prior art, but failed to provide the glue to combine these references” (emphasis added)).

The panel decision approving the Board’s invalidation of the ’106 patent on obviousness grounds based on Dr. Abowd’s conclusory testimony conflicts with *TQ Delta*, *ActiveVideo*, *DSS*, *Giannelli*, and *InTouch*. Unless corrected, the panel decision threatens the uniformity of patent enforcement by departing from established precedent involving similar facts, lowering the sufficiency threshold to its lowest point, and simultaneously removing a key guardrail against hindsight bias, in violation of *KSR*.

At minimum, in the event the panel intended such a sweeping result, it should grant *en banc* review to clarify the continued validity of existing sufficiency case law in this Circuit.

CONCLUSION

For the above reasons, KEYnetik respectfully requests the Court grant rehearing or rehearing *en banc* and reverse the Board’s finding that the appealed claims are unpatentable as obvious.

Respectfully submitted,

/s/ Edward F. Behm, Jr.

Edward F. Behm, Jr.
(Reg. No. 52,606)
Mark W. Halderman
Armstrong Teasdale LLP
One Commerce Square
2005 Market St., 29th Floor
Philadelphia, PA 19103
ebehm@atllp.com
mhalderman@atllp.com
Tel.: 267-780-2000
Fax.: 215-405-9070

Marlon J. Weiss
Armstrong Teasdale LLP
355 Alhambra Cir., Ste. 1250
Coral Gables, Florida 33134
Tel.: 305-371-8809
Fax.: 305-448-4155
mweiss@atllp.com
miamiefiling@atllp.com

Counsel for Appellant, Keynetik, Inc.

ADDENDUM

United States Court of Appeals
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SAMSUNG ELECTRONICS CO., LTD.,
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2022-1127

Appeal from the United States Patent and Trademark Office, Patent Trial and Appeal Board in No. IPR2018-00986.

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

AFFIRMED

FOR THE COURT

February 15, 2023
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**
KEYnetik, Inc. v. Samsung Electronics Co., Ltd., No. 22-1127

CERTIFICATE OF SERVICE

I, [[Brittany Lewis]], being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by Armstrong Teasdale LLP, counsel for Appellant, to print this document. I am an employee of Counsel Press.

On April 17, 2023, counsel has authorized me to electronically file the foregoing **Petition for Panel Rehearing and Rehearing *en banc*** with the Clerk of Court using the CM/ECF System, which will serve via email notice of such filing to all counsel registered as CM/ECF users.

Thirteen paper copies will be filed with the Court within the time provided in the Court's rules.

April 17, 2023

/s/ Brittany Lewis
Brittany Lewis

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS AND
TYPE STYLE REQUIREMENTS**

1. This petition complies with the type-volume limitation of Federal Rule of Appellate Procedure 35(b)(2) or Federal Rule of Appellate Procedure 28.1(e)

X The petition contains [2,834] words, excluding the parts of the petition exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), or

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2. This petition complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) or Federal Rule of Appellate Procedure 28.1(e) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6)

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April 17, 2023

/s/ Edward F. Behm, Jr.

Edward F. Behm, Jr.
Armstrong Teasdale LLP

Counsel for Appellant, Keynetik, Inc.