

UNITED STATES INTERNATIONAL TRADE COMMISSION

In the Matter of:
CERTAIN BEVERAGE BREWING CAPSULES,
COMPONENTS THEREOF, AND PRODUCTS
CONTAINING THE SAME

) Investigation No.:
) 337-TA-929
)
)

Pages: 257 – 456 (with excerpts)
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1 UNITED STATES OF AMERICA
2 BEFORE THE
3 INTERNATIONAL TRADE COMMISSION
4

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6 IN THE MATTER OF: : Investigation No.
7 CERTAIN BEVERAGE BREWING CAPSULES, : 337-TA-929
8 COMPONENTS THEREOF, AND PRODUCTS :
9 CONTAINING THE SAME :

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12 HEARING, VOLUME II

13

14 Tuesday, June 16, 2015
15 Courtroom C
16 U.S. International Trade
17 Commission
18 500 E Street SW
19 Washington, DC

20

21 The Hearing, pursuant to notice of the Judge, at 9:00 a.m.,
22 before the Honorable Theodore R. Essex, Administrative Law
23 Judge for the United States International Trade Commission.

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1 APPEARANCES:

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1 APPEARANCES (Continued):

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3 On behalf of Respondents Solofill, LLC, and

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1 P R O C E E D I N G S

2 JUDGE ESSEX: Complainants, do you have anything
3 that we should take up administratively before we go back
4 to our witness?

5 MR. KUNDU: Yes, your Honor. Well, with respect
6 to the witness, your Honor, Mr. Phillips is our expert
7 witness, and I didn't formally offer him as an expert.
8 That's something that I would like to do.

9 JUDGE ESSEX: He's listed as an expert, and you
10 gave an expert opinion for him, and the other side did not
11 object. So I think we are all right on that step. I don't
12 have formal procedures. If he's offered in that way and
13 he's done an expert report, the other side is well aware of
14 what he is, absent objection, he is accepted.

15 MR. KUNDU: Thank you, your Honor.

16 JUDGE ESSEX: Anything else?

17 MR. KUNDU: I believe, your Honor, we've
18 discussed with opposing counsel on some exhibits to be
19 admitted. We can either deal with that now or --

20 JUDGE ESSEX: Do we have something you need me
21 to intervene on?

22 MR. KUNDU: Yes, your Honor. I believe there's
23 two exhibits.

24 JUDGE ESSEX: All right. What is our issue?

25 MR. FUISZ: Your Honor, I think we can side

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1 track this. RX-1007 and RX-1008, these are two references
2 that were explicitly excluded by Order 24 in motion in
3 limine number 1. Those two references, however, also
4 appear in Respondent's initial prehearing brief for the
5 limited purpose of rebutting secondary considerations. I
6 don't have an issue with references coming in for that
7 limited purpose. I do have an issue if they're trying to
8 come in to back door them to make validity arguments that
9 were not made previously.

10 JUDGE ESSEX: All right. Respondents?

11 MR. MEI: Your Honor, we do not plan to argue
12 claim 8 and 19 anymore. So either of those two references
13 are for limited purposes of secondary considerations.

14 JUDGE ESSEX: All right. Staff?

15 MR. WILEY: Staff has nothing to add on this.

16 JUDGE ESSEX: Thank you.

17 Since the parties agree this is for limited
18 purposes, I don't believe we have a controversy. So I will
19 accept them for that purpose and that purpose alone.

20 MR. FUISZ: Thank you, your Honor.

21 JUDGE ESSEX: Respondents, do you have anything
22 to take up before the witness retakes the stand?

23 MR. MEI: No, your Honor.

24 JUDGE ESSEX: Staff?

25 MR. WILEY: Staff has nothing to add, your

1 Honor.

2 JUDGE ESSEX: All right. Good morning.

3 Mr. Phillips, come on back up to the witness stand. And as
4 I do all the witnesses, I will remind you you are still
5 under oath.

6 MR. KUNDU: Your Honor, could I check one thing?
7 I wanted to make sure Mr. Phillips still has his direct
8 witness binder on the stand.

9 JUDGE ESSEX: All right.
10 Whereupon,

11 PAUL PHILLIPS
12 resumed the stand and, having been previously duly sworn,
13 was examined and testified further as follows:

14 CROSS-EXAMINATION (Continued)

15 BY MR. PEARSON:

16 Q Good morning, Mr. Phillips.

17 A Good morning, sir.

18 Q Now, I have a pile of binders up here. How many
19 do you have in front of you over there?

20 A I have the direct witness binder and the witness
21 binder for cross, and there seems to be another one that's
22 not related to my situation, sir.

23 MR. PEARSON: Permission to approach, your
24 Honor.

25 JUDGE ESSEX: You may.

1 BY MR. PEARSON:

2 Q Mr. Phillips, what's the title of that binder
3 that you just mentioned?

4 A The title is "witness binder, U.S. Patent Number
5 8,720,320, and prosecution history."

6 Q You're welcome to use that throughout this
7 cross. I have the same binder. We will be referring to
8 the patent and the prosecution history. So you can leave
9 that up there and use it during the cross-examination.

10 A Thank you, sir.

11 Q So Mr. Phillips, yesterday, we were going
12 through a line of questioning that focused primarily on the
13 claim construction of the phrase "to hold brewing
14 material."

15 Do you remember that?

16 A I do, sir.

17 Q And we left off somewhere in column 1, I
18 believe. Do you remember that?

19 A I remember it was still in the early stages.

20 Q Okay. If I can direct your attention to line 66
21 of column 1, please. So this line says "as used herein,
22 the term "pod" is a broad term and shall have its ordinary
23 meaning and shall include, but not be limited to, a package
24 formed of a water permeable material and containing an
25 amount of ground coffee or other beverage therein."

1 Do you see that phrase, that sentence?

2 A Yes, sir.

3 Q Do you agree that "pod" should have a broad
4 definition?

5 A Yes, we do.

6 Q And do you see that a pod is described as that
7 it can be a packaged formed of water permeable material?

8 Do you see that?

9 A I do.

10 Q Now, do you agree that that description
11 describes a pod that is separate from the pod adaptor
12 assembly?

13 A If it is a pod of that nature, it is potentially
14 separate.

15 Q And do you agree that all the pods described in
16 the '320 patent are separate from the pod adaptor assembly
17 in the '320 patent?

18 A I would like to understand when you say "all the
19 pods described," because there are not a lot of specific
20 descriptions of pods in the '320.

21 Q To rephrase, do all the embodiments in the '320
22 patent describe a pod that is separate from the pod adaptor
23 assembly?

24 A My recall is where an embodiment describes a
25 pod, it shows a somewhat nondescript article that is

1 inserted in the container. It doesn't define particularly
2 what the rest of the features are of that pod.

3 Q If you had to pick a yes-or-no answer to that
4 question, do all the embodiments describe a separate pod
5 from the pod adaptor assembly?

6 A If you allow me to look, I'm not sure if all the
7 embodiments describe a pod.

8 Q I understand. What we will do is we will go
9 through those embodiments together. Let's take a look at
10 figure 1A. Can you see figure 1A on your screen?

11 A I do.

12 Q So figure 1A is a picture of a pod adaptor
13 assembly; right?

14 A Potentially, yes.

15 Q And it has a receptacle; right?

16 A Yes.

17 Q And then this portion has a passageway labeled
18 120; right?

19 A Yes.

20 Q And the purpose of that passageway is to fluid
21 can flow out of this container; right?

22 A Yes, it is.

23 Q And a pod would rest on top of those -- it looks
24 like they're labeled 122, those protrusions or projections;
25 right?

1 A I see 122, and a pod could rest there, but I
2 don't see a pod present in this figure.

3 Q But it would require a pod or some type of
4 separate filter media to be inserted into that receptacle
5 for this to operate; right?

6 A I believe we discussed previously that in order
7 to use this with brewable material, a filter material would
8 be required.

9 Q And under this illustration here in the
10 description, you would have to put a separate pod into this
11 receptacle; right?

12 A I would have to put a filter material and then
13 the brewable material in there.

14 Q And that filter material would be separate?

15 A It would be.

16 Q And there's no other depiction in this figure of
17 an integrated mesh?

18 A Nor of any other depiction of filter material or
19 brewable material. It's simply the container depicted
20 here.

21 Q There's no depiction or description of an
22 integrated filter media in this pod adaptor assembly here,
23 is there?

24 A No, I see no description of that.

25 Q If we could move on to figure 2, please. Figure

1 2 is another depiction of a pod adaptor assembly; right?

2 A Yes, sir.

3 Q And like figure 1A, you would have to put a
4 separate filter or separate package, something separate
5 from this into this container for it to operate
6 effectively; right?

7 A I would have to have a filter media for it to
8 operate effectively.

9 Q And there's no suggestion, there's no depiction
10 of an integrated filter media or integrated mesh in this
11 figure, is there?

12 A There's no depiction of one being there or not
13 being there.

14 Q Now, the purpose of the passageway at the bottom
15 labeled 212 is for the fluid to flow out of this container;
16 right?

17 A Yes, sir.

18 Q And if there was an integrated filter, say on
19 the side walls of this, integrated mesh, you really
20 wouldn't need that passageway 212, would you?

21 A Well, I would be looking at this from the
22 perspective of someone skilled in the art. I would expect
23 the integrated filter, if it was present, to be along the
24 pathway where the fluid would exit. So in this case, I
25 would expect it only to be integrated across the bottom

1 near that passageway. Again, it doesn't tell us that it's
2 there or not there, but that's how I would do it as a
3 person skilled in the art.

4 Q And that passageway that's open in this
5 embodiment at the bottom of 212 would be closed or covered
6 by some filter media if it changed that way; right?

7 A The filter media needs to be between the
8 brewable material and the exit or the passageway.

9 Q If we could take a look at figure 3A, please.
10 Now, figure 3A depicts a pod adaptor assembly; right?

11 A It does.

12 Q Now we see an outline of a package or pod,
13 whatever you want to call it, that's inside of this pod
14 adaptor assembly; right?

15 A It says for this embodiment that there's some
16 sort of a package inserted there labeled '320.

17 Q And it's resting on top of these protrusions
18 upwardly extending ribs, whatever you want to call it, that
19 separates it from the bottom of that receptacle; right?

20 A Yes.

21 Q And water would flow through the inlet port at
22 the top of this figure and then eventually out of this
23 passageway at the bottom; right?

24 A That would be the apparent process, yes.

25 Q In the '320 patent, there's no suggestion or

1 description of having integrated filter media or integrated
2 mesh in figure 3A, is there?

3 A There is not.

4 Q If we could go to figure 3B, please. Figure 3B
5 is a pod adaptor assembly; right?

6 A It is.

7 Q And it has a single passageway there at the
8 bottom, I believe labeled 324. Can you see that?

9 A I do.

10 Q And it has these ribs or protrusions that are
11 along the side walls at the bottom of this container;
12 right?

13 A Yes, sir.

14 Q And the way this would work is you would put an
15 individual separate pod or filter into the container;
16 right?

17 A Again, this is not showing me a filter, whether
18 it's individual, separate, integrated, or otherwise. I
19 would expect there would be a filter between the brewable
20 material and the 324 exit port.

21 Q Would you expect for that filter to be separate
22 from this container or the pod to be separate?

23 A It's a design choice. It's how the person
24 executing that design would want to do it.

25 Q There's no suggestion in the description or in

1 this illustration to use an integrated filter media or
2 integrated mesh in figure 3B, is there?

3 A There's no suggestion either to use one or not
4 to use one.

5 Q If we could go to figure 4, please. Figure 4 is
6 a cross-section view, if we can call it that, or a
7 side-view of a pod adaptor assembly; right?

8 A Yes, sir.

9 Q And we see a pod or package, whatever you want
10 to call it, a separate -- call it a separate package. A
11 separate package inside of this receptacle; right?

12 A Yes, we do.

13 Q We see it has jagged edges, and it's likely
14 flexible; right?

15 A By drawing convention, the way that that's
16 shown, that would indicate it's a -- not a rigid shape.

17 Q And it's resting on top of those upwardly
18 extending ribs. It gives a little space between the bottom
19 of the receptacle and the bottom of that pod or package;
20 right?

21 A Yes, it does.

22 Q And like the other embodiments, water would flow
23 in through the inlet port at the top, and then it would
24 flow out of that single passageway at the bottom?

25 A Yes, it would.

1 Q Like the other embodiments, there's no
2 suggestion or illustration of an integrated filter media or
3 integrated mesh in figure 4, is there?

4 A There's not.

5 Q If we could take a look at figure 5, please.
6 Figure 5, again, is a pod adaptor assembly, starting to
7 look a little more like the EZ-Cup product. It has a
8 spring at the bottom; right?

9 A Yes.

10 Q And it has this package that fits inside of the
11 receptacle; right?

12 A Yes.

13 Q Like the others, the package would be separate
14 from the pod adaptor assembly; right?

15 A Yes. It shows it as something that's inserted
16 inside the assembly.

17 Q And like the other ones, water would flow in
18 from the top and out through this passageway, the single
19 passageway at the bottom; right?

20 A It would.

21 Q And there's no description here or in the '320
22 patent that suggests or describes an integrated filter
23 media or an integrated filter mesh; right?

24 A I don't see any description or implication
25 there. But it also doesn't tell me exactly what the

1 construction is of that inserted element 502. It's just --
2 it's a soft shape of some sort.

3 Q If we can move to figure 6, please. Figure 6
4 looks the most like the EZ-Cup product; right?

5 A It appears very similar.

6 Q Almost identical from a cross-sectional view;
7 right?

8 A Yes, sir.

9 Q And this is also a pod adaptor assembly?

10 A Yes, sir.

11 Q And in this embodiment, a separate pod would be
12 inserted into this pod adaptor assembly; right?

13 A A separate pod could be, but it doesn't have to
14 be a separate pod. And as we discussed before, it could be
15 a filter cup that contains brewable material, and that
16 would --

17 Q It must be a separate filter cup if -- for this
18 to work, you would have to put a separate filter cup into
19 the pod adaptor assembly?

20 A For this embodiment, I would expect it would be
21 a separate item.

22 Q Because if you put a spoonful of coffee directly
23 into this, it would just spill out of the bottom most
24 likely?

25 A Again, with any of these embodiments, there

1 needs to be a filter media of the many design choices
2 available to you to prevent the coffee from just spilling
3 out through the passageway exit.

4 Q Because they have that passageway at the very
5 bottom, and it would interfere maybe the taste of the
6 coffee and not brew as well if it spills out or at all?

7 A Probably a variety of things that would be
8 undesirable, but I would say as well, in general, the grain
9 size of ground coffee is going to be small relative to the
10 size of the water passageway. And so it would be very easy
11 for a loose grain to go through that passageway. That's
12 why a filter media is always needed.

13 Q There's no discussion, like all the other
14 embodiments, of using an integrated mesh or an integrated
15 filter media in this embodiment, is it?

16 A In this embodiment, I think it would be less
17 conducive to consider that option for a filter. But again,
18 I see that I could either use a pod or I could use that
19 filter cup as another option.

20 Q And that filter cup would be separate from this
21 pod adaptor assembly?

22 A It would be a separate item inserted in.

23 Q And we discussed the definition of a pod, and we
24 agreed that it had a broad definition. Do you agree that
25 the filter cup could be considered a pod in that broad

1 definition?

2 A That would be broader than I would personally
3 choose. To me, that's not a pod, because a pod implies to
4 me some sort of a construction that is -- has been prepared
5 and sealed, and that filter cup is still an open device.

6 Q Have you ever provided that opinion before, that
7 a pod is something that is sealed?

8 A I don't recall if I have or not.

9 Q Did you ever provide that opinion in -- did you
10 provide it in your deposition, that a pod must be sealed?

11 A I don't recall if that was ever stated or not,
12 sir.

13 JUDGE ESSEX: Pardon me a moment.

14 Mr. Phillips, you were looking at the EZ-Cup
15 pods earlier. Do you recall that?

16 THE WITNESS: Yes, sir.

17 JUDGE ESSEX: Those filters weren't sealed, were
18 they, the pods?

19 THE WITNESS: They were not. That's the type of
20 filter cup I'm referring to.

21 JUDGE ESSEX: So those pods don't have to be
22 sealed, then?

23 THE WITNESS: That's what I'm saying. Those
24 types of filters don't have to be sealed.

25 JUDGE ESSEX: All right. Thank you.

1 Sorry for the interruption. Continue, Counsel.

2 BY MR. PEARSON:

3 Q So Mr. Phillips, we just reviewed all the
4 embodiments. Do you agree now that all of the embodiments
5 in the patent do not describe an integrated mesh or
6 integrated filter media in that pod adaptor assembly?

7 A I would agree that none of those describe that,
8 but they don't preclude it either, because several of them
9 don't tell me what the filter media is. So again, I would
10 have a design choice on how I would do that.

11 Q But nowhere in the '320 patent is there a
12 suggestion to use an integrated filter media or integrated
13 filter mesh in a pod adaptor assembly, is there?

14 A To the best of my knowledge, the patent is
15 silent on that option.

16 Q Mr. Phillips, did you look at the original
17 claims before forming your opinions, the original claims of
18 the '320 patent?

19 A So the original claims being the first ones that
20 were filed?

21 Q Yes, sir.

22 A I did at one point in time. I don't have clear
23 recall on them. So if we're going to discuss them, I would
24 like to refer to them.

25 Q Let's take a look at the original claims. We

1 will display them on your computer, but also, I believe
2 it's page 231 in that binder in front of you. I will give
3 you the Bates number. It's probably easier for you to find
4 in front of you. That is SOLO929000849, and I believe the
5 exhibit number is RX-1002.

6 A Sorry. It's a large binder here, and I'm --

7 Q We have it in front of you, too, if that's more
8 convenient. Right now, I just want to take a look at the
9 first claim, the very first claim of this patent. It
10 describes a "pod adaptor assembly"; right?

11 A Yes. It's a pod adaptor assembly for use in
12 combination with a brewer. That's what it says.

13 Q And the final issue claims a "beverage brewer";
14 right?

15 A The wording is certainly different in the final
16 claim.

17 Q And we see that pod adapter assembly has a
18 receptacle; right?

19 A Yes.

20 Q And then it has "a raised portion adapted to
21 provide a support surface for a pod." Do you see that?
22 It's the third line describing the receptacle.

23 A I do.

24 Q "A raised portion to provide a support surface
25 for a pod," the pod in this claim must be separate from the

1 receptacle; right?

2 A The way this particular claim was written, at
3 the time it was written is describing a separate pod.

4 Q We can move on to the next independent claim,
5 claim 8. Here in claim 8 we see again a pod adaptor
6 assembly being claimed; right?

7 A Yes.

8 Q And in the first sentence, it has a housing
9 adapted to receive a beverage pod; right?

10 A Yes.

11 Q So in this independent claim, the beverage pod
12 is separate from the pod adaptor assembly?

13 A It's described as a separate element within the
14 claim language.

15 Q If we can take a look at the next independent
16 claim, claim 13. Claim 13 describes "a brewing chamber for
17 a beverage pod"; right?

18 A Yes, it does.

19 Q And "a housing adapted to receive the beverage
20 pod"; right?

21 A Yes.

22 Q And that pod is separate; right?

23 A It's a separate element in the language.

24 Q And this is a claim that has a biasing device
25 which could be a spring; right?

1 A That would be one form of a biasing device, yes.

2 Q Thank you. If we could go back to the title of
3 the issued patent. So every embodiment in the original
4 claims describes -- all the independent claims describe a
5 separate pod; right?

6 A Well, I'm going to be careful in how I answer
7 here, sir, because I don't know if those were the original
8 claims or not. We jumped into there. I was following the
9 reference you were presenting, and I was responding. I
10 don't know if those were the first claims ever written or
11 somewhere midway or the last ones before the final change.

12 Q But in the set of claims that we just looked at,
13 the pod was separate from the pod adaptor assembly; right?

14 A In that set of claims, it was.

15 Q Have you ever heard, besides maybe in my opening
16 statement, the phrase "prosecution disclaimer"?

17 A I'm not sure I'm familiar with that other than
18 in your statement, sir.

19 Q Do you understand the principle that a -- first,
20 back up before we get into the prosecution disclaimer.

21 Do you understand the process of getting a
22 patent?

23 A I won't say I understand every bit of it, but I
24 certainly have a general understanding of it.

25 Q So does your understanding include that there is

1 an examiner who is examining the patent?

2 A It does.

3 Q And there's an applicant who files an
4 application for a patent?

5 A Correct.

6 Q And through that process, the applicant submits
7 claims that they would like to have allowed; right?

8 A Yes.

9 Q And often, the examiner rejects those claims?

10 A Yes.

11 Q And then the applicant makes an argument in
12 response to that rejection?

13 A Yes.

14 Q And that could go on, it went on in this case
15 for seven years in this patent; right?

16 A And I have seen it go on for long periods of
17 time in patents that I have been involved with, sir.

18 Q Do you understand that during that process, if
19 the claims are rejected and the applicant makes an argument
20 to say why their invention is different, that that can
21 limit the scope of the finally issued claims?

22 A My understanding is that the way that that
23 process goes is important to understanding what the scope
24 is. I'm not sure if I'm qualified to answer your specific
25 question.

1 Q Does it make sense to you that an applicant who,
2 during the process, argues that their invention is
3 different for some reason, that they can't later exclude
4 someone else from doing something that's outside of that
5 difference? Does that make sense to you?

6 A Possibly. Can you be more specific?

7 Q I can. What we will do is we will use this case
8 as an example.

9 A Okay.

10 Q It will take us a few minutes to get there. But
11 you understand that the claims, you could call it a
12 metamorphose, but they go through this process, and it's
13 often impossible to trace the lineage of the finally
14 allowed claims to decide which arguments pertain to which
15 claims; right?

16 A I understand it's a very complex process.

17 Q You're familiar with the term "prosecution
18 history," also called "file history"; right?

19 A Yes, sir.

20 Q So when I use the term file history or
21 prosecution history, we're talking about often those
22 arguments but that process in this case that took seven
23 years that is captured in the prosecution or file history;
24 right?

25 A Yes, sir.

1 Q And that's the majority of the binder you have
2 in front of you right now; right?

3 A I will accept that you represent it that way. I
4 remember it was a quite lengthy amount of information.

5 Q Did you go through the entire file history
6 before forming your opinion?

7 A I attempted to at least scan through everything,
8 but I won't say I understood everything.

9 Q Did you mention or refer to the prosecution
10 history, cite any documents that were in that history when
11 forming your opinions, your written statement?

12 A I'm sorry. Can you please, repeat the question.

13 Q In your written question, did you cite any
14 documents from the prosecution history as a basis for
15 forming your opinions?

16 A I don't recall if I did or not right now.

17 Q Do you recall if you cited it in any of your
18 reports, expert reports?

19 A I may have. I don't have specific recall right
20 now.

21 Q When you reviewed the prosecution history, did
22 you see any arguments that you thought might limit the
23 claims?

24 A I'm not sure if I'm qualified to say whether it
25 would limit the claims or not. I saw there were a lot of

1 arguments and that the claims, as you said, metamorphosized
2 over time.

3 Q So you can't recall if there was anything in
4 particular that stood out in the prosecution history?

5 A I don't.

6 Q Do you recall an amendment that was made on
7 December 28th, 2010, and there were discussions and
8 interview around about that time that involved the
9 reference, Hu, H-u?

10 A I do have some recall of that, and I believe it
11 was discussed yesterday briefly as well.

12 Q Was the first time you heard about Hu yesterday
13 when I mentioned it?

14 A No. I had seen that one before.

15 Q Did you see that was -- did one of our attorneys
16 bring it to your attention?

17 A I don't recall who brought it to my attention.
18 It was at a time prior.

19 Q Did you find that reference or notice that
20 reference yourself when going through the prosecution
21 history?

22 A I don't want to say whether I found it or not,
23 but I do recall that I looked at that particular patent to
24 understand what it was after it was something that I was
25 aware of. So I have some general understanding of what

1 that patent is attempting to describe as an invention.

2 Q Let's take a look at that amendment. We can
3 find it in RX-1002, Bates number SOLO929000693, and we can
4 bring it up on your screen.

5 Mr. Phillips, can you see that?

6 A I can.

7 Q Do you understand that this is -- these are
8 statements made by Mr. Rivera's representative in front of
9 the Patent Office?

10 A That's my understanding.

11 Q Did you know that all of the claims had been
12 rejected prior to this statement?

13 A I'm not having recall of what the claim status
14 was prior to this.

15 Q Do you see where it says "regarding the Hu
16 reference," that sentence? Do you see where Mr. Rivera's
17 representative says "there is a fundamental difference
18 between Hu and the present invention"?

19 Do you see that?

20 A I do.

21 Q Do you believe that that statement that his
22 representative is trying to explain, that there's something
23 very different about Hu and his present invention?

24 A I believe that, and having looked at the Hu
25 patent, it's describing a different area of the art

1 completely.

2 Q And his representative uses the phrase "present
3 invention"; right?

4 A It does.

5 Q So it doesn't use a specific claim term to say
6 there's a difference between Hu and a specific claim term;
7 right?

8 A Well, my understanding of the term "present
9 invention" is that he's referring to the invention as
10 described by the claims that were present in the discussion
11 at that moment in time.

12 Q And he said there's a fundamental difference
13 between Hu and the claims that were in front of the
14 examiner at that time; right?

15 A He did.

16 Q And then he says "the present invention
17 describes a pod adaptor which compacts a pod."

18 Do you see that?

19 A I see that.

20 Q Now, based on that description, that pod must be
21 separate from a pod adaptor, right, to be compacted?

22 A It's describing a pod adaptor which compacts a
23 pod. If a pod is a separate entity, then yes.

24 Q Do you believe that he is describing the
25 fundamental difference in that second sentence, that the

1 fundamental difference is that the pod adaptor compacts a
2 pod? That's the difference?

3 A To me, in knowing what -- again, my recall of
4 what Hu is, the fundamental difference is a lot different
5 than that. Hu is about a way for not brewing beverages but
6 to take a soluble powder and try to resolubilize that and
7 to create a pseudo effect of foam that looks like crema for
8 an espresso, so that kind of frothy surface that's on the
9 top of an espresso beverage. It's a way to be able to do
10 something with a soluble powder that looks like it's real
11 fresh-brewed when it's not. So it's describing a whole
12 different area of the art to me.

13 Q And -- but the phrase -- the difference he
14 chooses to highlight for the examiner is that his pod
15 adaptor compacts a pod; right?

16 A He uses those words there.

17 Q And in that phrase, that pod must be separate
18 from the pod adaptor?

19 A In that phrase, the pod would be separate, and
20 in my understanding, it's referring to the claims in the
21 status they were at that snapshot in time.

22 Q And therefore, the present invention, as he
23 describes it, must have a pod adaptor which compacts a pod;
24 right?

25 A It sounds like a pod adaptor that compacts a pod

1 is containing in the inventions. I can't tell from this
2 whether that's the only invention that was present at the
3 time.

4 Q Briefly, we will get back on track here, but you
5 mentioned a soluble powder. Is that like an instant
6 coffee?

7 A This would be a form of instant coffee.

8 Q The Hu reference?

9 A That's what it's describing, is how to use that,
10 that soluble powder.

11 Q And in this dispute, there's a dispute whether
12 brewing material includes instant coffee; is that right?

13 A Yes, sir.

14 Q And you believe that brewing material is not
15 instant coffee?

16 A I believe that instant coffee is not brewing
17 material would be the way I would choose to say that.

18 Q Understood. Do you understand that Solofill's
19 position is that instant coffee is brewing material?

20 A That's my understanding.

21 Q But the representative does not make any
22 distinction here between an instant coffee; right?

23 A He's not describing that particular aspect.

24 Q He's focused on the difference, fundamental
25 difference, which is a pod adaptor which compacts a pod;

1 right?

2 A He's mentioning that, but when I look at what's
3 in the quoted thing about a third of the way down the page,
4 he's talking about "mixing should be carried out while
5 entrapping sufficient air to form a good foam or froth."
6 So he's referring to this mixing of water with a soluble
7 powder and then entraining air to form a pseudo crema.

8 Q He's describing Hu when he says that; right?

9 A He is, which again is a very different process
10 in my understanding of the art than anything associated
11 with brewing.

12 Q And he, in the next paragraph after that
13 description, says "it is therefore clear that Hu does the
14 opposite of compacting brewing material"; right?

15 A There's no brewing material in Hu, and there's
16 no attempt to compact. In fact, it's trying to have
17 controlled expansion.

18 Q And his focus there is on compacting brewing
19 material; right?

20 A He says it's the opposite of compacting brewing
21 material.

22 Q And then the last paragraph on this page, the
23 representative points out that "the rejections incorrectly
24 assert that the extraction chamber," assert the extraction
25 chamber, and we're talking about Hu?

1 A That would be my understanding, yes.

2 Q "As a removable receptacle configured to receive
3 a pod." So is it accurate to say that he's saying the
4 examiner is wrong here by seeing Hu as having a removable
5 receptacle configured to receive a pod?

6 A I think he certainly is saying that.

7 Q And he's saying that because that's a
8 fundamental difference between Mr. Rivera's invention and
9 Hu?

10 A Whether it's the entirety of the invention or
11 one of the parts of the invention, I don't have enough
12 information to say. But he's saying there's a difference
13 there, yes.

14 Q But he's using the phrase "present invention";
15 right?

16 A Yeah, he uses the phrase "present invention."
17 For me looking at this and with my limited legal
18 ability, "present invention" to me is all the claims that
19 would have been in the discussion, not just a single claim.

20 Q And this phrase "removable receptacle configured
21 to receive a pod," he's highlighting that because his
22 invention has a removable receptacle configured to receive
23 a pod; right?

24 A At least a portion of his invention would. I
25 don't see why he would argue that if he didn't have that in

1 a portion of it.

2 Q In fact, that was in every embodiment we saw in
3 the '320 patent, a receptacle configured to receive a pod;
4 right?

5 A It had a receptacle configured to where it could
6 receive a pod.

7 Q If you were a competitor looking at this, would
8 you think that he has limited or that he's highlighting a
9 difference between his invention and Hu?

10 A I think he's certainly describing that Hu is
11 addressing a different field of the art.

12 Q So you understand that Mr. Rivera's
13 representative made those remarks in response to a
14 rejection; right?

15 A I believe that was the reason for that, yes.

16 Q In an attempt to overcome the rejection; right?

17 A Right.

18 Q You understand that remarks made in an attempt
19 to overcome a rejection are especially relevant in trying
20 to understand the scope of the claims?

21 A My understanding is they do need to be
22 considered. Again, I don't know whether that was the only
23 basis for the rejection at this time or if there were
24 others or if there were other arguments. But responding to
25 this particular piece of information that we're looking at

1 now, I think it certainly needs to be considered. But
2 those other elements should be as well.

3 Q Do you think it's clear in this argument that
4 he's saying there's a fundamental difference between Hu and
5 the present invention?

6 A I think he's very clear in stating that.

7 Q You think he's very clear when he says that the
8 present invention describes a pod adaptor which compacts a
9 pod? Do you agree?

10 A I think he's saying at least that the present
11 invention includes that. What I don't understand, because
12 I'm not able at this moment to see all the claims that were
13 just rejected, as to whether there were claims that did or
14 did not involve compressing a pod.

15 Q Now, when we went through the embodiments
16 earlier, every single embodiment had a receptacle or pod
17 adaptor assembly that received a separate pod; right?

18 A Every embodiment had a receptacle that could
19 receive a pod, but we also discussed that they could
20 receive other filter media as alternatives.

21 Q And not all of the embodiments we saw compacted
22 a pod, did they?

23 A No, they didn't.

24 Q Did you know that under the doctrine of
25 prosecution disclaimer, an applicant can even exclude

1 embodiments that are outside the scope of, for example,
2 this argument?

3 A That's probably outside of my knowledge area,
4 sir.

5 Q Does it make sense to you that all of those
6 other embodiments we went through, some of those -- looking
7 at all the embodiments, some of those embodiments could be
8 excluded from the scope based on this statement right here?
9 Does that make sense to you?

10 A I'm going to accept that that's possible but I
11 guess I would have expected if they were -- I'm saying this
12 by way of helping you understand my thought, that if they
13 were excluded, that they would have not, then, been present
14 in the final issued '320 patent. And since they're
15 present, I'm going down the assumptive path that they
16 weren't excluded.

17 Q So in the embodiments that we looked at, there
18 were two that had a spring mechanism, figure 5 and figure
19 6.

20 Do you recall that?

21 A I recall there were two. I don't remember the
22 figure numbers.

23 Q And those were the only two that had the spring
24 mechanism; right?

25 A Yes.

1 Q Those were the only two that compacted a pod;
2 right?

3 A Yes.

4 Q So do you understand that the scope of the
5 claims could exclude all of the other embodiments, even
6 though described in the '320 patent based on this statement
7 right here? Did you understand that?

8 A I would ask you to repeat that. I want to make
9 sure I'm clear.

10 Q Do you understand that -- if we put them in
11 numbers, we had six embodiments, five and six had a spring
12 and those were the only ones that compacted a pod.

13 A Yes, sir.

14 Q Do you understand that the other four
15 embodiments could be excluded from the scope of the claims
16 based on this statement right here, because they don't
17 compact a pod?

18 A I wouldn't understand that from this statement,
19 because again I don't know what is the full range of
20 inventions that were being discussed. To me, the
21 inventions are the ones that are described in the claims,
22 and I would have to see them all.

23 Q You understand that our position, Solofill's
24 position is not even that narrow? Do you understand that?

25 A You're probably getting into finer legal points

1 than I would say I understand.

2 Q But you understand that our position is that the
3 pod must be separate; right?

4 A I understand that position, yes, sir.

5 Q But this could narrow it even further than our
6 proposed construction; right?

7 A I'm not qualified to say it could or it
8 couldn't.

9 Q But a construction even more narrow than ours
10 would include our construction, which is that the pod is
11 separate; right?

12 A If this was the only construction that was
13 valid, I believe that would be correct.

14 Q Have you ever heard -- I will just ask you in a
15 different way. Do you think this is a clear and
16 unmistakable surrender of a scope of the claims?

17 A I don't see it as that way. Again, when I look
18 at this, I see that the discussion is that there's a
19 mischaracterization of what the invention is of Hu and that
20 it doesn't even apply in the same area of art in the field.
21 I don't have enough information in looking at this and I
22 don't from recall know what was the list of all the claims
23 that were in consideration at that time. But I know all
24 the claims that were at whatever that revision level need
25 to be considered and not just lumping them into something

1 called present invention. I'd have to look at them all to
2 understand what their scope is.

3 Q Do you remember, when I asked you about the
4 process and that these claims undergo this large
5 metamorphosis?

6 A Yes.

7 Q Do you understand that all subsequent claims can
8 be limited based on a statement like this that says there's
9 a fundamental difference between Hu and the present
10 invention? Do you understand that?

11 A I understand that statements can be made to
12 limit it. I don't know if I'm qualified to say this one
13 does.

14 Q And I will ask you again. And most of my
15 questions are yes or no, and I think we're doing a pretty
16 good job. I'm giving you a lot of leeway, but I have to
17 ask you yes or no. Is this a clear and unmistakable
18 surrender in your opinion of scope of the present
19 invention, even if it just -- at this moment in time, do
20 you think this is a clear and unmistakable surrender of the
21 scope?

22 A As I understand this, I would say no.

23 Q Mr. Phillips, I want to take us back to briefly
24 the beginning of cross-examination yesterday. We went
25 through some canons of claims construction.

1 Do you recall that?

2 A I recall that.

3 Q Do you remember me using the phrase "reviewing
4 the disputed claims in light of the intrinsic evidence is
5 necessary"?

6 A Yes, I do.

7 Q Do you remember me using the phrase "interpret
8 the claims so they cover what was actually invented, not
9 what the inventor intended them to cover"?

10 Do you recall that?

11 A I don't have a clear recall of that statement.

12 Q Does that principle make sense to you?

13 A If you would, please, repeat that, I want to
14 respond accurately.

15 Q That we should interpret the claims so they
16 cover what was actually invented and what the inventor
17 intended them to cover? Does that make sense to you, that
18 we should use that principle when construing the claims?

19 A Well, I'm struggling with yes or no on that,
20 because my understanding from my history of work and what I
21 had done in creating intellectual property is that at the
22 time a patent is written, one may not know all the
23 potential uses of that invention. So it feels like you're
24 asking me to say if I didn't know there was a use it
25 doesn't count, and if I'm interpreting that wrong, please

1 correct me. But --

2 Q I will ask it a different way. Is it reasonable
3 to use that principle when construing the claims?

4 A I would say I don't understand what you're
5 getting at. To me, what's reasonable is to understand the
6 invention as it's disclosed in the claims, and if it's
7 excluded by a specification in a claim, then it's excluded.
8 If it's not excluded, that leaves me open to variations
9 that one skilled in the art would apply.

10 Q And the principle that a patentee can disclaim a
11 broad definition of a claim during prosecution, that
12 principle, should we understand that when we're construing
13 the claims? Is that reasonable to you?

14 A Certainly, if that happened in the patent
15 prosecution, that would be important to know.

16 Q And you weren't that familiar with the
17 phrase "intrinsic evidence" yesterday, were you?

18 A I think extrinsic was the one I struggled with
19 more, but --

20 Q You didn't understand the difference between
21 extrinsic and intrinsic evidence yesterday, did you?

22 A My understanding of intrinsic is that it's the
23 patent and the prosecution history and things of that
24 nature. It gets a little less clear for me as to what goes
25 into extrinsic.

1 Q Do you believe that we should, when interpreting
2 those claims, consider that intrinsic evidence?

3 A I believe that's the correct method, yes.

4 Q Not just looking at the claims as finally
5 issued; right?

6 A Again, you need to look at both elements of it.

7 Q And I believe your opinion on the claim
8 construction of the phrase "to hold brewing material," is
9 that there is no basis to do so; is that right?

10 A Yes, sir. There's a design choice.

11 Q After going through this cross-examination and
12 hearing some of those claim construction principles, seeing
13 that Hu reference, seeing that every single embodiment in
14 the '320 patent describes pod adaptor that has a separate
15 pod, do you believe that there's a basis for the Judge to
16 construe those claims, that phrase, "to hold brewing
17 material," to keep brewing material in a separate pod? Do
18 you think there's a basis for him to do so?

19 A I still believe that there's not a basis for
20 that.

21 Q You've been using this phrase, "a design
22 choice," that it would be a design choice to use an
23 integrated filter media or integrated filter mesh; right?

24 A Those would be among the range of choices, yes.

25 Q And in your written statement, you refer to

1 the "My K-Cup"; is that right?

2 A I believe it was used as an example of something
3 that was known in the art at that time.

4 Q And that was the only example that you used,
5 wasn't it?

6 A I'm not sure if I had another one, but
7 certainly, it was a representative example that has also
8 been included in some of the reference patents that have
9 been discussed in this case.

10 Q Is Sweeny one of those patents?

11 A Sweeny is one of those patents.

12 Q And Sweeny describes the My K-Cup?

13 A I believe that was Sweeny that does. If we look
14 at the reference, I can confirm it.

15 Q We will in a minute. But they're very similar,
16 as you recall right here; right?

17 A What I recall with Sweeny is Sweeny was an
18 opportunity for something -- a way to convert a Keurig
19 brewer into something that did not use a K-Cup.

20 Q And both Sweeny and My K-Cup existed prior to
21 2007; right?

22 A Yes, they did.

23 Q Both Sweeny and My K-Cup are a fundamentally
24 different system than the '320 patent; right?

25 A My K-Cup, as it was presented, fundamentally

1 changes some of the parts of the Keurig brewer, and it
2 operates differently because of that.

3 Q So would you describe it as a fundamentally
4 different system than the embodiments in the '320 patent?

5 A Yeah, I believe it's different than what '320 is
6 trying to do.

7 Q What about the word "fundamentally different"?
8 Have you ever used that to describe it?

9 A I don't recall if I've ever used that word or
10 not.

11 Q You just said that Sweeny and My K-Cup are
12 similar. Do you ever recall using that word, that it's a
13 fundamentally different system, Sweeny, from the '320
14 patent?

15 A I don't recall a use of a particular word. What
16 I recall is, again, My K-Cup is a modification to a Keurig
17 brewer that eliminates the lower needle and changes the
18 bottom half of the brewing chamber. That's as it's
19 executed. That's actually different to a certain degree
20 than the way the patent described the invention, in terms
21 of the way you actually did it. It still did the same
22 principle.

23 Q You said just a minute ago that you have to
24 remove that lower needle, right, if you use the My K-Cup?

25 A If you're using the My K-Cup the way they chose

1 to implement it, you would -- part of doing that is you
2 change the lower half of the brewing chamber to where there
3 is no longer a lower needle.

4 Q And that's the holder, right, in the brewing
5 chambers, the holder?

6 A The bottom half.

7 Q So in every claim in the '320 patent, in every
8 asserted claim, there's a needle-like structure; right?

9 A Within '320, the assumption is we're retaining
10 all of the fundamental structure of the Keurig brewer and
11 not changing it. We're changing what goes in it.

12 Q But this My K-Cup that existed before the patent
13 was filed, it was different from the '320 patent and that
14 the My K-Cup does not have a needle-like structure when
15 used, does it?

16 A No, it does not.

17 Q And every single element, every single claim
18 that's asserted in this case includes a needle-like
19 structure; right?

20 A That's correct.

21 Q Would you say that that's a fundamental
22 difference between the My K-Cup and the '320 patent?

23 A I would say that would be a fair
24 characterization, yes.

25 Q So it's not really helpful to compare the My

1 K-Cup to the '320 patent, is it?

2 A The reason for the reference to My K-Cup was it
3 was an example of an integrated mesh within a brewing
4 system that was used relative to Keurig brewers. Again,
5 it's trying to do something which semipermanently changes
6 the Keurig. But it shows that it was well-known to people
7 skilled in the art at the time because it preexisted 2007,
8 to be able to use an integrated filter mesh with a Keurig
9 brewer and a device that's holding brewing material.

10 Q Let's take a look at it. I believe it's in
11 CX-1C.

12 A Which binder is that in?

13 Q It's a Complainant exhibit, but it's also likely
14 in the cross binder, and we will pull it up for you.

15 A Okay.

16 Q I believe it's answer 39 in your direct witness
17 statement in this case. Mr. Phillips, this is a picture of
18 the My K-Cup; right?

19 A Yes.

20 Q And it has three components, this bottom
21 plastic -- let me get my laser pointer.

22 A I believe I know the piece you're referring to
23 in the picture.

24 Q Mr. Phillips, right here is the receptacle in
25 the My K-Cup; right?

1 A That is the replacement of the lower brewing
2 chamber.

3 Q It's described as a holder; right?

4 A That's the terms that were used here in this
5 answer, yes.

6 Q And this holder replaces in the Keurig brewing
7 machine right here this piece that I'm holding; right?

8 A Yes, the lower brewing chamber, which you can
9 remove as you just did.

10 Q And this is referred to as a holder; right?

11 A In that answer, yes.

12 Q And it has a needle-like structure in the
13 bottom; correct?

14 A That's the original Keurig piece. The one that
15 goes in does not have a needle-like structure.

16 MR. PEARSON: Permission to approach, your
17 Honor. I'm handing the Judge the holder with a needle-like
18 structure from RPX-1008.

19 JUDGE ESSEX: Thank you.

20 BY MR. PEARSON:

21 Q So Mr. Phillips, the holder that I just
22 presented to the Judge has a needle-like structure in it;
23 right?

24 A It does.

25 Q And that's the needle-like structure that the

1 '320 patent refers to in all the asserted claims?

2 A It is. And just for clarity, we've also
3 frequently called that the lower half of the brewing
4 chamber.

5 Q Have you ever called it that before right now?

6 A Yes.

7 Q Did you call it that in your witness statement?

8 A I believe so.

9 Q Or did you call it a holder?

10 A I believe it was called a brewing chamber. In
11 this particular response with My K-Cup, it was discussed as
12 a holder.

13 Q But it wouldn't be a brewing chamber in the
14 context of the '320 patent because that brewing chamber
15 requires a needle-like structure, doesn't it?

16 A That's correct.

17 Q And you said it was a design choice to use an
18 integrated mesh. That integrated mesh for the My K-Cup is
19 this element right here; right?

20 A In the integrated mesh is a part of that
21 physical structure, which is basically a cup that is shaped
22 similar to a K-Cup with an open top and of different
23 construction.

24 Q And this piece, the third piece would be the
25 cover; right?

1 A Yes, sir.

2 Q And in the '320 patent, the cover fits on the
3 container; right?

4 A It does.

5 Q It doesn't fit on the brewing chamber, does it?

6 A Correct.

7 Q So if we were to compare this to the receptacle
8 here, this plastic piece, the first element I mentioned
9 would be the closest thing to a container; right?

10 A Yeah, the cylindrical plastic piece would be.

11 Q The My K-Cup is not mentioned anywhere in the
12 '320 patent, is it?

13 A I don't remember it being discussed in text.
14 Right now, I do not recall whether it was listed as a
15 reference in the prior art.

16 Q And in your opinion, you said it would be a
17 design choice to take the integrated mesh from the My
18 K-Cup, right, and use it in the '320 patent?

19 A It would be a design choice to take integrated
20 mesh, as was done with the My K-Cup, because integrated
21 mesh has been known for many number of years. I can't tell
22 you how many, but it can certainly go back 20-plus years
23 prior to that date. So it was well known to those in the
24 art as an option for filters. I think most people might
25 remember drip coffee brewers as well where there was a

1 basket they could insert that could have an integrated mesh
2 as opposed to using a paper filter. It's a well-known
3 option.

4 Q But it's not in the patent, is it?

5 A It was not specifically embodied in the patent.

6 Q So if we're trying to understand the meaning of
7 that phrase, "to hold brewing material," we shouldn't
8 consider it, should we?

9 A I would disagree, because my understanding of
10 the way that I would look at the claim is if it's
11 restricted in the claim language, you know, in the numbered
12 claim, then it has to be done the way that it is. If it's
13 a design choice that I have options as one skilled in the
14 art, then I can execute any of those options and still be
15 within the spirit of the claim.

16 Q Let's move on from the phrase "to hold brewing
17 material."

18 A Okay.

19 Q And focus on claim 5, if we could pull up claim
20 5, please. There's a dispute over the phrase in claim 5,
21 specifically the phrase "needle-like structure." If we
22 could focus in on that phrase, please. It looks like it's
23 at line 20, and claim 5 describes a beverage brewer; right?

24 A It does.

25 Q With "a needle-like structure disposed below the

1 base"?

2 A It does.

3 Q Do you understand Solofill's position to be that
4 that phrase "the base" should mean the entire base?

5 A I understand that's your position.

6 Q And it's your position or ARM's position or both
7 of yours position that "the base" refers to a portion of
8 the base?

9 A In particular, I would say my position is the
10 base is the base as described in the claim specification,
11 which is the base that we see in column 9 there at the --
12 on the right side of the screen, and it describes that at
13 least a portion of the base is disposed a predetermined
14 distance above the bottom surface of the brewing chamber.
15 So it's telling me what a base is in the context of this
16 claim. It's specifically describing what a base is.

17 Q So in short, you disagree with our position?

18 A With Solofill's position? Yes, I do.

19 Q So you see on line 20 it's referred to as "the
20 base," not "the at least a portion of the base"; is that
21 correct?

22 A I see the words "the base," but my
23 interpretation is that's the base as was described above in
24 lines 1 through 5.

25 Q Specifically, your opinion is that it should

1 refer to the phrase "the at least a portion of the base";
2 right?

3 A "The at least a portion of the base is disposed
4 a predetermined distance above a bottom of the surface of
5 the brewing chamber" is a part of what the base is that
6 we're considering.

7 Q Are you familiar with the principle that
8 different phrases should have different meanings?

9 A I'm not sure from a legal standpoint. I can
10 understand the statement.

11 Q Is it reasonable to use that principle in
12 interpreting claim 5, that when we see different phrases,
13 we should interpret those different phrases to have
14 different meanings?

15 A Again, I don't see this as being a different
16 descriptor. What it's told me at the top is what a base
17 is. When it refers later to "the base," to me, it's
18 referring to the same base.

19 Q So is it your opinion that the phrase "a base"
20 is not referring to the entire base?

21 A What this says is "a base," and it goes on
22 further to describe what is that base. It's telling me
23 what are the limiting features of the base that are
24 applicable for claim 5. And therefore, after that, when I
25 see a reference to "base," it's that same base to me.

1 Q And you see a reference specifically that
2 says "at least a portion of the base"; right?

3 A I do.

4 Q So if the phrase "the base" on line 20 was
5 referring to at least a portion of the base, would you
6 expect it to say "at least a portion of the base"?

7 A I wouldn't from the way I understand it, because
8 it's already described the base up in lines 1 through 5.

9 Q Have you reviewed other patents and seen phrases
10 like "at least a portion of the base" or a portion of
11 something?

12 A I've seen terms such as that before in general,
13 yes.

14 Q It sounds a little awkward to probably a lot of
15 folks in the room or some folks in the room who use regular
16 English and not patent phrases. But do you find it common
17 when defining claims, when you use a phrase like "at least
18 a portion of the base," that you would later, if you're
19 referring to that "at least a portion of the base," would
20 call it the "at least a portion of the base"? Would you
21 expect that in a patent claim?

22 A To be honest, me as a person more skilled in the
23 art and not with legal training, I wouldn't necessarily
24 expect it, because again, when I read it, when it tells me
25 what a base is in the context of the claim, I'm now

1 applying that definition of base whenever I see that term
2 referenced. So I don't look for it and expect it.

3 Q If we could take a look at claim 7 briefly, and
4 then we will go back to claim 5. Claim 7, we see in the
5 second sentence "includes at least one extension that
6 raises the at least a portion of the base."

7 Do you see that?

8 A I do.

9 Q That doesn't sound like something you and I
10 would use if we were having a conversation outside this
11 courtroom, does it?

12 A Those wouldn't be words I would typically use,
13 no.

14 Q Do you understand that has significant meaning
15 in the patent claims?

16 A I understand what we're taking is everything
17 that came from claim 5 as being the invention, and now
18 we're further narrowing the invention to say that it has
19 other features or limitations.

20 Q Do you believe that the drafter here is
21 specifically referring to "the at least a portion of the
22 base" to distinguish it from "the base"?

23 A What I believe is, whether he's distinguishing
24 it or not, what this says is that I have an extension to
25 the base, and that's what is the further narrowing from

1 what is in claim 5. I'm not qualified to read the legal
2 language that may be implied.

3 Q If we could go back to claim 5, please, and have
4 the portion -- thank you. In your statement -- or you have
5 said that Solofill's interpretation that "the base" should
6 mean the entire base renders part of the claims
7 superfluous; is that correct?

8 A Yes.

9 Q Can you tell the Court exactly what you mean?

10 A Can we look at the reference where you're --

11 Q I will try to find it for you, but can you
12 recall which portion of this claim, while I'm looking for
13 it, is rendered superfluous by our interpretation?

14 A I would prefer to do it by actually referring to
15 the specific language, if we could, please.

16 Q I don't have it in front of me now, and we may
17 get back to it later. This is an odd way for me to
18 impeach, too, with all of this up here. But can you take a
19 moment just to look at it and see what phrase, just sitting
20 here now, what you think is superfluous?

21 A Again, sir, I would prefer to respond in the
22 full context of having the opportunity to see the statement
23 that had been made before and not try to do it purely from
24 memory.

25 Q So right now on the stand, you can't think of

1 any element in here that's superfluous by our
2 interpretation?

3 A I'm not saying that. I'm saying I would like to
4 give a complete and accurate response to your question, and
5 I believe I need that other reference to be able to do
6 that.

7 Q Why don't we do this: Why don't we take a look
8 at the phrase just after it. "Wherein the predetermined
9 distance is selected such that a tip of the needle-like
10 structure does not penetrate the exterior surface of the
11 base."

12 Do you think that phrase is superfluous because
13 of our interpretation that "the base" must mean the entire
14 base?

15 A To me, what this is defining is how that
16 predetermined distance is selected. I mean, there's a
17 technical reason for what that is.

18 Q Is that phrase superfluous, based on our
19 reading?

20 A Well, I guess what I would answer to that is, if
21 you're saying that the entirety of the needle needs to be
22 below the entirety of the base, then there's no way that
23 the needle-like structure's tip could ever penetrate the
24 base.

25 Q All right. Then let's use your interpretation.

1 Instead of seeing the words on line 20 "below the base,"
2 imagine that you're seeing the words "the at least a
3 portion of the base," referring back to that "at least a
4 portion of the base" above.

5 Can you do that?

6 A All right. So --

7 Q So if we take your meaning, that "the base" is
8 referring back to that "at least a portion of the base," so
9 imagine the claim saying that. Take a look at it, and let
10 me know if you think that second line is also superfluous
11 or not.

12 A To me, if we're saying that -- I want to be
13 careful here to give you a clean and clear answer. What we
14 are trying to do -- and I'm referring, as I think about
15 this, to some of the embodiments to teach how one could
16 practice this. In some cases, there is a penetration in
17 the bottom surface of the base, and the needle would
18 protrude through that space, as we look at embodiments in
19 '320. In a situation such as that, the tip of the needle
20 is extending through an opening in the wall. So therefore,
21 it's not penetrating the base, but it is capable of being
22 above the base.

23 There are other --

24 Q Mr. Phillips, I apologize to cut you off. But
25 just to go back to the question, if we were to imagine or

1 if the phrase "the base" was not "the base," it said "the
2 at least a portion of the base" and referring to the
3 same "the at least a portion of the base" above, would that
4 next phrase be superfluous, if you could pick a yes or a
5 no?

6 A I would say no, because there are different ways
7 that that situation can be satisfied. In your
8 interpretation, you're requiring a different physical
9 height for the needle versus any part of the base than what
10 would be possible with this.

11 Q So you don't agree that your interpretation
12 would also be superfluous?

13 A I don't agree.

14 Q You don't agree that if it's already below "the
15 at least a portion of the base," it's not going to
16 penetrate "the at least a portion of the base"?

17 A Well, it's not going to penetrate the base. I'm
18 applying base as the entirety of the base as defined above.
19 That's the way, again, I interpret this. So that's a lower
20 part and a predetermined disposed above distance.

21 Q You don't think it's just bad drafting?

22 A I'm not qualified to say whether it is or isn't.

23 Q Let's take a look at the phrase, it looks like
24 lines 3 to 5, it says "at least a portion of the base is
25 disposed a predetermined distance above a bottom surface of

1 the brewing chamber."

2 Do you believe that phrase is superfluous?

3 A No, I do not.

4 Q Under our interpretation, do you believe that
5 that phrase is superfluous?

6 A Well, under your interpretation, the
7 distinguishing difference has to do with the needle, not
8 having to do with the base and brewing chamber. So I don't
9 know how to respond to your question.

10 Q If you had to pick, yes or no, do you think that
11 our interpretation renders that phrase superfluous, yes or
12 no? Meaningless, we can use a different word.

13 A Again, your interpretation is talking about a
14 position of a needle, and that is a part of the claim
15 specification that occurs later. You're asking me to do it
16 in this only early part.

17 Q It may be that my question was confusing. So I
18 will rephrase. Our interpretation, the only difference
19 being that "the base" means the entire base versus "the at
20 least a portion of the base." So reading the claim 20,
21 let's put "entire" between "the" and "base." "A
22 needle-like structure disposed before the entire base."

23 Would that render the phrase you see, the clause
24 at lines 3 and 5 meaningless?

25 A No, it wouldn't.

1 Q Thank you. I believe you said -- you have said
2 in depositions and your witness statement that the
3 embodiments do not show a needle-like structure below the
4 entire base. Does that sound accurate?

5 A I believe that's accurate.

6 Q Could we take a look at the figures. We will
7 start with figure 5. So it's your position that the
8 needle-like structure is not below the entire base; right?

9 A In figure 5, it doesn't tell me specifically
10 where the needle-like structure exists. But based on the
11 description of this figure, it's telling me that that
12 structure is actually extending through the opening 510.
13 So with that understanding, it can't be below the entire
14 base.

15 Q But based on this picture, just looking at the
16 picture, the needle doesn't have to fit into that
17 passageway 510, does it?

18 A This particular figure is not disclosing where
19 the needle is located.

20 Q It doesn't disclose where it is, and it doesn't
21 disclose where it is not; right?

22 A I believe there was descriptive language of the
23 figure that provided further clarity on that.

24 Q And let's take a look at figure 3A. Figure 3A,
25 we don't have any indication where that needle is, do we?

1 A No, we do not.

2 Q So it could be below the entire base?

3 A Again, it's not describing where it is, but
4 telling us how this is supposed to work in the description
5 of embodiments where they refer to figures, it tells me
6 that it is in the opening statement.

7 Q So it could very well be in that passageway;
8 right? What is the base in this figure? Where would you
9 describe the base in this figure?

10 A This is a cut-away figure, as best as I can
11 tell, and the base is the lower surface. Do you need me to
12 point at it?

13 Q I can hand you my laser pointer, if that helps,
14 or you can describe it.

15 A All right. To me, what I can't tell is what
16 wall thicknesses are in certain areas because the figure is
17 incomplete there. But in general, I would look at the base
18 as what is the surface that -- if I was to invert this
19 product and look at it from its bottom, it would be the
20 surface that's facing me. That's probably the simplest way
21 to describe it. So it appears to be nominally flat across
22 parts of it. There appears to be some walls there on the
23 perimeter.

24 Q Let's take a look at this top portion. Do you
25 see this -- we can describe it as a rim or lip or however,

1 but do you see that projection there and this one here?

2 A I'm sorry. I was looking at the computer and
3 not at the --

4 Q Right there.

5 A Yes, I do.

6 Q When you put this into a machine like the Keurig
7 machine, that would rest on top of that holder; right?

8 A I believe that's what's implied by that, yes.

9 Q And the very bottom here in figure 3A doesn't
10 have to rest on the very bottom of the holder, does it?

11 A It doesn't have to. It could be above it by
12 some clearance distance.

13 Q So there would be some clearance because there
14 has to be?

15 A You have to allow for normal variations in
16 manufacturing and the like, yes.

17 Q And you could make a shorter variance of this;
18 right? When I say shorter, it's not as tall, if this were
19 the top and this were the bottom? There's no scale,
20 dimensions in the patent, is there?

21 A No, this doesn't have anything specific defining
22 the size of that figure.

23 Q So this could be resting on the cover -- sorry,
24 the holder in the Keurig machine. The needle could be down
25 here, down here. It could be anywhere below this pod

1 adaptor assembly; right?

2 A If it was much shorter than a K-Cup in height,
3 the needle could be below it.

4 Q It wouldn't take much for the needle to be below
5 the entire base, would it?

6 A It would take some reduction in that height, but
7 I can't tell you exactly what that dimension is. It's not
8 an inch. Whether it's a 1/10 or 2/10 --

9 Q It would be the measurement of however tall that
10 needle is in the holder, right, plus a little bit?

11 A Yes, sir.

12 Q Let's take a look at figure 6. Now, you
13 describe in figure 6 the base as being this annular portion
14 602b?

15 A That's a portion of the base. I also say it is
16 the lower portion of 606a.

17 Q What is 608 called in the '320 patent?

18 A I believe somewhere there is a term such as a
19 platform is being used.

20 Q But it's your understanding that that's the base
21 in the '320 patent?

22 A It's my interpretation that that has a function
23 of a base.

24 Q It's a part of the base; is that more accurate?

25 A It's a part of the base.

1 Q But the other part being 602b?

2 A Yes.

3 Q What about the spring that attaches 602b to 608?

4 Is that also a part of the base, in your opinion?

5 A No. It's a connecting piece between elements of
6 the base.

7 Q So is 608 and 602b made of the same material,
8 same plastic? Would you expect it to be? We can use the
9 EZ-Cup as an example.

10 A I'm looking for what 608 is.

11 Q 608 is the platform/what you call the base.

12 A Yes. I would expect those to be of the same
13 material.

14 Q What if they were made of different material?
15 Would you still consider 608 to be the base?

16 A I would say, if it is still a structural
17 material, it could still have a function of a portion of
18 the base.

19 Q So what makes 608 a base to you? Why is it --
20 it's not because it's made of the same material; right?

21 A It's because it is performing the equivalent
22 function of the bottom portion of the capsule.

23 Q The equivalent function?

24 A Yeah.

25 Q So what's the same function that they serve, the

1 bottom portion and 608?

2 A In this particular case where you have -- I'm
3 going to distinguish this from what you might do in an
4 actual K-Cup. The base has a function within, I think, all
5 of the embodiments where it is providing a support for the
6 filter and brewing material combination. So if I don't
7 have a base functionality for that element 608, the base is
8 not providing that support.

9 Q Is it accurate -- well, let me rephrase.

10 When defining 608, which is called a platform in
11 the '320 patent, as a base or a part of the base --

12 A Part of the base.

13 Q You said that if you turn this EZ-Cup or a
14 device that looked like figure 6 upside down, what you're
15 looking at is the base; is that accurate?

16 A Yeah, I would be able to see the elements of the
17 base when looking at it from that perspective.

18 Q That's a part of your reasoning as to describe
19 608 as the base in addition to 602b?

20 A It's that, as well as that supporting function.

21 Q If you were to turn the EZ-Cup upside down, the
22 first thing that's closest to your eyes looking at that
23 device would be the very bottom portion, 602b; right? And
24 the next thing you would see is the spring? That would be
25 the next thing closest to your eyes.

1 A The spring tends to live in a hard-to-see area,
2 because it's fairly close to the diameter of the outer part
3 of the shell. So it's only as that spring gets smaller
4 towards the top that you begin to actually see it.

5 Q But you see it -- it's closer to your face, if
6 you're looking at it upside down, than the 608 is; right?
7 It must be?

8 A Yes.

9 Q And the spring is made of a different material
10 than the container, the pod adaptor assembly, and 608;
11 right?

12 A It is.

13 Q But it's your opinion that the material doesn't
14 matter?

15 A The material isn't as significant as the
16 function.

17 Q So 608 can be a completely different material,
18 and it's still going to be the base in your mind?

19 A Yes, sir.

20 Q Now, let's take your interpretation and consider
21 608 the base and 602b to be the base together, but not the
22 spring. Is that an accurate --

23 A That's accurate.

24 Q -- way to describe it? The needle-like
25 structure in this figure could be below all of that; right?

1 A It could be. It doesn't tell us in this figure.
2 Again, if we look at the descriptor of the embodiment that
3 this figure is a part of, it tells us where that
4 needle-like structure ends up.

5 Q It could be, for example, where we see 614,
6 those numbers? The needle could be down there; right?

7 A It could be.

8 Q It doesn't tell us where it is and where it is
9 not?

10 A Again, the figure doesn't. I believe there's
11 other descriptive text that does.

12 Q Again, under the boundaries of your
13 interpretation, platform is the base, spring is not the
14 base, and then this base is a part of the base. And the
15 needle-like structure were inside of this EZ-Cup right?
16 When I say "inside," I mean a portion is above 602b.

17 Does that make sense to you?

18 A I believe that is the normal way it is executed,
19 yes.

20 Q So it would be at least a portion of the base,
21 that portion being the platform; right?

22 A Yes, sir.

23 Q But if we were to take our interpretation that
24 the base is the entire base but we are using your
25 description of the base, which is 608 and 602b, the

1 needle-like structure would not be below the entire base,
2 would it?

3 A Okay. So if we're using your --

4 Q Let me simplify it. Your description of the
5 base.

6 A Right.

7 Q Our interpretation of the phrase "the base,"
8 meaning the entire base.

9 A Right.

10 Q The needle-like structure is above 602b there.
11 So it's inside the EZ-Cup, would be a good example?

12 A Yes.

13 Q It's not below the entire base, is it?

14 A If that is the configuration, no, it's not below
15 the entire base.

16 Q So even under your description of the base with
17 our construction, it's not below the entire base?

18 A That's correct.

19 Q Let's move on. Let's focus on the -- let's go
20 to claim 18, please, and if we could focus on the
21 phrase "corresponding outflow." It looks like it's lines 7
22 through 10.

23 A Yes, sir.

24 Q I will read it for the Court. "Wherein the
25 container is adapted to accept the input fluid from the

1 inlet port through the opening and to provide a
2 corresponding outflow of fluid through the passageway."

3 Do you see that, Mr. Phillips?

4 A I do.

5 Q And there's several disputes about this phrase
6 between ARM and Solofill; right? Is that your
7 understanding?

8 A That's my understanding.

9 Q Do you understand that Solofill's position is
10 that the outflow must flow through a single passageway? Is
11 that how you understand part of our position?

12 A Yes.

13 Q And you disagree?

14 A Yes.

15 Q You believe that it could flow through multiple
16 passage ways, the outflow?

17 A Yes, I do.

18 Q Without going through the embodiments in great
19 detail like we did before --

20 A That's fair.

21 Q -- there's not a single embodiment that has a
22 multiple passageway at the bottom of the pod adaptor
23 assembly, is there?

24 A There's not, but my recall is there is a claim
25 that talks about more than one passageway.

1 Q And the claim uses the phrase -- I don't want to
2 be imprecise here, so let me find it. Claim 5 uses the
3 phrase "at least one passageway."

4 A Yes.

5 Q Is that what you're referring to?

6 A I would say that is correct.

7 Q And so you're saying that claim 5 uses the
8 phrase "at least one passageway," that tells you that this
9 passageway in claim 18 should refer to plural passageways
10 in the bottom or base of this container? Is that a fair
11 description of your position?

12 A Well, what it tells me is that this invention
13 includes that possibility, even though the specification in
14 18 is not specific about it. So when 18 doesn't say it's
15 one or multiples, it allows me the design flexibility for
16 multiples.

17 Q And your reasoning is because it refers in claim
18 5 of this, "at least one passageway"; right?

19 A Yes, sir.

20 Q Do you know that claim 5 was added long after
21 the patent was filed, that phrase "at least one passageway"
22 was not in the claims? Do you know that?

23 A I don't know when that was added. We discussed
24 earlier, the claims morphed quite a bit along the way.

25 Q Did you know it was added about six years after

1 the patent application was filed?

2 A I don't have knowledge of when it was added.

3 Q So let's assume it was added about six years
4 after the patent application was filed. So it was nowhere
5 in the original application, nowhere in the original
6 claims.

7 You still think that the -- "at least one
8 passageway" provides support to interpret "the passageway"
9 as having multiple passage ways for the out flow?

10 A I still believe it does.

11 Q You still believe that. Again, to save
12 everyone's pain from having me go through each embodiment,
13 did you know that when you see "the passageway" in the
14 specification, every single time you see it, it's singular?

15 A Which specification?

16 Q The specification of the '320. It's talking
17 about the passageway in the base, passageway at the bottom
18 of this container. We never see an S next to the Y in
19 passageway. Did you know that?

20 A If you're talking about in the embodiments, I
21 don't see it as plural in the embodiments. But to me, the
22 embodiments don't represent the only ways that one could
23 execute the invention. They represent ways that were
24 described by the inventor at the time of filing.

25 Q So I think we're in agreement here that you know

1 that the term "the passageway" when it's referring to where
2 that outflow flows out is always singular, never plural,
3 never has an S next to that Y in the specification; is that
4 right?

5 A If "specification" to you is the embodiments,
6 then I would agree. If it's -- if you're talking about the
7 claim specifications, I would disagree.

8 Q When I say "specification," and throughout this
9 case, I'm referring to the written description. I'm
10 referring to -- I'm referring to everything but the claims
11 in the original filed application.

12 A All right.

13 Q Let's take a look at figure 2, please.
14 Passageway is 212; right?

15 A That's what it's identified there, yes.

16 Q 212, a good description of that would be a
17 cylinder?

18 A It's incomplete in this graphical depiction, but
19 that might be an assumption.

20 Q You would expect this to be a cylinder; right?

21 A It appears to have some feature of that nature.

22 Q And it's the only passageway at the bottom of
23 this figure; right?

24 A It appears to be. Again, this is an incomplete
25 figure.

1 Q And you understand that our position, Solofill's
2 position is that "passageway" in claim 18 is referring to a
3 single passageway?

4 A I do.

5 Q And the word "single" does not appear in the
6 claim. That's one area of dispute; right?

7 A Uh-huh.

8 Q That we are saying it's a single passageway.
9 And this passageway here, if it's a cylinder, has an
10 opening at the top; right?

11 A Yes.

12 Q And an opening at the bottom?

13 A Yes.

14 Q And it's connected, you could call it a
15 sidewall, cylindrical wall, annular wall. But it has two
16 openings and something that connects it; right?

17 A Yes.

18 Q You could describe this as a channel?

19 A There are various terms that could be applied,
20 yes.

21 Q Could you describe this as a road or a path?

22 A Again, I think we describe this as a way to pass
23 from one place to another.

24 Q So again, to save me from having to ask you what
25 looks like about 40 questions, "passageway" is always

1 singular when it's referring to the passageway that
2 receives this outflow; right?

3 A You're saying within the embodiment
4 descriptions?

5 Q Within the embodiments, the specifications in
6 the '320 patent.

7 A Yes.

8 Q And your support is that "at least one
9 passageway" in claim 5, right, that it could have multiple
10 passageways?

11 A Claim 5 shows me the idea that more than one is
12 something that is under consideration. And again, my --

13 Q Under consideration six years after the patent
14 was filed; right?

15 A I don't have knowledge of the timing. But if I
16 can finish the answer, please, my understanding is if there
17 is not a specific limitation in the claim as to what a
18 passageway is, that as a designer, I have freedom to
19 execute that in equivalent ways, and those equivalent ways
20 are also representative of the patent invention.

21 Q If we could go to claim 18, please, and take a
22 look at that phrase that we were focused on. You just told
23 me that you agree that all the embodiments have a single
24 passageway receiving that outflow; correct?

25 A Yes.

1 Q So do you think it's reasonable to interpret the
2 claims to cover an embodiment that is not described or
3 shown in the patent?

4 A I believe that the embodiments shown in the
5 patent don't represent all of the potential embodiments.
6 So implicit from that, yes.

7 Q So you think it is reasonable to interpret these
8 claims to include an embodiment that's not described in the
9 specification?

10 A Yes, if it is performing the same invention.

11 MR. PEARSON: Your Honor, I move to strike that
12 last response. I believe we're getting close to --

13 JUDGE ESSEX: You keep asking him legal
14 questions, and he's not an attorney. He's admitted he's
15 not an attorney. So I think you're stuck with his answers
16 as long as you keep going into -- I know the law that
17 involves preferred embodiments and the specification and
18 that, but he's never pretended that he is a legal expert in
19 this, and I think you're stuck with the answer as long as
20 you keep dabbling in the legal field. So I'm not going to
21 strike it. I'm going to allow it.

22 MR. PEARSON: I understand, your Honor, and I
23 will move on.

24 JUDGE ESSEX: As long as you're thinking of
25 moving on, do you feel you have a lot more time here to go?

1 MR. PEARSON: Give me just a minute, your Honor.
2 I will see. Would you like to take a break?

3 JUDGE ESSEX: Well, if you think you haven't got
4 all the wind out of your sails just yet, this would be an
5 appropriate time for our morning break, I think.

6 MR. PEARSON: I have quite a bit of wind, I
7 believe, looking at my notes.

8 JUDGE ESSEX: Let's take our morning break and
9 be back about five minutes to the hour. We are in recess.

10 Again, I admonish you, don't talk about the case
11 or look answers up. Do you understand that still applies?

12 THE WITNESS: I understand, your Honor.

13 JUDGE ESSEX: All right. Then we're in recess.

14 (Recess.)

15 JUDGE ESSEX: We will come to order.

16 Mr. Phillips, I remind you that you're still
17 under oath.

18 THE WITNESS: Thank you, your Honor.

19 BY MR. PEARSON:

20 Q Mr. Phillips, let's move on.

21 A Thank you, sir.

22 Q Beyond the passageway, the outflow. Still in
23 claim 18, if we can pull claim 18 up, please. We're going
24 to focus this line of questioning on "corresponding," to
25 provide "corresponding outflow."

1 A Yes, sir.

2 Q So not so much on the discussion of whether it's
3 singular or plural, the passageway, but the "corresponding
4 outflow." You understand there's a disagreement between
5 ARM and Solofill on what that phrase "corresponding outflow
6 through the passageway" means; right?

7 A Yes, sir.

8 Q And Solofill's proposed construction is that
9 that phrase means a flow through a single passageway that
10 is substantially the same in amount as the flow of input
11 fluid from the inlet port.

12 Is that your understanding of Solofill's claim
13 construction?

14 A It is.

15 Q And you disagree that this "corresponding" means
16 that the flow must be substantially the same in amount; is
17 that correct?

18 A Yes.

19 Q Did you ever measure the amount of flow that
20 flows out of any of the products?

21 A Not specifically.

22 Q But it's still your opinion, without measuring
23 the flow that went through any of these similar products,
24 that the "corresponding" means substantially the same in
25 amount?

1 A My opinion is still the same, yes.

2 Q Thank you. Let's move on.

3 A Okay.

4 Q Let's talk about the phrase "the passageway."

5 We talked about it earlier about it being identified in
6 figure 2. If we could pull up figure 2, please, which is
7 one example of a passageway. All right. So the passageway
8 is 212 in this figure; right?

9 A Yes, sir.

10 Q Just to frame the dispute here, Solofill argues
11 that the passageway, the definition of "the passageway" is
12 a long narrow space permitting the flow of fluid there
13 through.

14 Is that your understanding of Solofill's
15 position?

16 A Yes, it is.

17 Q And ARM's position is that "the passageway"
18 means the action or process of passing from one place or
19 condition to another, a road, path, channel, or course by
20 which something happens.

21 Is that your understanding of ARM's position?

22 A That's correct.

23 Q And you helped formulate that construction;
24 right?

25 A Yes, sir.

1 Q When it uses these examples of a road, a path, a
2 channel, a course, which one best describes 212 in this
3 embodiment, in your mind?

4 A I think -- well, depending upon one's use of
5 words, but "road" is not an appropriate one. Channel or
6 course potentially are closer descriptors.

7 Q So channel or course. And would you say
8 throughout the '320 patent, that of the words used in ARM's
9 construction, that channel or course is the better
10 description?

11 A Yes.

12 Q If it's a channel or a course, then there has to
13 be a beginning and an end; right?

14 A Yes, sir.

15 Q And at the beginning, there's going to be an
16 opening?

17 A Yes.

18 Q At the end, there's going to be an opening?

19 A Yes.

20 Q And something in between those two openings;
21 right?

22 A Yeah, if it's a physical surface, it will have
23 some dimension.

24 Q And the term "passageway" is something different
25 than just an opening; right? Regardless of either

1 interpretation, ours or theirs, the passageway is more than
2 an opening?

3 A It's implicit that something is coming from one
4 place to another.

5 Q But in the '320 patent, a passageway is
6 something different than an opening, isn't it?

7 A An opening doesn't necessarily mean something
8 goes through it. Passageway implies something is going
9 through it.

10 Q And specifically, in claim 18 -- well, we will
11 just stay focused on the term "the passageway." To all the
12 claims, not just claim 18, claim 5 also.

13 A Okay.

14 Q Do you understand that the patent describes an
15 opening in the patent when it describes figure 6? If we
16 could pull figure 6 up. Do you see that, Mr. Phillips?

17 A I do.

18 Q In that area where that 602, if that's the base,
19 the annular rim, that area that's open is considered an
20 opening, right, in the '320 patent?

21 A It's an opening. I consider it also the
22 passageway.

23 Q But the '320 patent does not refer to it as a
24 passageway, does it?

25 A I don't believe it used that term when it was

1 describing the figure.

2 Q Do you understand that it uses the
3 term "opening"?

4 A I believe that's correct. I can look and verify
5 it, but --

6 Q So it uses in the patent the "opening" and
7 "passageway" to describe different elements in the
8 embodiments; right?

9 A It uses that term there. I'm not sure they're
10 describing something different. My interpretation is
11 they're not.

12 Q Your interpretation is that they're not what?

13 A They're not describing something with a
14 different function.

15 Q But different words are used in the '320
16 patent, "passageway" and "opening"; right?

17 A Yes.

18 Q This is an opening that we're looking at here?

19 A This is a passageway to me in the context of the
20 patent.

21 Q According to the '320 patent, that's an opening;
22 right?

23 A According to the identifier for that element,
24 yes.

25 Q Let's take a look at that description. I think

1 that would help the Court. If we could focus on the
2 description of figure 6 in the specification. Let's go to
3 the discussion of figure 6, and probably control F
4 for "opening" would help us out. Let's look at 614 where
5 it says -- line 47.

6 So the '320 patent specifically refers to 614 as
7 an opening; correct?

8 A It does, and it tells us what that opening is
9 for in the next couple lines, which is that it allows
10 coffee to flow out of the chamber.

11 Q If we could go to the discussion on figure 2 and
12 possibly pull up figure 2 next to the discussion on figure
13 2. You will see it identifies 212 as a passageway, at
14 least there on line 22. Do you see that?

15 A I do. And again, it tells me the same thing.
16 The intent of that is to permit the brewed beverage to -- I
17 lost my place here, but for the brewed beverage to exit the
18 container.

19 Q If the Judge adopts ARM's construction in whole
20 or in part, do you think it's reasonable for him to
21 interpret "the passageway" as a channel?

22 A I believe a channel again is what I started out
23 saying would be one of the terms that could be used.

24 Q Do you think that it's reasonable for this claim
25 to be interpreted to distinguish between a passageway and

1 an opening?

2 A I believe when we're talking about passageway,
3 we're talking about the channel by which the brewed
4 beverage exits from the inside of the receptacle to the
5 outside.

6 Q So do you think it's reasonable to interpret the
7 term "passageway" in the claims of the '320 patent as
8 something different than an opening?

9 A Again, "the passageway" is the path by which the
10 brewed beverage exits in the context of this patent.

11 Q Would it be reasonable for that difference to be
12 that this passageway, whether it's a path or channel, has
13 two openings and something that connects those two
14 openings?

15 A There will be some wall thickness of that
16 material by where that fluid passes, yes.

17 Q Thank you. Let's move on. Did you know that
18 the K3 and K2 products can be used as a loose-leaf tea
19 infuser?

20 A I have heard that or seen that in some of the
21 documentation from Solofill. I don't see that anywhere on
22 the packages to tell me to use it that way. Again, as I
23 responded in previous reports, it doesn't seem to be a
24 particularly suitable device to do that function.

25 Q Do you remember looking at the -- have you had

1 an opportunity to look at the Solofill products in the
2 courtroom?

3 A Not in the courtroom, sir.

4 Q Let me present you RPX-1005.

5 MR. PEARSON: Permission to approach, your
6 Honor. I'm handing the witness RPX-1005.

7 THE WITNESS: Thank you.

8 BY MR. PEARSON:

9 Q You're welcome. Mr. Phillips, could you,
10 please, take a look at the back of that package.

11 A Yes.

12 Q Do you see anywhere where it says that it can be
13 used with loose-leaf tea?

14 A I've been asked the question before. I need to
15 find it on here.

16 Q I think it's in the middle.

17 A I see the last bullet in the upper section that
18 says "works great with loose-leaf tea."

19 Q Thank you.

20 MR. PEARSON: Permission to approach, your
21 Honor. I am retrieving RPX-1005.

22 BY MR. PEARSON:

23 Q Mr. Phillips, do you know how a tea infuser
24 works?

25 A I have a general understanding of that, yes,

1 sir.

2 Q And if this product were to be used as a tea
3 infuser, it wouldn't require use in this Keurig beverage
4 brewing machine, would it?

5 A No. As a tea infuser, it would not, although
6 that product is -- I'm instructed to use it in a Keurig
7 brewer.

8 Q And if this product were used as a tea infuser,
9 you could open up the cover and put loose-leaf tea inside;
10 right?

11 A Yes, sir.

12 Q Then close the cover; right?

13 A Right.

14 Q And simply put it in a cup of hot water?

15 A That would be one of the two ways I know how to
16 use an infuser. The other would be that you would pour
17 liquid through it when it's resting on top of a cup or a
18 teapot.

19 Q And if used as a tea infuser, it wouldn't
20 infringe the '320 patent, would it?

21 A I don't recall that being claimed as one of the
22 inventions of the '320.

23 Q It wouldn't infringe any of the asserted claims,
24 would it?

25 A I don't see where it would.

1 Q Because it's not -- we're not going to find a
2 needle-like structure in that coffee mug or whatever it's
3 placed in; right?

4 A Right.

5 Q And it's probably not considered a coffee mug --
6 a beverage brewer, as the '320 contemplates a beverage
7 brewer, that coffee mug; right?

8 A That's right.

9 Q And you understand that the K2 would work
10 similarly as this?

11 A I understand your descriptions. I would also
12 understand and it is my opinion that neither of them would
13 be a good choice to use as an infuser because the lid is
14 not very securely retained, and one would not be well
15 ensured, if they dropped it inside a pot of boiling water,
16 that it wouldn't come open.

17 Q Have you ever used a tea infuser?

18 A Yes, I have.

19 Q Did you ever try to use the K2 or the K3 as a
20 tea infuser?

21 A Not specifically, no.

22 Q Why not?

23 A I wasn't asked to do that. And again, it wasn't
24 one of the instructed uses of this. So it doesn't make
25 sense to me.

1 Q Let's move on.

2 A Very well.

3 Q If we could pull up the patent, going back to
4 column 1. There was a reference to tamping or compacting.
5 I believe it starts at line 55. Mr. Phillips, what's your
6 understanding of the level of food science experience,
7 training, education, whatever it is, what's your
8 understanding that a person having ordinary skill in the
9 art should have in the context of the '320 patent?

10 A My understanding is they need to understand
11 about beverage brewing, what, in fact, is brewing as a
12 process. They need to understand some of what happens
13 during a brewing process, whether it's -- and my contention
14 is it's not a static process. Things change over time.
15 Those would be important things to know.

16 If I was going to practice this patent, I need
17 to understand things that would be associated with food
18 safety, because I wouldn't want to create an unsanitary
19 condition --

20 Q Let's pause there for a minute, food safety.
21 Are you an expert in food safety?

22 A I'm not an expert, but I have general awareness,
23 and I know that I need to consult an expert when I get into
24 certain areas.

25 Q So if you're not an expert on food safety, you

1 would go to a microbiologist. Isn't that what you said in
2 your deposition?

3 A That would be one of the typical ways. The
4 question in the deposition was, I believe, with regard to
5 Coca-Cola and how we would have done it. Yes, that was a
6 typical process, that we would have a cross-functional team
7 member that had that skill.

8 Q But you're not an expert in microbiology or food
9 safety; right?

10 A Not specifically.

11 Q And did you consult a microbiologist in this
12 case?

13 A No, sir.

14 Q But you still think that a person having
15 ordinary skill in the art should have experience in food
16 safety?

17 A They need to be aware of the considerations for
18 food safety.

19 Q Is food safety ever mentioned in the '320
20 patent?

21 A Those words are not -- we went through this in
22 the deposition. Those words did not occur.

23 Q What we're looking at here is a discussion or at
24 least a statement that "some coffee connoisseurs believe
25 that coffee brewed using pod brewers do not have as good

1 flavor."

2 A Right.

3 Q Are you basing your opinion that a person having
4 ordinary skill in the art should have some type of training
5 or education in flavor, food flavor?

6 A I think that's one of the things about
7 understanding food science here and that flavor and
8 extraction of flavors is a part of understanding brewing.

9 Q You remember when we were discussing this issue
10 briefly yesterday?

11 A Yes, sir.

12 Q If we could go back to the "Field of the
13 Invention," please. I asked you if the primary purpose of
14 this patent was about compatibility. You agreed with me.

15 Do you recall that?

16 A I do.

17 Q Is that still your position?

18 A Yes, it is.

19 Q Mechanical compatibility; right?

20 A Well, functional compatibility.

21 Q When you say "functional compatibility," you
22 mean having a pod adaptor assembly that can be placed into
23 a Keurig machine and also brew pods; right?

24 A And to be able to brew brewable material, yes.

25 Q And just so we can give the Court a complete

1 picture of the references to anything related to food, do
2 you agree that food safety is not an issue, that neither
3 you nor Dr. Howle or anyone else testifying here has to be
4 an expert in food safety?

5 A To be an expert in food safety, I would agree.
6 To be aware where those considerations are important, I
7 think, should be included.

8 Q So the issues that are in dispute is how much
9 experience or training they need to have in flavor; is that
10 correct?

11 A Again, I think having the awareness of food
12 safety is also included, but flavor would be a part of it
13 as well.

14 Q If we put food safety to the side because we
15 would consult a microbiologist, is there anything besides
16 flavor?

17 A There's the basics of understanding what is
18 brewing and what is not brewing.

19 Q Any word you would use besides flavor to
20 describe what experience a person having ordinary skill in
21 the art should have experience or training in?

22 A As we're talking about brewing, we're talking
23 about extractions in general. So we're going to be seeing
24 that as flavors. We're going to be seeing that as
25 caffeine, as acids. There's a variety of things that

1 happen when you brew coffee, and I'm limiting that to
2 coffee for that particular discussion.

3 Q So would strength be a good way, caffeine
4 strength?

5 A Caffeine extraction and strength is a part of
6 it, yes.

7 Q Is that also a part of flavor, caffeine
8 strength? Would it affect the flavor?

9 A Caffeine does have a bitter taste to it. So it
10 affects flavor. There are other things, too, that affect
11 flavor.

12 Q So if we could go to column 6, line 62.. Line 62
13 here, we see -- we see a reference to -- just following a
14 statement that the pod has been pressed up against the
15 cover?

16 A Yes.

17 Q Would you describe that as compacting or
18 tamping?

19 A Yes, that's equivalent.

20 Q It says "this advantageously 'traps' the hot
21 water in the pod for a longer period of time," "produces a
22 stronger and more consistent brewed beverage."

23 Do you see that?

24 A I do.

25 Q That's another place in the '320 patent that

1 discusses something related -- it doesn't use the words,
2 but something related to strength or flavor; right?

3 A Yes.

4 Q Let's go to column 7, line 14. And again, we
5 see 7, 14, "As a result, a much stronger and consistent cup
6 of coffee is produced." Right below that, we see this
7 discussion about pushing the pod against the inlet cover;
8 right?

9 A Yes.

10 Q So in all three references, to summarize, they
11 share similarity of compacting a pod; right?

12 A Those three references, yes.

13 Q And they say that the result of compacting or
14 squeezing a pod. Is that another word you use, squeeze a
15 pod?

16 A I wouldn't say squeeze a pod. Tamping would be
17 a more comfortable term for me.

18 Q We will use tamp. So tamping the pod could
19 result in a stronger cup of coffee?

20 A It could and should.

21 Q And that's what these last two references are
22 referring to; right?

23 A That is a beneficial result of doing that
24 function.

25 Q And then on the first column, it talked about

1 flavor, compacting a pod. Some people prefer a pod
2 that's -- coffee that comes from a pod that's been
3 compacted; right?

4 A Yes.

5 Q Those are the only references in the entire '320
6 patent that suggest anything about flavor or strength;
7 right?

8 A To my knowledge, those are the areas where it is
9 specifically brought out.

10 Q And the rest of the entire patent focuses on
11 mechanical compatibility; right?

12 A It's the functional compatibility. It's
13 mechanical. It's hydraulic. It is around the brewing.
14 There are things like -- we were talking earlier about
15 making a shorter receptacle. That would mean I could have
16 less brewable material contained in there, which would then
17 affect the quality of the taste.

18 Q So you use the term "hydraulic." And I use the
19 term "mechanical." I think you use mechanical and
20 hydraulic.

21 Do you believe that fits squarely in the field
22 of mechanical engineering?

23 A Which piece, mechanical or hydraulic?

24 Q Both. I ask dumb questions sometimes, but let's
25 just stick with hydraulic. Does hydraulic fit squarely

1 within the field of mechanical engineering?

2 A Yes, sir.

3 Q You have some experience in engineering, don't
4 you?

5 A Yes, sir.

6 Q You're an electrical engineer?

7 A That's my degree.

8 Q Not a mechanical engineer?

9 A No.

10 Q Do you know Mr. Rivera had -- he's not a
11 mechanical engineer; right?

12 A That's my understanding, that his degree is in a
13 different field.

14 Q He's not a licensed engineer?

15 A No, not to my knowledge.

16 Q And you're not a licensed engineer?

17 A That's correct.

18 Q Mr. Rivera does not have any -- before he
19 invented or this patent was drafted, he did not have any
20 food science education, did he?

21 A As far as I know, he didn't. I do not know
22 Mr. Rivera's personal history to any extent.

23 Q He did not have any education or training in
24 food safety, did he?

25 A I don't know.

1 Q He did not have any education or training in
2 flavor?

3 A Sir, I don't know what his training was. I have
4 never met Mr. Rivera until yesterday.

5 Q That's fair. What about Mr. Ditta? Do you know
6 if he has any experience or training, education in anything
7 related to food science before he was retained to help
8 Mr. Rivera with his products?

9 A I don't know his qualifications, sir.

10 Q What about Mr. Vu? Do you have any knowledge of
11 whether Mr. Vu had any training or experience in food
12 safety before he -- and I'm not going to use invented,
13 because we disagree. Why don't we go with made the K2
14 product or the K1 product or the K3 product.

15 A I don't know. Most of what I know about Mr. Vu
16 is what was in your opening remarks yesterday, sir.

17 Q You know Dr. Howle, who we will hear from this
18 week, has a Ph.D. in mechanical engineering?

19 A I saw that in his CV, yes.

20 Q He teaches mechanical engineering at Duke
21 University?

22 A Yes, sir.

23 Q He's written over 700 articles?

24 A I'll trust you on the 700. I know he's been
25 published in many places.

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1 Q Do you consider him an expert in mechanical
2 engineering, based on the review of his CV?

3 A Yes, sir.

4 Q But it's still your opinion that he's not a
5 person that has enough skill or ordinary skill in the art
6 to opine on this '320 patent?

7 A I believe that it is necessary to have an
8 understanding of brewing in order to be capable of being
9 skilled in the art in this area.

10 Q Did you know that he spent over 200 hours
11 reading references, testing the devices, the K2, the K3
12 devices? Did you know that?

13 A I know you made a statement of that nature. I
14 have not seen his time sheets and don't expect to.

15 Q If he devoted that level of effort, do you think
16 he is qualified to testify on matters related to the '320
17 patent?

18 A I don't know what he did with those hours he
19 spent. So I can't answer that question.

20 Q You've read his report; right?

21 A Yes, sir.

22 Q Now, in your report, you used the term -- and
23 we're going to move on from this line of questioning of a
24 person having ordinary skill in the art.

25 In your report, you referred -- you used the

1 word "pressurized." And you use it throughout your report
2 over 10 times to explain in at least one example ARM's
3 interpretation that the container's adapted to provide
4 corresponding outflow through the passageway. More
5 specifically, you used it where it was coming out of this
6 inlet port to the container. So if it were the K3 product,
7 you described the water as pressurized when it leaves the
8 inlet port coming into this container.

9 Do you recall that?

10 A Yes, sir.

11 Q Is that water under anything -- under any
12 pressure when it exits that inlet port?

13 A It is exiting that port to an atmospheric
14 condition. So it only has a gravity head at that point.

15 Q So when you use the term "pressurized" in your
16 report, it's not exposed to any more pressure than we are
17 right now, which is atmospheric pressure; right?

18 A Which part, sir?

19 Q When the water flows out of the inlet port, it's
20 exposed to atmospheric pressure?

21 A No, no. There is a pressure gradient through
22 that container during the operation, because the inlet pump
23 is creating a supply pressure, and there is a pressure drop
24 from that pressure to atmospheric over the course of flow
25 through the device.

1 Q Let me be more precise here. After it leaves
2 the inlet port, is it under any pressure other than
3 atmospheric pressure?

4 A I would expect there's some. Again, within the
5 vessel you're looking for that pressure point is going to
6 determine how much.

7 Q It's exiting at some velocity, right, a certain
8 velocity?

9 A Yes.

10 Q Are you confusing velocity with pressure?

11 A No.

12 Q I know I was confused when I first saw it until
13 I read Dr. Howle's report. Did you see where he corrected
14 your use of the word "pressurized"?

15 A I don't recall that correction. I'm sorry.

16 Q Okay. Do you understand that momentum is
17 different -- a matter, say a brewed material, water, fluid
18 has a certain momentum is different than a fluid having a
19 certain pressure?

20 A Those are two different measurements.

21 Q And so water is flowing out of an inlet port, is
22 flowing out with a certain velocity; right?

23 A I would expect there's a velocity.

24 Q And because of that velocity, it has a certain
25 momentum, right, because it's moving?

1 A Because of the velocity in the mass, yes.

2 Q But when it's moving at a certain velocity, it
3 could even be a high velocity. It's not necessarily under
4 any pressure other than atmospheric pressure. Right?

5 A In a general statement, I would agree with that,
6 but in the case of immediately at the inlet to the brewing
7 container, I think there is pressure present.

8 Q Do you think the more accurate way to describe
9 it, instead of pressurized, is flowing at a certain
10 velocity?

11 A To describe what, please?

12 Q Describe the water leaving the inlet port.

13 A I would say that that water, as it leaves the
14 inlet port, has a velocity component, but there is also
15 pressure because there is a restriction to flow downstream
16 of that inlet port until it gets to the exit point, the
17 passageway.

18 Q We will move on. I will save the Court and
19 ourselves from going through each of those items.

20 Let's talk about infringement, which I would
21 like to describe as noninfringement, and focus on the K2.

22 A Okay.

23 Q I believe this is CX-3. And my question for
24 you, Mr. Phillips, is how do you describe the base in the
25 K2? What is the base in the K2?

1 A The base of the K2 I describe --

2 Q Can we pull this up for the Court, please, CX-3,
3 page -- let's try 133. It's -- sorry, 115, answer 220
4 through 222. I believe, for the sake of time, that your
5 answer provided in the statement is in the middle.

6 A All right. What's the reference again, please?

7 Q It's CX-3. It's going to be your statement that
8 you made. There should be a copy in your cross binder.

9 A Yes.

10 Q And we also have a copy in front of you on the
11 screen.

12 A Right. This is talking about the needle-like
13 structure, which seems to be a different place.

14 Q It is, but it says it's "below the region of the
15 base." You say "surrounding the nub on the bottom of the
16 K2."

17 A Okay.

18 Q The question I have for you is where is the base
19 in the K2?

20 A I look at defining the base of the K2 the same
21 way when we were talking about the other figure, the
22 EZ-Cup. I'm going to look at that bottom view
23 perpendicular to the axis of the diameter there. The base
24 is going to include solid plastic material that is at the
25 central bottom. There's going to be some ribs, and then

1 there is, I believe, an outer ring where you transition to
2 a side wall. And then there are elements that are void
3 when I look at that space. There are multiple passageways,
4 another way I would refer to that, and those passageways
5 have been covered from the inside with a metal mesh.

6 Q I know we have a better picture, Mr. Phillips,
7 to help the Court here. Let's go to the next page. I
8 believe it's the answer to 221.

9 A When I look at the binder, there's a picture on
10 113, which would be question 218.

11 Q Let's focus on this one here on the screen to
12 question 221.

13 Do you see that?

14 A I do.

15 Q What are we looking at in that picture?

16 A We're looking at a side-view of the K2 product.

17 Q And that blue triangle would be where the needle
18 is?

19 A That's an approximation of where the needle
20 goes.

21 Q Where is the base on the K2?

22 A Again, it's easier to understand that if you
23 look at a bottom view, and that's why I was trying to
24 direct you to one of the other views.

25 Q We might get there in just a minute. But just

1 looking at this one, where is the base defined, in your
2 mind?

3 A In my mind, there is an annular ring. And
4 again, I don't have a pointer here, but --

5 MR. PEARSON: Your Honor, permission to
6 approach.

7 JUDGE ESSEX: You may.

8 THE WITNESS: This is much easier to see in a
9 bottom view, but we will do our best here. So if I'm
10 looking at this from the bottom, I see there's an annular
11 ring that's at about this height. I see that there are
12 four ribs that come down from that. And then there is also
13 a flat surface at the bottom. What I'm describing as the
14 base is that ring, these ribs coming down, and that flat
15 bottom.

16 BY MR. PEARSON:

17 Q Thank you. So under ARM's claim construction,
18 "the base" means at least a portion of the base.

19 A Yes, sir.

20 Q Which portion are you referring to?

21 A Which portion --

22 Q At least a portion of the base.

23 A The "at least a portion" would be this portion
24 where the annular ring is and the flats of the ribs.

25 Q Do you understand that Solofill's construction

1 is that the phrase "the base" should mean the entire base?

2 A I understand that.

3 Q If the Court adopts Solofill's claim
4 construction, would there be any infringement by the K2 of
5 the asserted claims?

6 A I didn't follow the question there.

7 Q If the Court adopts Solofill's claim
8 interpretation of "the base," would there be any
9 infringement of claim 5, to be precise? Would there be any
10 infringement by K2 of claim 5?

11 A I guess the way I would respond to that is it
12 probably takes a judgment decision, because the effective
13 part of the base that would be not below the needle --
14 excuse me -- yeah, the effective part of the base that
15 would be below the tip of the needle in Solofill's
16 construction is inconsequential in function --

17 MR. PEARSON: Your Honor, at this time I'm going
18 to move to strike that.

19 I think we're getting close to a doctrine of
20 equivalents scenario that was excluded by one of your
21 orders.

22 JUDGE ESSEX: I will give it whatever weight it
23 deserves. I'm not going to try to do my thinking on it
24 right here.

25 MR. PEARSON: I understand, your Honor. I will

1 move on.

2 BY MR. PEARSON:

3 Q If the entire base was the base that you just
4 described, the needle-like structure would not be below the
5 entire base, would it?

6 A That's correct.

7 Q Therefore, this product would not infringe claim
8 5, according to that interpretation, would it?

9 A If that was the literal interpretation, I would
10 agree with that statement.

11 Q Let's take a look at the K3, and I believe, I
12 hope we have a good picture at page 133, answer 245. Let's
13 take a look slide 10 from the opening argument. It's a
14 picture of RDX-1005.

15 Mr. Phillips, while we're waiting for that
16 image, what I have in my hand here, can you see this K3
17 product?

18 A Yes, sir.

19 Q If your interpretation -- your Honor, permission
20 to approach the bench.

21 JUDGE ESSEX: You may.

22 MR. PEARSON: I'm handing the Judge RDX-1005.

23 BY MR. PEARSON:

24 Q Mr. Phillips, the Judge has in his hands
25 RDX-1005, a K3 product.

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1 A Yes, sir.

2 Q Your interpretation of "the base" is the very
3 bottom portion; right?

4 A That's a portion of it.

5 Q And this area that I believe you described them
6 as slots, can you point those slots out to the Judge,
7 please.

8 A There are two slots, one on either side, and
9 they have a flat surface parallel to the nominally flat
10 base, as well as side walls on three sides.

11 Q And the needle-like structure, again, is
12 depicted by this blue triangle. Do you see that on the
13 left?

14 A Yes, sir.

15 Q Now, if the Court were to adopt our
16 interpretation that "the base" means the entire base, the
17 K3 would not infringe claim 5, would it?

18 A If the interpretation is that the entire base is
19 above the tip of the needle, then this device as used, the
20 entire base is not above the tip of the needle.

21 Q And the Eco-Fill Deluxe looks a lot like this,
22 doesn't it?

23 A There are general similarities.

24 Q And the Eco-Fill Deluxe also would not practice
25 the -- would also not practice the '320 patent if the Court

1 adopted Solofill's -- would not practice claim 5 if the
2 Court adopted Solofill's claim construction that "the base"
3 means the entire base?

4 A Let me look at that claim again, just to make
5 sure I'm answering you correctly, please.

6 MR. PEARSON: Your Honor, while he's looking,
7 permission to approach.

8 JUDGE ESSEX: Sure.

9 MR. PEARSON: I'm handing the Judge RPX-1001,
10 the Eco-Fill, and RPX-1002, the Eco-Fill Deluxe. RPX-1001
11 has not been opened. So it might be difficult. I can open
12 for you if you would like.

13 JUDGE ESSEX: No. We need a small child.

14 BY MR. PEARSON:

15 Q Mr. Phillips, have you had an opportunity to
16 review the claim?

17 A Yes, sir, I have.

18 Q And so Eco-Fill Deluxe would not practice claim
19 5 if the Court adopted our interpretation of "the base" to
20 mean the entire base; right?

21 A This is requiring something careful because
22 we're redefining what a base is.

23 Q We're defining it "the base" as the entire base.
24 So even under your description of the base, the entire
25 base, the needle-like structure would not be below it;

1 right?

2 A It depends upon how the device is constructed
3 and how the Keurig is constructed.

4 Q The way the Eco-Fill works, the way the Eco-Fill
5 Deluxe works, the needle-like structure would be above the
6 entire base, wouldn't it?

7 A It could be, but if I made that device where the
8 overall height was less, then that would not be the case.

9 Q As the device is right now sitting in front of
10 the Judge, if that were to be used, the Eco-Fill Deluxe
11 would not practice claim 5, if he adopts our
12 interpretation; right? No modification to it.

13 A And we're saying if the needle is below the
14 entirety of the base?

15 Q If the Court adopts our interpretation that the
16 word "the base" means the entire base.

17 A Yes, I would agree with that.

18 Q Would you agree that the Eco-Fill is very
19 similar to the K2 product? Right?

20 A Yes.

21 Q And that the Eco-Fill, like the K2 product, it
22 would not practice claim 5 if the Court adopts the
23 interpretation that "the base" means the entire base?

24 A Again, if we're staying out of the doctrine of
25 equivalents discussion, it's literally yes.

1 Q Understood. Thank you. Now, for all of the
2 asserted claims, so claims 5, 18, and all their dependent
3 claims, if the Court interprets the phrase "to hold brewing
4 material" to mean to keep brewing material in a separate
5 pod, as Solofill has argued, none of the -- neither one of
6 the products would infringe, would they?

7 A Which products?

8 Q K2 or K3.

9 A All right. You posed a hypothetical here that I
10 want to make sure I'm clear on.

11 Q If the Judge adopts our -- and I will rephrase.
12 That may help.

13 If the Judge adopts our interpretation of the
14 phrase "to hold brewing material" to require that the
15 brewing material be kept in a separate pod, then neither
16 independent claim 5 -- or neither the K2 or the K3 infringe
17 claim 5 or 18; correct?

18 A I want to be careful with this.

19 Q Understood.

20 A So you're saying with the definition that "to
21 hold brewing material" is to hold material in a --

22 Q If we go to the very beginning of our cross, I
23 said let's start with the phrase "to hold brewing
24 material."

25 A Yes.

1 Q And Solofill's proposed construction is "to hold
2 brewing material" should mean to keep the brewing material
3 in a separate pod.

4 We agree there; right? That's Solofill's
5 position?

6 A That's Solofill's construction, yes.

7 Q If the Court adopts that construction, which I
8 understand you disagree with, but if the Court adopts it,
9 isn't it true that neither the K2 nor the K3 would infringe
10 the asserted claims?

11 A What I'm struggling with is I could put that
12 separate pod in a K2 or K3, and it feels to me like it
13 might still be reading on the same thing.

14 Q But that K2 and K3 is designed not to have a
15 separate pod, to have coffee directly or brewing material
16 put directly in it; right?

17 A But I'm not precluded from putting it in there.

18 Q Do you remember going through the specification
19 and seeing the phrases "adapted to keep," "adapted to
20 receive a pod"?

21 A Yes, sir. Again, where I'm coming out on this
22 is that if a user were to put a separate pod in a K2 or K3,
23 which is possible for them to do, that could be a violation
24 of the claim.

25 Q Have you ever made that arguments before?

1 A I don't recall whether I have done that, but --

2 Q In your written statement, did you make that
3 position?

4 A To my understanding, you're asking me to make an
5 interpretation on the spot here of something I don't
6 believe I specifically reported on, and --

7 Q Do you know if ARM has asserted at any point in
8 time that someone would put a separate pod in the K2 or the
9 K3?

10 A I don't know.

11 Q So --

12 A I'm just saying it's not precluded, and so if
13 that use happens, it sounds like it's fitting within that
14 description.

15 Q Did you read the pretrial brief?

16 A No, sir. I've never been provided a copy of it.

17 Q You had a deposition in this matter?

18 A Yes.

19 Q You wrote two expert reports at least?

20 A Yes.

21 Q Did you ever propose that position?

22 A I don't recall it.

23 Q Let's move on. If the Court adopts the
24 phrase -- and we're focused on claim 18 here, and if we
25 could focus in on claim 18, the language

1 involving "corresponding outflow through the passageway."
2 We see here on the right side of the screen "wherein the
3 container is adapted to accept the input fluid from the
4 inlet port through the opening and to provide a
5 corresponding out flow of fluid through the passageway."

6 If the Court agrees with Solofill that that
7 phrase "the passageway" or "the outflow" is a single
8 passageway, then neither the K2 nor the K3 infringe claim
9 18; correct?

10 A Neither the K2 or the K3 have a single
11 passageway.

12 Q And likewise, neither Eco-Fill or Eco-Fill
13 Deluxe would practice claim 18 if the Court adopts that
14 interpretation?

15 A If the restriction is that only a single
16 passageway is allowed, I would agree.

17 Q Thank you.

18 Just a moment, your Honor.

19 Mr. Phillips, there's a disagreement on the
20 term "passageway," the claim construction; right?

21 A Yes, sir.

22 Q I direct your attention to RX-1020, and that is
23 in your cross binder.

24 A Yes, sir.

25 Q Have you seen this exhibit before? Have you

1 seen that definition of a "passageway" before?

2 A I'm looking at the entirety of the information
3 on this page. This is not the definition that I had used.
4 It came from a printed dictionary, not a Web page.

5 Q Do you understand that Solofill's -- this is
6 consistent with Solofill's claim construction?

7 A I understand that Solofill is suggesting the
8 claim construction needs to include the terms "long"
9 and "narrow."

10 Q Do you recognize this as a definition from
11 Merriam-Webster's online dictionary?

12 A I do.

13 MR. PEARSON: Just a moment, your Honor. Your
14 Honor, we're almost done here.

15 BY MR. PEARSON:

16 Q If we could take a look at claim 5, please.
17 Mr. Phillips, do you see on the left side of the screen the
18 phrase "adapted a container disposed with the brewing
19 chamber, this container is adapted to hold brewing
20 material"?

21 A I do.

22 Q And you understand that Solofill's construction
23 is that "to hold brewing material" in this claim means to
24 keep brewing material in a separate pod?

25 A Yes, I do.

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1 Q So that this container, according to the claim
2 language under Solofill's construction that it would be
3 adapted to keep brewing material in a separate pod? Is
4 that your understanding?

5 A Yes.

6 Q Do you believe that the K2 or the K3 is adapted
7 to hold -- to keep brewing material in a separate pod?

8 A I believe that the K2 and the K3 are both
9 capable of doing that.

10 Q You think they're adapted to do that?

11 A Yes.

12 Q Let's take a look at claim 18. Again, I want to
13 focus on this language "adapted to hold brewing material."
14 We see it at line 56. Before that, we have a container
15 that's presented to us, and we see it's "adapted to hold
16 brewing material."

17 Under Solofill's claim construction, that would
18 mean adapted to keep brewing material in a separate pod.
19 Do you believe that the K2 and the K3 --

20 MR. KUNDU: Your Honor, I'm going to object.
21 That's not a proposed construction from Solofill in the
22 prehearing briefs.

23 MR. PEARSON: Your Honor, my response is that
24 the phrase "to hold brewing material" has been clearly --
25 our dispute and position has been clearly presented, and

1 that is to keep brewing material in a separate pod and that
2 the "adapted to" is further language in the claim to tell
3 us what that means.

4 JUDGE ESSEX: Come get your RPX-1005 back from
5 me, would you, please.

6 MR. PEARSON: Yes, your Honor.

7 JUDGE ESSEX: On the surface I'm holding towards
8 you, read the top part of that for me, please.

9 MR. PEARSON: Thank you, your Honor. Permission
10 to retrieve the others.

11 JUDGE ESSEX: You can retrieve them all, but if
12 you're going to continue on this, I want that in the
13 record.

14 MR. PEARSON: Your Honor, I am not going to
15 continue, but I can still read it in the record if you
16 choose.

17 JUDGE ESSEX: I would like the other parties to
18 know as well.

19 MR. PEARSON: Understood. I will present this
20 to counsel now.

21 JUDGE ESSEX: You may continue.

22 MR. WILEY: Your Honor, I'm sorry. If the Staff
23 could take a quick look.

24 MR. PEARSON: Your Honor, I actually would like
25 to continue briefly with this line of questioning, now that

1 we've presented it to everyone.

2 JUDGE ESSEX: Go ahead.

3 MR. PEARSON: And permission to approach the
4 witness.

5 JUDGE ESSEX: You may.

6 MR. PEARSON: I offer the witness RPX-1005.

7 BY MR. PEARSON:

8 Q Mr. Phillips, what the Judge pointed out to me
9 and that I showed to other counsel and you is that on the
10 top of RPX-1005, it has a picture of a coffee pod.

11 Did you see that?

12 A I did, sir.

13 Q It looks like a small disk-shaped package;
14 right?

15 A Yes, sir.

16 Q And it says "coffee pod compatible"; right?

17 A Right.

18 Q "In addition to being able to fill with ground
19 coffee, the Solofill K3 can also be used with the popular
20 coffee pod"; right?

21 A Yes, sir.

22 Q Do you believe, after seeing that on the top of
23 the container, that this K3 product is adapted to keep
24 brewing material in a separate pod?

25 A Yes, I do.

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1 Q Do you believe that the primary purpose of this
2 is to simply put a scoop of coffee into it?

3 A I believe that's one of the purposes. Since the
4 instructions tell the user that they can either do that or
5 use the popular coffee pod, I don't know which is the
6 primary.

7 Q Are you familiar with the doctrine of
8 substantial noninfringing use?

9 A I'm familiar with the term. I'm not capable of
10 fully explaining the legal implications.

11 Q Do you think that it would be a substantial use
12 of the K3 product to use coffee, not a pod, just coffee
13 grinds?

14 A I think "substantial" is something -- I'm not
15 sure what the legal definition is, but I think it is a
16 likely use, is probably similar probability to using it
17 with a pod.

18 Q Do you think the most likely use of this product
19 is to put coffee grains or tea versus a pod into it?

20 A That would be conjecture. I have no data to
21 tell me what the most likely use is.

22 Q Have you ever put a pod in this?

23 A Not a soft pod because I honestly didn't have
24 one when I was testing it, but it was obvious it could be
25 done.

1 Q Do you remember when I handed you this several
2 times there was a back portion I directed you to, the loose
3 leaf tea?

4 A Yes.

5 Q Do you remember seeing the instructions on the
6 top of it?

7 A On the top of the container?

8 Q On the top of the package. I think it will be
9 easier if I hand the package back to you.

10 A It might be if you would.

11 MR. PEARSON: Permission to approach, your
12 Honor.

13 THE WITNESS: Thank you.

14 BY MR. PEARSON:

15 Q Mr. Phillips, do you see two figures at the top
16 of the package? Not on the very top. If you look at the
17 area where it describes loose leaf tea in the middle.

18 A You're on the back of it. I was looking at very
19 top. I'm sorry.

20 Q Do you see instructions on how to use that
21 product?

22 A This provides a variety of different marketing
23 discussions about the Solofill cup.

24 Q Do you see at the very top it has two figures?

25 A Yes.

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1 Q Could you describe to the Court what you're
2 looking at.

3 A The figure on the left says "fill it with your
4 favorite coffee," and the figure on the right says "close
5 it, ready to brew."

6 Q And what is the picture -- when it says "fill it
7 with your favorite coffee," do you see a picture of a
8 spoon?

9 A I do.

10 Q And you see coffee grains or some type of
11 material in the spoon?

12 A That would appear to be what's there. It's not
13 very clear.

14 Q But it's not a pod, is it?

15 A In that case it's not a pod. But again, it
16 tells me I can use the pod elsewhere, just like it tells me
17 on that same back I can use it with tea in there.

18 Q Just focus on those -- the first instructions
19 using the figures. It has a spoonful of something that's
20 not a pod; right?

21 A That would be the way it's depicted, yes.

22 MR. PEARSON: Permission to approach, your
23 Honor. Permission to approach the bench, your Honor.

24 JUDGE ESSEX: Yes, you may. I've looked at them
25 all. Thank you very much.

1 MR. PEARSON: If I could have a brief moment,
2 your Honor.

3 To everyone's relief, I conclude.

4 JUDGE ESSEX: You conclude?

5 MR. PEARSON: Yes, your Honor. We're done.

6 JUDGE ESSEX: All right. Thank you.

7 Staff, how much do you have to go over?

8 MR. WILEY: Your Honor, I think I have a few
9 questions for the witness. I would imagine 15 minutes or
10 so.

11 JUDGE ESSEX: I will give you your choice. Do
12 you want us to break for our noon break now?

13 MR. WILEY: That might be a good idea, your
14 Honor, yes. Thank you.

15 JUDGE ESSEX: All right. Mr. Phillips, you're
16 getting to be an old hand about this by now. But let me
17 caution you it would be inappropriate to look things up or
18 discuss the case. Feel free to talk to anybody about
19 anything else.

20 We are adjourned until 1:00.

21 (Whereupon, at 12:00 p.m., the hearing was
22 recessed, to be reconvened at 1:00 p.m. this same day.)

23

24

25

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1 AFTERNOON SESSION (1:00 p.m.)

2 Whereupon,

3 PAUL PHILLIPS

4 resumed the stand and, having been previously duly sworn,
5 was examined and testified further as follows:

6 JUDGE ESSEX: Before we begin with the Staff's
7 cross-examination, is there anything we need to take up
8 administratively?

9 MR. KUNDU: Not from Complainants, your Honor.

10 MR. MEI: No, your Honor.

11 JUDGE ESSEX: All right. If you would. I hope
12 you had a pleasant lunch, and I remind you you're still
13 under oath.

14 CROSS-EXAMINATION

15 BY MR. WILEY:

16 Q Good afternoon. My name is James Wiley, and I
17 represent the Commission Investigative Staff.

18 A Thank you, Mr. Wiley.

19 Q I just have just a couple questions for you. If
20 you could, could you explain a little bit to the Court, at
21 the time the patent was filed, what materials would a
22 person of skill in the art have understood a filter for
23 purposes of brewing coffee to be made out of, constructed
24 out of?

25 A Sure. There were quite a few different choices

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1 that were available. There would be, more common, paper,
2 blends or layered things that were -- we would call them
3 poly paper. So they were kind of a hybrid. Those were
4 particularly good if you were making something like a pod
5 where you wanted to seal it together with heat. There
6 would be nylon mesh filters, so you know, just a
7 cross-hatch of nylon fiber, same thing, metal mesh filters.
8 In a food application, you would typically do that with
9 stainless steel for food safety reasons and corrosion and
10 the like.

11 There was a beginning of availability of things,
12 you know, like etched filter materials, it was -- where you
13 took a sheet of material, and you were using a chemical or
14 photo-type process to create openings within that that
15 could be, we will say, more shape-oriented as opposed to
16 rectangular than just a cross-hatched etch would provide.

17 There were some things that were done where it
18 was simply things formed -- I will say, more typically it
19 would be done in plastic, but the filter could be done as
20 form where you would have pins in the plastic tool that
21 would create small openings from one side to the other.
22 There would also be perforated metal disks that were used,
23 not as much in this area, but that would have been common
24 in the area for like espresso brewing. So they would punch
25 tiny holes in a metal disk.

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1 But those would be a general range of things
2 that would be available at that time.

3 Q Okay. Would there be certain shapes that were
4 common at that time?

5 A For filters?

6 Q Yes.

7 A Well, I guess there was -- it depended upon
8 which philosophy you were going after in terms of a
9 business, is honestly the way I would answer that. People
10 that were doing closed systems, so a Keurig being a closed
11 system -- some of the work I did at Coca-Cola was on a
12 closed system. We were optimizing our package and our
13 machine to work in a particular way. So the shape of the
14 filter, you know, would be something that would conform to
15 the package.

16 Other situations would be simpler. They could
17 be flat, or they could be -- maybe a poor analogy here, but
18 sort of like the folded wrapper of a Reese's Cup where
19 you've got kind of a crinkled-side finish on it where you
20 take a flat sheet and form it that way. And those types of
21 things could be used.

22 And then there was an emerging thing within the
23 space of a pod itself, this thing that got known in the
24 industry as an ESE pod. That term really didn't catch on
25 as well in the U.S., but it was a little more commonly seen

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1 outside the U.S., and that was a way of forming that
2 somewhat flat round disk where you would take two flat
3 sheets, put coffee or other brewing material between them,
4 and then heat seal the perimeter of those together. So
5 it's kind of, again, a range of options.

6 Q Okay. And if you were to describe the purpose
7 of a filter for purposes of brewing coffee, how would you
8 describe that purpose?

9 A Honestly, the biggest reason for the filter is
10 to try to maintain the ground coffee within the brewing
11 receptacle, whatever shape or form it was taking. It is
12 generally advantageous to have openings for liquid entry
13 and liquid exit that are larger in size than the size of a
14 coffee ground.

15 I guess a little bit to the food science thought
16 here, you really want to take -- if there's any pressure
17 brewing that's going on, you want to take the difference in
18 pressure between whatever the supply is and atmosphere or
19 the discharge side, you want to take as much of that as
20 possible across the coffee and not across other elements of
21 the brewing receptacle. That is one of the ways you can
22 improve the quality of brew and the taste attributes.

23 So the filter allows me to have a large exit in
24 the sense of something here where I'm filling it at the
25 time of use, and that large exit does not create a

1 significant pressure loss. So I can take the pressure drop
2 across the bed of coffee.

3 If I'm preproducing something and shipping it
4 around, it's advantageous for me to have that copy
5 surrounded and sealed, because you don't want it to come
6 out of the containment. So if you had that simple Reese's
7 Cup kind of thing sitting inside of a container, and I will
8 say like a Keurig pod, and I had a seal on the top and it
9 was closed on the bottom but I didn't have something
10 sealing that filter to the receptacle or sealing the top of
11 that, when I transport it in the commercial space, when I
12 take it home as a consumer, when I'm using it, I turn it
13 over, things sort of salt shaker out, move around, get in
14 places you don't want. And then you end up with coffee
15 grounds being able to get to the exit port too easily.

16 So in those cases, that's why you want things
17 connected together or sealed when you're doing that
18 transport.

19 MR. WILEY: Okay. Those are the only questions
20 I have, your Honor.

21 Thank you, Mr. Phillips.

22 JUDGE ESSEX: Thank you very much.

23 Complainants?

24 MR. KUNDU: Your Honor, I don't have any
25 questions on redirect.

1 JUDGE ESSEX: All right. Respondents, as a
2 result of any of Staff's questions, do you have any further
3 questions?

4 MR. PEARSON: No, your Honor.

5 JUDGE ESSEX: Thank you very much.
6 Mr. Phillips, I appreciate your testimony. I thank you for
7 your time, and you're excused.

8 THE WITNESS: Thank you, your Honor.

9 MR. KUNDU: Your Honor, just as a procedural
10 matter, is now a good time to move in exhibits? We're at
11 the end of our --

12 JUDGE ESSEX: Do we have any disputes among the
13 exhibits?

14 MR. MEI: Your Honor, we didn't have any dispute
15 at this point with respect to yesterday's exhibits. For
16 today's exhibits, I don't think we have cross-checked each
17 other's.

18 JUDGE ESSEX: The best time to do it is when I'm
19 not in the room. Make sure the three of you don't have a
20 disagreement, and if there's disagreement call it to my
21 attention when you come back. But this is a good time to
22 move on in the case, but the exhibits, I don't want you to
23 move them in to me. Give them to the court reporter if
24 there's no dispute. I will take up any disputes you might
25 have.

1 MR. KUNDU: Thank you, your Honor.

2 JUDGE ESSEX: You're keeping your case open for
3 the exhibits, and you are done with your witnesses, you're
4 resting?

5 MR. KUNDU: Yes, your Honor.

6 JUDGE ESSEX: All right. Respondents?

7 MR. MEI: That's fine with us.

8 JUDGE ESSEX: No, I'm telling you to put on your
9 case.

10 MR. MEI: Oh, okay. Thank you, your Honor.
11 Your Honor, Respondents call their first witness, Robert
12 Vu.
13 Whereupon,

14 ROBERT VU
15 was called as a witness and, having first been duly sworn,
16 was examined and testified as follows:

17 JUDGE ESSEX: Please be seated.

18 DIRECT EXAMINATION

19 BY MR. MEI:

20 Q Good afternoon, Mr. Vu. Please state your full
21 name for the record.

22 A Good afternoon. My name is Robert Vu.

23 Q Where do you work?

24 A I work at Solofill, LLC.

25 Q What's your position?

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1 A I'm the founder and president of the company.

2 Q There is a binder in front of you. Can you,
3 please, open it.

4 A Which binder?

5 Q There should be a binder called "witness binder,
6 Robert Vu, volume 1 of 1."

7 A I still have Mr. Paul Phillips's binders here.
8 Okay. I've got it.

9 JUDGE ESSEX: If you want to have someone
10 retrieve the other binders, that would be, perhaps,
11 helpful.

12 MR. MEI: Okay. Thank you, your Honor.

13 BY MR. MEI:

14 Q Mr. Vu, do you see Exhibit RX-1084C?

15 A Yes.

16 Q Is that your witness statement?

17 A Yes.

18 Q Does it contain your answers to questions posed
19 by counsel?

20 A Yes, it does.

21 MR. MEI: Your Honor, at this time we pass the
22 witness for cross-examination.

23 JUDGE ESSEX: Very well.

24 MR. KUNDU: Your Honor, provided that
25 Complainants can move in the 30(b)(6) deposition testimony

1 of Solofill, which we've requested and I don't believe
2 there's any opposition to --

3 MR. MEI: No objections.

4 MR. KUNDU: -- then we don't have any questions
5 for this witness. Thank you, your Honor.

6 JUDGE ESSEX: All right. Thank you.

7 I have one quick clarification, Mr. Vu, if you
8 would. It says when you first marketed your product there
9 was only the Keurig K-cups.

10 Can you tell me when you first launched your
11 product?

12 THE WITNESS: We first launched our product at
13 the end of 2010.

14 JUDGE ESSEX: Thank you very much.

15 Staff, do you have any questions?

16 MR. WILEY: No questions for this witness, your
17 Honor.

18 JUDGE ESSEX: All right. Mr. Vu, that's one of
19 the shortest cross-examination witness statements we will
20 have. It's still required, and you still have my thanks,
21 and you are excused.

22 THE WITNESS: Thank you, your Honor.

23 Whereupon,

24 LAURENS HOWLE

25 was called as a witness and, having first been duly sworn,

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1 was examined and testified as follows:

2 JUDGE ESSEX: Please be seated.

3 DIRECT EXAMINATION

4 BY MR. NIENSTADT:

5 Q Good afternoon, Dr. Howle.

6 A Good afternoon.

7 Q Would you, please, state your full name for the
8 record.

9 A Laurens Edward Howle.

10 Q What is your current employment?

11 A I'm an associate professor at Duke University,
12 associate professor of mechanical engineering and material
13 science.

14 Q Do you have any other employment?

15 A I'm also an associate professor of radiology at
16 the Duke University Medical Center, as well as owner of
17 BelleQuant Engineering PLLC in North Carolina.

18 Q Would you, please, speak up a little.

19 A I will move closer.

20 Q And you are offering expert witness testimony on
21 behalf of Respondents in this investigation?

22 A I am.

23 Q There's a binder in front of you. Will you,
24 please, open it. It's titled "witness binder, Laurens
25 Howle, volume 1 of 1."

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1 A Yes.

2 Q Would you, please, turn to Exhibit RX-1085C.

3 A Okay.

4 Q Is this your direct witness statement?

5 A It is.

6 Q Does it contain your answers to questions posed
7 by counsel?

8 A Yes, it does.

9 MR. NIENSTADT: I will pass to Complainants'
10 counsel.

11 CROSS-EXAMINATION

12 BY MR. KUNDU:

13 Q Good afternoon, Dr. Howle.

14 A Good afternoon, Mr. Kundu.

15 Q So we are situated, you have a binder that was
16 handed to you by Solofill's counsel; correct?

17 A Correct.

18 Q And what Complainants have handed you is a
19 cross-examination binder for you.

20 A Yes, I have that also.

21 Q Okay. Just so we are further situated, the
22 cross-examination binder I've handed you has a copy of your
23 deposition transcript and your two expert reports.

24 A Okay.

25 Q Dr. Howle, over the course of your career, you

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1 did not do any research on coffee brewing; is that correct?

2 A Prior to engagement in this case, I have not,
3 that's correct.

4 Q And you did not design any beverage brewers as a
5 part of your research; isn't that correct?

6 A That is correct.

7 Q And you don't have a general knowledge on the
8 kinds of beverage brewing machines that existed around
9 2007; isn't that right?

10 A Based on my engagement with this case, I have
11 gained that knowledge.

12 Q If I could have you turn to your
13 cross-examination binder, and I want to have you look at
14 Exhibit CX-298, which is the first tab.

15 A All right.

16 Q Do you recall being deposed in this case on
17 March 26, 2015?

18 A Yes, I do.

19 Q And I was the one asking you questions?

20 A Yes, you were.

21 Q And you were under oath?

22 A I was under an oath, yes.

23 Q And you were sworn to tell the truth?

24 A Yes.

25 Q And you did tell the truth; right?

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1 A I did.

2 Q If I could have you turn to page 189 of your
3 deposition.

4 A Okay.

5 Q Looking at lines 14 to 17. Do you see that?

6 A I do see that.

7 Q Do you recall that I asked you "do you have an
8 understanding of the kinds of beverage brewing machines
9 that existed around 2007" and you answered "not a general
10 knowledge, no"?

11 A I recall that, yes. In fact, previous to that
12 discussion, I had shown you what materials I had reviewed
13 in preparation for this case and the expert reports, and I
14 understand your question to be prior to my engagement in
15 this case what knowledge did I have.

16 Q So your answer to my question about whether you
17 had general knowledge of beverage brewing machines in 2007
18 at your deposition when you were under oath was that you
19 did not have a general knowledge; isn't that correct?

20 A I understood your question, again, to be prior
21 to my engagement in this case.

22 Q I just would like you to answer the question.
23 Your answer to my question about whether you had general
24 knowledge of beverage brewing machines that existed around
25 2007, your answer to that question was "not a general

1 knowledge, no"; isn't that correct?

2 A That was the answer to my question, yes.

3 Q In general, you are not familiar with Keurig
4 brewers; is that correct?

5 A Before being engaged in this case, I had seen a
6 few, but had never used one.

7 Q If you could turn to your deposition on page
8 106.

9 A Okay.

10 Q I'm looking at lines 10 through 13. Do you
11 recall me asking you "let me ask you -- so, are you
12 familiar with Keurig brewers in general," and your answer
13 was "only the one that I have reviewed for this case. In
14 general. No"? Do you recall giving that answer?

15 A Yes, I do.

16 Q That was an accurate answer when you testified
17 at your deposition; isn't that correct?

18 A That's correct.

19 Q You don't own a Keurig brewer, do you?

20 A Only one that I was sent in connection with this
21 case. So I suppose actually Solofill owns that.

22 Q But you don't own a Keurig brewer; right?

23 A Not personally, no.

24 Q And you never have?

25 A I never have.

1 Q You don't drink coffee?

2 A I do not drink coffee.

3 Q In fact, you've only tried coffee on one or two
4 occasions; isn't that right?

5 A That is what I testified in my deposition,
6 that's right.

7 Q And the last time was over 30 years ago?

8 A When I was in the Army, approximately 30 years
9 ago, yes.

10 Q Coffee is not your thing; right?

11 A Coffee is not my thing, that's correct.

12 Q You're not an expert in beverage brewing; isn't
13 that right?

14 A I've learned what I needed to know about
15 beverage brewing since being engaged in this case. Prior
16 to that, I had no exposure to beverage brewing, per se.

17 Q Dr. Howle, if you could, please, turn to
18 exhibit -- your deposition, excuse me, page 204. Let me
19 know when you're there, please.

20 A Okay.

21 Q If you could look on page 204 at lines 21 to 23.

22 A Okay.

23 Q I asked you "okay. Let me ask you, do you
24 consider yourself an expert in beverage brewing?" And you
25 answered "we've covered that. I do not."

1 Do you recall giving that answer to my question?

2 A I do recall giving that answer.

3 Q And that was an accurate answer; isn't that
4 correct?

5 A That was an accurate answer, yes.

6 Q And you're not an expert in flavor extraction;
7 isn't that right?

8 A I have not worked with flavor extraction before
9 being engaged in this case.

10 Q You're not an expert in flavor extraction; isn't
11 that correct?

12 A I claimed in my deposition that I'm not an
13 expert in flavor extraction. However, when I look at the
14 '320 patent, I only see "flavor" once and "strength" twice.
15 When I look through the claims, I see "fluid mechanics." I
16 see "heat transfer." I see "mechanical components." I see
17 "flow and porous media." And so I would expect that
18 somebody, as I stated, who is an expert, a mechanical
19 engineer would need to be an expert for this case.

20 Q You're not an expert in the science behind
21 beverage brewing; isn't that correct?

22 A I've learned what I needed to know since I
23 became engaged in this case.

24 Q If you could turn, please, to your deposition at
25 page 218.

1 A Okay.

2 Q Are you there?

3 A Yes.

4 Q I would like you to look at lines 4 through 9.

5 Do you recall at your deposition I asked you "and you're
6 not an expert in sort of -- in flavor extraction of coffee;

7 right?" Answer, "I'm not an expert in flavor extraction."

8 And then I asked you "or the science behind beverage

9 brewing; right?" Answer, "correct."

10 Do you recall me asking those questions and you
11 provided those answers?

12 A Yes.

13 Q That was accurate when you said that at your
14 deposition?

15 A That was accurate as I said it, but as I said,
16 I've learned what I needed to know since I became engaged
17 in this case.

18 Q My question, Dr. Howle, is whether your
19 responses on page 218, lines 4 through 9, of your
20 deposition were accurate as you were under oath. Were they
21 accurate?

22 A They were accurate, yes.

23 Q Dr. Howle, you are familiar with the K2 and K3
24 products?

25 A I am, yes.

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1 Q Okay. You could use the K2 or K3 products to
2 hold spare change; right?

3 A Yes, you possibly could.

4 Q But that wouldn't be a substantial noninfringing
5 use; right?

6 A I would not consider that to be a noninfringing
7 use because it's so far removed from the intended purpose.

8 Q And the intended purpose of the K2 and K3
9 products is that they are supposed to be used with the
10 Keurig unit to brew coffee or tea; is that right?

11 A That is the main purpose of those, yes.

12 Q It is the intended purpose, isn't it?

13 A It is the intended purpose, but there are
14 subsidiary uses as well.

15 Q Okay. If you could turn to page 239 of your
16 deposition, please.

17 A Yes.

18 Q I would like to focus your attention starting on
19 lines 14 through 20 on page 239. I asked you "what's the
20 intended purpose of a K2 or K3?" And you began your
21 answer, "well, as it states," and then your counsel
22 said "same objections." And then you continued, "as it
23 states on the front side of the package, it's to be used
24 with the Keurig unit to brew coffee or tea."

25 Do you recall me asking that question and you

1 providing that answer?

2 A I do recall that, yes.

3 Q That answer is accurate, isn't it?

4 A That answer is accurate.

5 Q I want to ask you a few questions on the K-Cup.

6 Now, if you could turn to your binder that Solofill's

7 counsel gave you, and if you could turn, please, to

8 RX-1004. Just let me know when you're there.

9 A I'm there.

10 Q What is it?

11 A This is a patent to Beaulieu that describes a

12 K-Cup.

13 Q So you understand -- well, let me step back.

14 You said it's the Beaulieu reference; is that right?

15 A That's correct.

16 Q That's U.S. patent 6,079,315?

17 A Yes, that's right.

18 Q It's your testimony that this patent describes a

19 K-Cup?

20 A Yes.

21 Q There's a patent referenced in Beaulieu,

22 5,840,189 to Sylvan; isn't that right?

23 A Yes, there is.

24 Q And in your binder, RX-1005, that's the Sylvan

25 patent?

1 A That is correct, yes.

2 Q Before this case, did you know what a K-Cup was?

3 A I did.

4 Q How did you know that?

5 A I had seen them at various hotels and houses
6 that we rented.

7 Q You saw them on TV?

8 A Saw them on TV and through media, yes.

9 Q You had them at a house that you rented?

10 A Yes, that is correct.

11 Q You didn't use it or pay much attention to it;
12 right?

13 A I did not use it, no.

14 Q And before your involvement in this case, that
15 was the total experience you had on Keurigs and K-cups;
16 right?

17 A That is correct, yes.

18 Q Is it fair to say that before this case you were
19 not familiar with the structure of a K-Cup?

20 A I would say that's a fair statement, yes.

21 Q Did you look at any K-Cup technical references
22 before your work in this case?

23 A No, I did not.

24 Q So you did not consult any technical references
25 concerning how these products were designed?

1 A Prior to my work on this case, I did not.

2 Q Let's take a look at that Sylvan reference that
3 has been identified as RX-1005. Take your time to look at
4 the patent. My question is, in the figures of Sylvan, the
5 patent refers to element 12 as a base; isn't that right?

6 A They actually refer to the entire cup as a base,
7 but it has a lower component which I think they call out
8 with another element number.

9 Q My question -- maybe it's helpful for you to
10 look at the patent, but all I'm asking you is that the
11 patent refers to element 12 as a base?

12 A They do call that a base, yes.

13 Q Okay. And in the figures, the patent refers to
14 element 12 as a side wall of the base 12; isn't that
15 right?

16 A Correct also, yes.

17 Q And in the figures of Sylvan, the patent refers
18 to element 14 as a filter element; isn't that right?

19 A Yes; that's correct.

20 Q So the filter element 14 is joined to the side
21 wall 12a of the base, right, in Sylvan?

22 A According to their element language, if you look
23 at figure 5, there are two possible embodiments. On the
24 left-hand side of that, you see the filter element 14
25 joined to the side wall of 12. On the right-hand side of

1 that, you see the filter element 14 overlapping the upper
2 lip and engaging with the cover 16. So yes, one of those
3 embodiments shows that.

4 Q Just so we're clear, if you could turn back to
5 your deposition, looking at the bottom of page 139 to 140.

6 A Okay. I'm there.

7 Q Excuse me. Actually 138. I'm looking at lines
8 2 through 5. So I asked you "so the filter element 14 we
9 know is joined to the side wall 12a of the base, right, in
10 Sylvan?" And your answer, "it states that in Sylvan, yes".

11 Do you recall me asking that question and you
12 providing that answer?

13 A Yes, I do.

14 Q Your answer at your deposition is accurate,
15 isn't it?

16 A Yes; that's correct.

17 Q And it's fair to say, then, that the base 12 is
18 supporting the filter element 14; isn't that right?

19 A In the left-hand embodiment, that's true. In
20 the right-hand embodiment, that's not the case.

21 Q If you would look at 139 of your deposition,
22 starting at question 20. I asked you "okay. Is it fair to
23 say, then, that base 12 is supporting the filter element
24 14?" And your counsel objected "asked and answered." You
25 took a look at Sylvan, and then you answered "well, it's

1 certainly attached. It looks like it's suspended. I
2 suppose I -- it could be supported by what's called 12."

3 Do you recall giving that answer in response to
4 my questions?

5 A I do recall that, yes.

6 Q That was an accurate answer?

7 A Yes, it was; in one embodiment, it certainly
8 was.

9 Q Okay, Dr. Howle. If you could turn to your
10 witness statement, RX-1085C.

11 A Okay.

12 Q If you could turn to question and answer 240.

13 A Okay. I'm there.

14 Q Now, I want to be very clear. I'm not going to
15 be asking you questions about claim construction. I just
16 want to ask you some questions about your written
17 description opinion. Okay?

18 A I'm sorry. The last part, I didn't hear that.

19 Q I want to ask you some questions about your
20 written description opinion. Is that all right?

21 A Yes, of course.

22 Q Now, you believe that if Respondents'
23 construction of "a container adapted to hold brewing
24 material" is not adopted, then the '320 patent is invalid
25 for lack of written description; isn't that right?

1 A Yes, that is what I wrote in my witness
2 statement, that is correct.

3 Q And just to be clear, I'm not asking you about
4 claim construction, but I want to confirm that the
5 Respondents' construction is "a container adapted to keep
6 brewing material in a separate pod"; isn't that correct?

7 A Yes, that's my understanding, yes.

8 Q Okay. Now, again, I want to be very specific,
9 because I don't -- the questions I want to ask are very
10 specific. So in this case you submitted two expert
11 reports; isn't that right?

12 A That's correct.

13 Q Okay. And after that, after you submitted your
14 expert reports, you were deposed; isn't that correct?

15 A That is right, yes.

16 Q Now, at the time of your deposition, you had not
17 done anything to educate yourself on the state of the art
18 in 2007 with respect to beverage brewers and pods; isn't
19 that correct?

20 A The first part of your question was prior to my
21 engagement; is that right?

22 Q My question was, at the time of your
23 deposition --

24 A Okay.

25 Q -- you had not done anything to educate yourself

1 on the state of the art in 2007 with respect to beverage
2 brewers and pods; isn't that correct?

3 A No, that's not correct. In fact, we just
4 discussed this a few minutes ago. I understood the
5 question in the deposition to mean in addition to the
6 materials that I presented there. Since being engaged in
7 this, I spent quite a bit of time understanding the state
8 of the art of beverage brewers in 2007.

9 Q Okay. Would you, please, turn back to your
10 deposition, page 240. At line 13, I asked you "In
11 connection with your work in this case, did you do anything
12 to educate yourself on sort of the state of the art in 2007
13 with respect to beverage brewers and pods?" And you
14 answered "No, I did not, actually." And then I asked
15 you "Okay. Is there anything that you'd like to change or
16 clarify with respect to your testimony today?" And you
17 answered "No."

18 Do you recall me asking you those questions and
19 you providing those answers?

20 A Yes, I do.

21 Q And those answers were accurate?

22 A Again, I understood your questions to mean prior
23 to being engaged in this case.

24 Q Where in your deposition do you recall telling
25 me that?

1 A Actually, we had reviewed the materials in my
2 expert report of what I had gone over. So I didn't think
3 it needed to be explained.

4 Q So when I asked you if there is anything you
5 want to change or clarify, you said "no"; correct?

6 A Again, I was in the same frame of mind. That is
7 what I said, yes.

8 Q And you were under oath, weren't you?

9 A I was under oath.

10 Q And you were telling the truth?

11 A I was telling the truth.

12 JUDGE ESSEX: Counsel, you don't need to keep
13 asking those things. I know what a deposition is. It
14 isn't helpful to me.

15 BY MR KUNDU:

16 Q Dr. Howle, if you could turn back to your -- the
17 binder that was provided to you from Solofill's counsel.

18 A Yes.

19 Q And if you could turn, please, to exhibit --
20 just give me one moment. Sorry about that.

21 If you could turn to RX-1003, please.

22 A Okay.

23 Q What's this exhibit, RX-1003?

24 A This is the Nordskog patent.

25 Q And this is a reference that you analyzed in

1 connection with this case?

2 A Yes, it is.

3 Q Okay. And the Nordskog patent is U.S. patent
4 3,878,772?

5 A Yes; that's right.

6 Q Okay. Now, in connection with your opinions on
7 this Nordskog reference, you believe that instant coffee is
8 brewing material; isn't that right?

9 A I do believe that. In fact, it states here in
10 this patent that this is a brewing machine for use with
11 instant coffee granules.

12 Q When you're saying that you believe instant
13 coffee is brewing material, that's based on your incomplete
14 knowledge on the subject because you don't have expertise
15 in food science; isn't that right?

16 A It's based on my understanding of the English
17 language. "To brew" means to infuse with hot water.

18 Q So it's only based on your understanding of the
19 English language?

20 A And what I've learned since I began this case.

21 Q Okay. If you could turn to page 101 of your
22 deposition.

23 A Okay.

24 Q I'm starting at line 23.

25 A I'm sorry. Which page?

1 Q Page 101, starting at line 23, and continuing on
2 to page 102. I asked you "when you're saying that, you
3 know, you consider instant coffee to be brewing material,
4 what level of skill are you applying?" And you
5 answered "as I stated before, I do not have expertise in
6 food science, so I'm stating only my incomplete knowledge
7 in the subject."

8 Do you recall me asking that question and you
9 providing that answer?

10 A I do recall that, yes.

11 Q If you could turn back to the Nordskog
12 reference.

13 A Okay.

14 Q Now, in your opinion, the Nordskog reference
15 discloses a brewing chamber; isn't that right?

16 A Yes; that is correct.

17 Q And you believe that in the closed position
18 cover 48 and the base 50 of Nordskog forms a brewing
19 chamber; isn't that right?

20 A That was my written opinion, yes.

21 Q Just to be clear, in the closed position, the
22 cover 48 is not in contact with the base 50; isn't that
23 right?

24 A That is true.

25 Q Okay. And Nordskog uses the phrase "brewing

1 chamber"; isn't that right?

2 A Yes, it does.

3 Q And it uses that phrase to refer to a coffee
4 can; is that right?

5 A He uses that phrase to refer to the space
6 between 48 and 50.

7 Q Now, if we could look at the "abstract" of
8 Nordskog. Do you see that?

9 A Yes, I see the abstract.

10 Q And the first sentence says "the reusable coffee
11 maker container of this invention is to be employed in
12 combination with prior art structure comprising a coffee
13 maker which uses the coffee supply can itself as the
14 brewing chamber."

15 Do you see that?

16 A Oh, that is correct, yes. I do see that.

17 Q So this is referring to the coffee supply can
18 itself as a brewing chamber?

19 A Nordskog refers to that, yes.

20 MR. KUNDU: Your Honor, could I have one moment,
21 please?

22 JUDGE ESSEX: Sure.

23 MR. KUNDU: Your Honor, I don't have any further
24 questions.

25 JUDGE ESSEX: All right. Doctor, let me ask you

1 a couple, because it's my prerogative.

2 THE WITNESS: Yes, your Honor.

3 JUDGE ESSEX: He had asked you about whether
4 you're familiar with the science of coffee makers or
5 something along those lines.

6 Do you recall that?

7 THE WITNESS: Yes, I do; yes, sir.

8 JUDGE ESSEX: And you are a doctorate in
9 mechanical engineering. If you look at the coffee maker,
10 have the specifications, schematics or whatever for it.

11 THE WITNESS: Yes, sir.

12 JUDGE ESSEX: What science is there in that you
13 wouldn't know about?

14 THE WITNESS: None, your Honor.

15 JUDGE ESSEX: You say you hadn't made those.
16 But in terms of the science that goes into that, I assume
17 we have fluid dynamics?

18 THE WITNESS: Fluid dynamics.

19 JUDGE ESSEX: We have heat transfer?

20 THE WITNESS: Yes, sir, heat transfer, transport
21 in porous media, granular material, percolation theory.
22 All of that is encompassed within mechanical engineering,
23 your Honor.

24 JUDGE ESSEX: That was kind of what I was
25 thinking. So you hadn't tried to build one or tear one

1 down before, but you haven't found science in there that is
2 beyond what you are familiar with; is that fair to say?

3 THE WITNESS: I absolutely not, your Honor.

4 JUDGE ESSEX: I had Army coffee once at
5 Grafenwoehr when I was stationed for a week. They have
6 made some improvements since then. You might try it again
7 some day.

8 THE WITNESS: I will keep that in mind, your
9 Honor.

10 JUDGE ESSEX: Staff?

11 MR. WILEY: No questions for this witness.

12 JUDGE ESSEX: All right. Any redirect?

13 MR. NIENSTADT: I do have a few questions on
14 redirect, your Honor.

15 JUDGE ESSEX: All right.

16 REDIRECT EXAMINATION

17 BY MR. NIENSTADT:

18 Q Dr. Howle, I just have a couple of quick
19 questions, a few quick questions. Do you recall that
20 Mr. Kundu asked you various questions about whether you
21 reviewed any technical references in preparation for the
22 case and reviewed anything to familiarize yourself with the
23 state of the art of beverage brewing machines in 2007,
24 questions along that theme?

25 A Yes, I do remember that.

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1 Q And do you remember the answer that you gave?

2 A Yes. I gave an answer that I did not, but I
3 interpreted his question to mean prior to my engagement in
4 this case.

5 Q And I believe you mentioned to Mr. Kundu that
6 there were a bunch of materials and items, various items
7 that you had reviewed?

8 A That's correct. I reviewed many patents and
9 many technical references, as well as the physical machine
10 and all of the samples -- all of the components at issue in
11 this case.

12 Q Would you, please, turn in the cross-examination
13 binder that Mr. Kundu gave you to Exhibit CX-301. That's
14 your initial expert report.

15 A Okay.

16 Q Would you, please, turn to page 3 of that
17 document?

18 A Okay. I'm there.

19 Q Would you, please, look at III, line 12.
20 There's a list of items A through N. Do you see those?

21 A I do see those.

22 Q Are those some of the materials that you
23 reviewed?

24 A Indeed, they are.

25 Q Would you, please, turn to CX-303. That's your

1 corrected rebuttal expert report, and specifically, would
2 you, please, turn to page 3 again.

3 A Okay.

4 Q I'm sorry. I gave you the wrong page number.
5 Give me a moment here to find it. Would you, please, look
6 at page 2, paragraph 6.

7 A Yes, I see that.

8 Q Would you, please, read paragraph 6.

9 A "A list of materials that I have received and
10 considered is also set forth in the Howle initial report.
11 In addition to the materials in this list, for the present
12 rebuttal report I have also considered the Phillips report
13 and U.S. patent number 6,832,542 to Hu, et al."

14 Q And have these two expert reports, CX-301 and
15 CX-303 been provided to Complainants' counsel to your
16 knowledge before the deposition took place that Mr. Kundu
17 was citing from?

18 A Yes, they had.

19 Q And did you discuss any of these items that you
20 had reviewed in the deposition, in the same deposition that
21 Mr. Kundu cited from?

22 A Quite a few of them, yes.

23 Q Will you, please, turn to CX-298. That's the
24 first exhibit in Mr. Kundu's cross-exam binder.

25 A Okay.

1 Q And would you, please, turn to the deposition
2 transcript page 132.

3 A Okay. I'm there.

4 Q And would you, please, look at lines 21 through
5 24? I will read them. Mr. Kundu asked "what references
6 did you look at in order to analyze the structure of a
7 K-Cup?" And your answer was "the physical samples and any
8 references that are stated in my report here."

9 A That's correct.

10 Q And is your report there referring to at least
11 one of your expert reports?

12 A It certainly is, yes.

13 MR. NIENSTADT: No further questions, your
14 Honor.

15 JUDGE ESSEX: All right. Any recross as a
16 result of those questions?

17 MR. KUNDU: No, your Honor.

18 JUDGE ESSEX: All right. Staff?

19 MR. WILEY: No, your Honor.

20 JUDGE ESSEX: All right. Thank you very much.
21 Doctor, I appreciate your testimony. It's very helpful,
22 and I thank you very much, and you're excused.

23 THE WITNESS: Thank you, your Honor.

24 JUDGE ESSEX: Respondents?

25 MR. MEI: Your Honor, previously, Respondents

1 intended to call Jay Brewer, a third-party witness, but at
2 this time Respondents withdraw that witness.

3 JUDGE ESSEX: All right. Fair enough. Any
4 others?

5 MR. MEI: No others. Thank you.

6 JUDGE ESSEX: All right. Complainants?

7 MR. KUNDU: Yes, your Honor. We will call
8 Mr. Paul Phillips again for his rebuttal witness statement.

9 JUDGE ESSEX: All right. Mr. Phillips, you have
10 been previously sworn in this case. I remind you that you
11 are still under oath.

12 Whereupon,

13 PAUL PHILLIPS

14 resumed the stand and, having been previously duly sworn,
15 was examined and testified further as follows:

16 DIRECT EXAMINATION

17 BY MR. KUNDU:

18 Q Good afternoon, Mr. Phillips.

19 A Good afternoon.

20 Q You have a binder placed in front of you. Do
21 you see that?

22 A Yes, sir, I do.

23 Q What does it state on the front?

24 A "Rebuttal witness binder of Paul Phillips."

25 Q Would you, please, open the binder and turn to

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1 tab CX-4C.

2 A Yes, sir.

3 Q Do you recognize the document that's been
4 identified as CX-4C?

5 A Yes, sir.

6 Q What is it?

7 A The rebuttal witness statement of Paul Phillips.

8 Q Mr. Phillips, would you, please, turn to the
9 last page of the witness statement?

10 A Yes, sir.

11 Q Do you see a signature?

12 A I do.

13 Q And is that your signature?

14 A It is my signature.

15 Q And Mr. Phillips, does this witness statement
16 contain your answers to the questions from counsel?

17 A Yes, it does.

18 MR. KUNDU: I pass the witness at this time,
19 your Honor.

20 JUDGE ESSEX: Thank you.

21 MR. PEARSON: Your Honor, briefly, I would like
22 to discuss some matters that are confidential. I think I
23 can do that at the beginning, if we could go confidential,
24 and then shortly after that --

25 JUDGE ESSEX: All right. Whose confidential?

1 MR. PEARSON: It will be ARM's confidential.

2 JUDGE ESSEX: All right.

3 (Confidential session follows.)

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1 OPEN SESSION CONTINUED

2 Q Mr. Phillips, before we continue with this line
3 of questioning, could you explain what binders you have in
4 front of you now?

5 A There are several on the desk. I have a binder
6 labeled "witness binder cross for Paul Phillips rebuttal."
7 I have a binder labeled "rebuttal witness binder of Paul
8 Phillips." And there remains a binder that is "Witness,
9 binder, U.S. patent 8,720,320 and prosecution history" that
10 is on this corner. And there's something up here that I
11 don't believe belongs with --

12 Q Could you just read what's on the cover of it?

13 A "Cross-examination binder for Dr. Howle."

14 MR. PEARSON: Permission to approach, your
15 Honor.

16 JUDGE ESSEX: Yes.

17 BY MR. PEARSON:

18 Q Mr. Phillips, what's your understanding of the
19 written description requirement?

20 A In general language, and again not being a
21 lawyer, I can't give that to you from a legal perspective.
22 But there needs to be within the written description of the
23 patent enough information for a person skilled in the art
24 to be able to understand and practice the invention.

25 Q So your understanding is there has to be enough

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1 information for them to understand and practice the
2 invention?

3 A Yes, sir.

4 Q And when you say "practice," do you mean make or
5 use the invention?

6 A Yes, sir.

7 Q Are you familiar with the enablement
8 requirement?

9 A No, I'm not.

10 Q But you reviewed the written description
11 requirement in the model jury instructions; right?

12 A I did, but you're asking me if I recall of that
13 extemporaneously, and I would say I do not right now.

14 Q Would you say that -- so you're not familiar at
15 all with the enablement requirement; is that what you're
16 telling me?

17 A I'm not going to say I haven't seen the term,
18 but I couldn't explain it to you present here without
19 referring to other information.

20 Q If I told you that the enablement requirement --
21 and I'm telling you, that the enablement requirement
22 involves making and using the invention, would that sound
23 familiar to you?

24 MR. KUNDU: Your Honor, I would object.
25 Solofill doesn't have an enablement defense in their

1 prehearing brief. So I'm not sure what this line of
2 questioning is relevant to.

3 MR. PEARSON: Your Honor, we agree, we have not
4 presented an enablement defense. I'm questioning
5 Mr. Phillips's understanding of the written description
6 requirement to see if he was following an enablement
7 standard or some other standard.

8 JUDGE ESSEX: Again, he's not a legal expert.
9 Staff?

10 MR. WILEY: Your Honor, the Staff agrees it
11 seems to be outside the scope.

12 JUDGE ESSEX: Since we're not doing enablement
13 as a defense, I don't see what you're doing with this right
14 now. I would ask you to wrap up and move on.

15 MR. PEARSON: Understood, your Honor.

16 BY MR. PEARSON:

17 Q Mr. Phillips, do you understand that the written
18 description requirement at issue in this case, that the
19 requirement ensures that the issued claims correspond to
20 the scope of the written description that was provided in
21 the original application? Do you understand that?

22 A I would say you're talking about legal
23 principles that I may not be fully aware of.

24 Q Do you understand that the written description
25 requirement is satisfied if a person having ordinary skill

1 reading the original patent application would have
2 recognized that it describes the full scope of the claimed
3 invention as it is finally claimed in the issued patent and
4 that the inventor actually possessed that full scope by the
5 filing date of the original application?

6 A I've seen some of that language, but to say I
7 fully understand that would assume that I have legal
8 knowledge, and I do not.

9 Q Do you believe that that description should be
10 somewhere in the written description for it to be
11 satisfied, the written description requirement?

12 A Please clarify.

13 JUDGE ESSEX: Counsel, you're asking an awful
14 lot of lawyery-sounding questions. I would ask you to
15 consider that he is an engineer and has some food knowledge
16 rather than legal knowledge, because these are questions
17 that, I think, are fully within my scope and not his.

18 MR. PEARSON: Understood, your Honor. I will
19 move on.

20 BY MR. PEARSON:

21 Q Now, earlier on -- during the cross-examination
22 of your testimony, your written statement as a part of the
23 Complainant's case, we spent a lot of time going through
24 the embodiments.

25 Do you recall that?

1 A I definitely do, sir.

2 Q At the very beginning. And it was in the
3 context of the claim construction for the phrase "to hold
4 brewing material."

5 A Yes, sir.

6 Q And part of that, you opined in your -- on
7 direct that the construction included an integrated mesh,
8 the scope; right?

9 A Could you show me the reference you're
10 referring?

11 Q Well, maybe I will rephrase the question, and it
12 would be helpful.

13 You believe the claims as finally issued
14 included using an integrated mesh filter; right?

15 A I believe that the claims as finally issued are
16 silent on the type of filter that could be used, which
17 would allow one skilled in the art to practice it with any
18 of the available methods.

19 Q We also used the phrase "filter media." I used
20 the phrase "integrated filter media." Is your opinion the
21 same, that the final issued scope of the claims covers an
22 integrated filter media?

23 A Yes, it is.

24 Q And then also during that line of questioning,
25 we went through each embodiment. I'm trying not to do that

1 again here. And your conclusion was, after going through
2 those embodiments, that there was not an integrated mesh
3 filter in any of those embodiments; is that correct?

4 A My conclusion was none of the embodiments
5 describe that, but likewise, none of them precluded it.

6 Q And the same goes for if we use the
7 definition "filter media" or "integrated filter media,"
8 that nothing in the drawings and nothing in the description
9 describe an integrated filter media; is that correct?

10 A That's correct.

11 Q And I believe your opinion is that it would have
12 been a design choice?

13 A That's correct.

14 Q And we also discussed during that
15 cross-examination the My K-Cup.

16 Do you recall that?

17 A Yes, sir.

18 Q And that was the one example you provided in
19 your opinion that described an integrated mesh; is that
20 right?

21 A That was an example that was provided which was
22 as well to indicate that that was known to one skilled in
23 the art and known to the industry prior to the date of this
24 patent.

25 Q And we also discussed how that My K-Cup was a

1 fundamentally different system.

2 Do you recall that?

3 A Yes.

4 Q And you agree that the My K-Cup is a
5 fundamentally different system?

6 A Yes, but it's an example of how one in this
7 exact same field would use an integrated mesh.

8 Q And we compared the My K-Cup to a reference to
9 Sweeny during that. Do you recall that?

10 A Yes, sir.

11 Q And that you agree that Sweeny is very similar
12 to the My K-Cup in that it describes an embodiment like the
13 My K-Cup?

14 A There are similarities in the embodiments, yes.

15 Q And you agree that Sweeny was a fundamentally
16 different system than the '320 patent; right?

17 A Sweeny is a system that, yes, is converting the
18 existing brewer into a different functionality brewer. So
19 that is fundamentally different than a system that is
20 keeping the brewer the same and allowing you to use
21 different brewing material options.

22 Q So even though Sweeny and My K-Cup is a
23 fundamentally different system, you still think that that
24 provides support to satisfy the written description
25 requirement?

1 A Again, I think that is providing an example of a
2 integrated filter media and how it can be employed in a
3 very similar application.

4 Q Let's move on.

5 A Thank you.

6 Q We also discussed, or at least I discussed in
7 the opening and, I believe, briefly we discussed the
8 reference in Nordskog.

9 Do you recall that?

10 A Yes, sir.

11 Q Could we pull up the Nordskog patent, please.

12 Mr. Phillips, can you see -- do you see an image
13 on your screen there?

14 A I do.

15 Q What are you looking at?

16 A I'm looking at the front page of U.S. Patent
17 3,878,772, assigned to Robert A. Nordskog. And it's
18 RX-1003.

19 Q And you understand that Solofill has cited this
20 patent as a reference that anticipates the asserted claims;
21 right?

22 A That's my understanding.

23 Q There are several disputes involved with this
24 reference; right?

25 A Yes, sir.

1 Q One is whether instant -- whether brewing
2 material includes instant coffee; right?

3 A That would be one.

4 Q And another dispute was whether the knives
5 labeled 49 are considered needle-like structures; is that
6 correct?

7 A That's correct.

8 Q If we could take a -- well, we will just keep
9 this image upright here. Focused on the dispute over
10 whether "brewing material" includes instant coffee, your
11 opinion is that it doesn't; right?

12 A That's correct.

13 Q Instant coffee is not brewing material. Do you
14 think that the Nordskog reference considers instant coffee
15 to be brewing material?

16 A I note that they use words in there that would
17 suggest brewing. I believe that would be incorrect
18 statements on the part of who drafted that patent. Again,
19 as one with experience in the food industry, I have
20 reasonably good knowledge about what is instant coffee and
21 what is a brewable material. The brewing process
22 associated with instant coffee happened prior to it
23 becoming instant coffee. It's a commercial process.

24 Q So that process -- I believe your opinion was
25 that process is different, and it's not brewing because the

1 brewing happens first; right?

2 A The brewing happened remote. Typically, it's in
3 a commercial process, and then what you have is a soluble
4 powder and maybe to help you understand better, that
5 soluble powder of instant coffee is -- the way it can be
6 used with the Nordskog invention is no different than the
7 soluble powder of a chocolate. So to use a brand people
8 may be familiar, Nestle's Quik is a powder. That's an
9 equivalent. I could put it in there instead of the instant
10 coffee. I could run the operating cycle that runs hot
11 water in there, and I would be creating resolubilized hot
12 chocolate, the same way that I would be creating
13 resolubilized coffee. Clearly, with the chocolate, there's
14 no brewing that happens.

15 Q Now, instant coffee is made by brewing,
16 according to you, coffee grains. Then after that, there is
17 this extract; right?

18 A There's a process that dehydrates that brewed
19 coffee, and the resultant product is a -- typically a
20 powder or crystal form. There are commercial processes
21 that can be used to enhance it, change it, apply other
22 flavorants to it and the like, but those are probably not
23 relevant to whether it's instant coffee or not.

24 Q So one way to describe the process of making
25 instant coffee is you could pass water through ground

1 coffee beans and get a material after that; right?

2 A You would have brewed coffee after that.

3 Q Then you would dehydrate that brewed coffee?

4 A You would remove the liquid, and what's left is
5 a soluble powder that can then be -- the term I would use
6 is resolubilized so you can mix it with water and with
7 sufficient agitation, and you end up with liquid coffee
8 again.

9 Q Did you consult any dictionary definitions when
10 understanding the phrase "brewing material"?

11 A Dictionary definitions, not as much as my
12 industry knowledge as well in the case of what is instant
13 coffee versus brewed coffee. I located and provided a
14 couple of references that verify the viewpoint that I've
15 expressed.

16 Q What are those references?

17 A I believe they're contained in the materials
18 provided, and I can look them up --

19 Q That's okay. You're talking the two articles, I
20 believe; right?

21 A Two books.

22 Q Two books. Did you know that Merriam-Webster
23 defines to "brew" to make coffee?

24 A I haven't seen where you looked that up. Again,
25 with my industry knowledge, I would look at what is to brew

1 as done with coffee is one thing. But I can brew tea. I
2 can brew other things as well.

3 Q Do you know that Merriam-Webster defines the
4 term "brew" to make tea?

5 A It would make sense, yeah.

6 Q That wouldn't surprise you, would it?

7 A No.

8 Q And they also define it to make beer?

9 A Yes.

10 Q And the New Oxford American Dictionary
11 defines "brew" to make by mixing it with hot water. Would
12 that surprise you?

13 A That would seem to be an inaccurate definition,
14 but I don't know what that dictionary is. So I can't say
15 whether it surprises me or not.

16 Q Mr. Phillips, have you ever made beer?

17 A No, sir, I haven't.

18 Q Are you familiar with the process of brewing
19 beer?

20 A To a certain degree. I've visited a brewery as
21 an experience before.

22 Q Are you familiar with the home brew process?

23 A In the generalization that it is trying to
24 replicate that commercial scale process at a small level
25 for a home user.

1 Q You understand that a person who makes beer,
2 home brew would buy an extract that has been dehydrated?
3 Do you understand that?

4 A An extract of what?

5 Q Well, it would be a syrup, or it could be a
6 soluble powder. Do you understand that?

7 A Again, my understanding of brewing a beer is
8 that it is more of a cooking process that involves grains
9 and other agricultural materials and if someone is adding
10 something soluble, it's to provide other flavor ants or
11 functions. But the primary process is different.

12 Q Do you understand that someone who brews beer
13 can take and often takes a soluble powder and mixes it with
14 hot water, and that's the brewing process? Did you
15 understand that?

16 A Not the way I understand the brewing process,
17 no, sir.

18 Q But another way is to take a syrup, which has
19 been -- some of the water has been removed and to mix that
20 with hot water, and that would be a brewing process?

21 A Are you saying this is a beer syrup or an
22 ingredient syrup?

23 Q It would be an extract that's already been made
24 by a commercial process somewhere, but the person who is
25 doing this at their own home would put that in a pot of

1 water and mix it with hot water, and that would be the
2 brewing process.

3 Did you understand that?

4 A Again, I'm not an expert on home brewing
5 processes of beer. The brewing processes I know associated
6 with beer involve a cooking of grains and other
7 agricultural materials.

8 Q And you could cook grains, you could pass water
9 through grains in addition to all those to brew beer.

10 Do you understand that?

11 A Again, the process as I understand it involves
12 that and yeast and allowing a fermentation to occur. So
13 something that does all those processes up front and then
14 turns them into a soluble powder or a liquid syrup, to me,
15 that's a mid-process product of some sort. That's a
16 concentrate as opposed to brewing agricultural materials.

17 Q It sounds a lot like making instant coffee or
18 using instant coffee, doesn't it?

19 A Which does?

20 Q Brewing beer, using a dehydrated extract.

21 A Again, I'm not familiar with the ability to do
22 something that's called brewing of beer. You might be able
23 to resolubilize a previously brewed or previously processed
24 ingredient that way. I'm speculating, because I don't have
25 deep familiarity with that.

1 Q Did you know that there is a disposable K-Cup
2 that uses instant coffee?

3 A I'm not familiar with that particular item. Is
4 that a Keurig-produced product, or is that something that
5 has come out later?

6 Q I believe it's made by Groves Square Coffee.
7 Are you familiar with that name?

8 A I'm not. That sounds like something that is
9 other than a -- something that's one of the Keurig-licensed
10 products, but I'm not familiar with that particular
11 company.

12 Q Would you be surprised to see a K-Cup or K-Cup
13 cartridge with instant coffee in it?

14 A Surprised, I think, would be a personal
15 response. There's no reason why one couldn't put a soluble
16 powder in a K-Cup construction and run water into it and
17 resolubilize that and have it come out as a finished
18 beverage. You might have elements there like a filter that
19 really don't do the same function, but I mean, I recall as
20 example, when we were doing the work at Coke, some of the
21 things that we did in our pods involved soluble powders.
22 We looked at the patent earlier from Hu where they were
23 trying to take a soluble coffee and make a simulated
24 espresso by passing hot water through it.

25 So technically being able to do it is very

1 plausible. Whether a consumer would buy it, I think, is a
2 different question and not necessarily one that I'm
3 qualified to answer.

4 Q Let's move on. There's a dispute in Nordskog --
5 and when I say move on, I mean beyond the instant coffee
6 line of questioning.

7 A Sure.

8 Q Now let's talk about the dispute over whether
9 Nordskog discloses a needle-like structure. If we could
10 zoom in on this figure and, if possible, highlight items
11 49, there is a dispute in the context of this anticipation
12 argument on whether these knives highlighted here and
13 labeled 49 are needle-like structures.

14 Are you familiar with that dispute?

15 A In a general sense, yes.

16 Q And it's your position that these knives are not
17 needle-like structures; right?

18 A Not in the same way that they're described in
19 '320.

20 Q And you understand Solofill's position that
21 these knives are needle-like structures?

22 A That's my understanding.

23 Q You understand that a needle, according to its
24 plain and ordinary meaning, could take on many forms;
25 right?

1 A It's another one of those broad terms, yes.

2 Q And its broad definition could include a range
3 of things, like a sewing needle? The shape at least of a
4 sewing needle, would you consider that a needle?

5 A I think a sewing needle would be generally
6 assumed to be a needle, yes.

7 Q Or a speedometer needle has a pointed end on it;
8 right?

9 A Sometimes it's referred to that way, or some
10 people call that a pointer. Yes, I've heard that term.

11 Q We have a syringe, maybe you would find in a
12 hospital somewhere, that would also be considered a needle;
13 right?

14 A It would be, and that would be something that,
15 in addition to having a shape, has also got a hollow
16 feature that allows liquid to pass through.

17 Q So those are all needles, and you agree
18 that "needle" has a broad definition. The phrase used
19 is "needle-like"; right?

20 A Yes.

21 Q So wouldn't needle-like have an even broader
22 definition than "needle"?

23 A Needle-like just by itself starts to have a
24 broader definition. My understanding of needle-like in the
25 context of '320 involved the other functions of that

1 needle, which had to do with receiving fluid.

2 Q Does the '320 patent limit this needle-like
3 structure, specifically limit it to any type of structure
4 that you recall?

5 A It tells me what that needle-like structure is
6 intended to do and what it needs to do. So it needs to be
7 able to pierce the cartridge of a K-Cup. If we're talking
8 about the lower needle in this case, it needs to be able to
9 receive liquid from the K-Cup and convey it to the cup for
10 the user.

11 Q Is it your understanding that these knives here
12 puncture a container in Nordskog?

13 A My understanding is in Nordskog they do none of
14 that. It's only in the prior art that they have a
15 function. In Nordskog, those knives are actually rendered
16 unused and they are, in fact, covered and prevented from
17 interacting with anything.

18 Q Isn't it true in the '320 patent that
19 needle-like structure is rendered unused?

20 A It's true that when using the pod adaptor, as we
21 were calling it earlier, and not wanting to debate that
22 term, in a Keurig, then those needle-like structures have
23 limited use.

24 Q So they share a similarity with Nordskog in that
25 they're rendered useless?

1 A I wouldn't say they're rendered useless. They
2 have limited use. In certain embodiments, they are still
3 capable of receiving fluid.

4 Q Let's move on. If we could pull up the Beaulieu
5 patent.

6 A Okay. What's the reference for that one,
7 please?

8 Q It's RX-1004. It should be in your binder, and
9 we have a picture of it on the screen in front of you.
10 Where is the base in this figure?

11 A In the figure on the front, it's probably less
12 than precisely understood. I don't see it having an
13 identifier coming out.

14 Q I think we have a better image that may help
15 this dialogue. If we could take a look at -- in the
16 opening statement, there's slide 19.

17 A All right.

18 Q Mr. Phillips, can you see that image on your
19 screen?

20 A Yes.

21 Q Do you see the area in red, the red horizontal
22 line?

23 A I see that area, yes.

24 Q Do you consider that to be the base?

25 A I'm trying to discern from this particular image

1 if that is the base or if it's the cross-hatched area that
2 is below that. I think that may be what is actually the
3 base of that device.

4 Q You say it is the base?

5 A I'm saying, I don't think that is. That looks
6 to me like the bottom of the filter.

7 Q Where would the base be?

8 A Again, the base would be below that. In this
9 figure, it doesn't appear to have an identifier callout on
10 it. But the next surface outside of what is shown by the
11 green and red boundaries, to me, I think, is the housing or
12 the cup for the K-Cup, and the base of it would be the
13 bottom surface.

14 Q Do you recall providing an opinion on why that
15 red area is not the base?

16 A If the red area is what I was referring to in my
17 opinion, that is the bottom of the filter, and the bottom
18 of the filter is not the base. It is suspended above the
19 base or in many of the implementations, and it is not the
20 area that is pierced by the lower needle. In a K-Cup, the
21 base has to be able to be pierced by the lower needle.

22 Again, looking at this, I believe the lower
23 needle is the purple-like item which your color code
24 identifies, which this mechanism, as it is taken from the
25 position you see it now into a brewing position, that whole

1 assembly moves down, and that purple needle then is able to
2 contact the base, again the area that's not called out.
3 It's above the opening 88 that lets the needle pass through
4 the mechanism, and it's the next surface that's not called
5 out that's cross-hatched.

6 Q Is it accurate to say that you don't think this
7 is the base because it's not at the bottom of this
8 cartridge?

9 A My statement would be yes, the base of the
10 cartridge is the bottom of the cartridge.

11 Q Do you recall also stating that the reasoning
12 that this is not the base is because it's not referred to
13 as the base in Beaulieu or a patent that Beaulieu
14 incorporates by reference? Do you recall that?

15 A I do. I believe the feature that I'm calling
16 the base was, in fact, called out by that referring patent
17 or the incorporating patent as a base. And I believe
18 that's a consistent description of what the base is.

19 Q And is that patent the '189 patent? Is that how
20 you remember it?

21 A I don't remember the number. I believe it was
22 one of the ones assigned to Sylvan. If we can look at it,
23 I'm happy to verify.

24 Q If we could pull up that patent, '189 to Sylvan.
25 Actually, let's scratch that. I don't think we provided

1 that to you in your cross binder.

2 A Okay.

3 Q We can take a look at your statement instead,
4 and let's look at CX-4C at .pdf page 16, answer number 53.
5 This is your discussion about why the filter in the '189
6 patent is not the base. And I direct your attention to the
7 middle of this where it starts saying "the filter element
8 14 is not the base 12," and the rest of that sentence
9 says "the filter element 14 is not the base 12, and the
10 '189 patent does not refer to the filter element 14 as a
11 base."

12 Do you see that?

13 A I'm trying to find it. I'm sorry.

14 Q There's an arrow right next to the sentence on
15 the screen.

16 A I see it now. I was looking at the binder.

17 Q We've highlighted it there for you. Do you see
18 that highlighted portion?

19 A Yes.

20 Q If we could pull up figure 6 of the '320 patent,
21 please. Do you recall a dialogue that you and I had
22 regarding that figure and where the base was during
23 testimony this morning?

24 A Yes, I do.

25 Q And you consider the base to be at least two

1 parts -- or two parts, to be accurate, 602b and 608; right?

2 A Yes.

3 Q 608, what is that called in the '320 patent?

4 A In '320, it's called a platform.

5 Q You believe that should be considered the base,
6 even though it's not called the base?

7 A I believe it should be considered a part of the
8 base.

9 Q And that platform 608 is elevated; right?

10 A It is.

11 Q So it's not at the very bottom of that
12 container, is it?

13 A No, it's not.

14 Q And it shares similarities with Beaulieu. The
15 area that was highlighted in red was not called the base
16 and was also elevated from the bottommost portion of the
17 container; right?

18 A It shares that similarity, but from a
19 dissimilarity standpoint, I believe I was consistent in the
20 way that I defined elements that were a base. It involved
21 the ability to be able to visualize that portion or that
22 element from a direct bottom view of the cartridge. In the
23 case of the Beaulieu patent, if I was to look at the bottom
24 of that cartridge, I would be seeing the bottom of the item
25 that doesn't have a callout, which is the same as I call

1 the base. And I would have no ability to see the filter.

2 So to be completely consistent on all of those,
3 I think I am, it needs to be the lower facing surfaces that
4 one can see from the bottom of the cartridge.

5 Q If you were to turn this upside down, the
6 EZ-Cup, because they're so similar, you would see the
7 bottommost portion 602b; right?

8 A Right.

9 Q You would see the spring; right?

10 A We would see a portion of the spring, yes.

11 Q You would see a portion of 608, what you call
12 part of the base, what the patent calls the platform;
13 right?

14 A I would probably see virtually all of that,
15 because if I had a filter cup and coffee in there and a lid
16 on there, it would be displaced down almost to the same
17 surface as 602b.

18 Q You could also probably even see the bottom of
19 the lid; right?

20 A If I don't have a filter media and coffee in
21 there, I could potentially see some of it. But if it's
22 prepared for brewing with the filter paper, as EZ-Cup is
23 frequently used with, and the brewing material in there,
24 and when I put the lid on there, I'm displacing that
25 platform down very close to the same elevation as 602b. So

1 I compress that spring.

2 Q Is it your opinion that -- if we could go back
3 to Beaulieu, to the figure on the front page of Beaulieu,
4 please.

5 A Yes, sir.

6 Q Is it your opinion that the filter, that filter
7 area cannot be the base because it's the filter? Is that
8 your opinion?

9 A It's my opinion that the filter is a different
10 element. It is not the base, because there's an element
11 that is the base. Within Beaulieu and within Sylvan and
12 others, they describe a cartridge shell in some terms or a
13 base in some terms, and that is the piece that is always,
14 or the element, that is always pierced by the needle in a
15 K-Cup.

16 Q Now, after the K-Cup is punctured, you can see
17 the base, the bottom of the filter paper; right?

18 A After the K-Cup is punctured, if you would
19 remove the cartridge, the K-Cup from the machine and invert
20 it and, were able to shine light in through the tiny hole
21 that was made by the needle, you might be able to see some
22 small portion of the filter.

23 Q Earlier during your testimony, you explained to
24 the Court where the base was on Solofill's product. Do you
25 recall that?

1 A Which product?

2 Q The K2 product.

3 A The K2 product, yes.

4 Q This product with the knob at the bottom?

5 A Yes, sir.

6 Q And you defined the portion of the base as the
7 very bottom portion; right?

8 A That was a portion of it.

9 Q And then the portion extending upwards from the
10 very bottom; right?

11 A Yeah, there are four ribs that come up, as well
12 as an annular ring kind of at the bottom of the larger
13 diameter.

14 Q And then that area that's horizontal to the very
15 bottom, that would also be a part of the base; right?

16 A Probably, but I would like to know what you're
17 referring to. Is that what I'm calling the annular ring?

18 Q Let's take a look at -- I believe the best
19 picture is slide 9 of the opening statement. So the
20 portion directly above that blue triangle would also be the
21 base; right?

22 A There's a ring around that area that I would
23 call the base, and then there are the four rib members that
24 come inwardly from that ring and turn down and then join
25 with the disk at the bottom.

1 Q Do you include that filter area by those four
2 ribs as a part of the base?

3 A I would conclude that the ribs are. I wouldn't
4 conclude that the filter necessarily is.

5 Q Just so we're clear for the Court, this area
6 right here, that filter area, besides these four ribs as
7 you call them, would that be a part of the base?

8 A In my definitions that I've been trying to use,
9 there are openings in the base in the area that I believe
10 you were pointing to which reveal the filter material that
11 are -- that is installed from the inside. I do not
12 consider the filter material itself as a part of the base.
13 I consider the plastic material that would be -- again,
14 trying to see this from side views is hard. If you look at
15 it from the bottom view, I think it's fairly clear to see
16 where that plastic material is.

17 Q Let's move on. You formed an opinion on whether
18 Nordskog and Beaulieu anticipated the '320 patent; is that
19 right?

20 A Yes; that's correct.

21 Q And your opinion was that neither one of those
22 references anticipate the '320 patent; right?

23 A That's correct.

24 Q And you were asked at some point in your
25 deposition that if the prior art needed to use the same

1 term to anticipate.

2 Do you recall that?

3 A I don't recall it specifically. If you could
4 show me the reference, I will be glad to look at that.

5 Q Do you remember saying that in all cases the
6 terms used may not be exactly the same word, but if it is
7 equivalent in function and form and result, then it would
8 apply?

9 A That sounds like something I would have said.
10 Again, without seeing the reference, I can't say if that's
11 verbatim correct.

12 Q Is that your understanding of an anticipation
13 analysis, that if they're equivalent in function and form,
14 then regardless of whether they're the same word, they
15 would apply?

16 A That would be my understanding.

17 Q Let's move on to your opinion on whether the
18 asserted claims are obvious. Do you recall forming an
19 opinion on obviousness?

20 A I believe so.

21 Q And you were asked if you were familiar with the
22 term "analogous art."

23 Do you recall that?

24 A I don't have clear recall. Is that from the
25 deposition?

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1 Q Yes, sir.

2 A Again, I would feel better if I could see that
3 reference. That's been a couple months ago.

4 Q Sitting here now, are you familiar with the
5 term "analogous art"?

6 A I'm familiar with that only as a legal term, not
7 one that I could answer its definition without some
8 reference.

9 Q If we could pull up RX-1080C. I believe the
10 .pdf page is 51. Let's go to .pdf page 14, page 51 of your
11 deposition, lines 16 through 18.

12 Do you see that?

13 A Yes, sir.

14 Q And you were asked "have you heard the term
15 analogous art?" Do you see that?

16 A Yes.

17 Q You said "I'm not familiar with that specific
18 term."

19 Do you recall that?

20 A Yes.

21 Q But you formed an opinion on whether the patent
22 was obvious or not; is that correct?

23 A I formed the opinion based upon whether it was
24 obvious or not, yes, and that was based upon a perspective
25 of one skilled in the art.

1 MR. PEARSON: Just a moment, your Honor.

2 Your Honor, I'm finished. Thank you.

3 Thank you, Mr. Phillips.

4 JUDGE ESSEX: All right. Staff?

5 MR. WILEY: Just one question, your Honor.

6 CROSS-EXAMINATION

7 BY MR. WILEY:

8 Q Hi, Mr. Phillips. In your opinion as one
9 skilled in the art, does a container that is adapted to
10 hold a brewable material require a filter?

11 A Yes, my opinion is it would require a filter,
12 because without a filter the brewable material is likely to
13 not be able to be contained in the container when the
14 brewing process is enacted.

15 Q Okay. And as I understand your testimony, the
16 type of filter would be a design choice; is that correct?

17 A That's correct.

18 Q So it could be one of the types of filters we
19 talked about a few minutes ago?

20 A Yes, it could.

21 Q Could it also include a pod of -- let me step
22 away from that.

23 A That's a dangerous term.

24 Q That's a loaded term. Could it also include a
25 sealed package with a paper filter material, a sealed paper

1 filter with the brewable material inside?

2 A A sealed filter material containing -- I'm
3 struggling with it, too. I'm sorry. If I took some
4 brewable material and I sealed it within a paper filter,
5 that would be one of the design choice options that I could
6 put in that container to then brew.

7 Q And in your opinion as one of skill in the art,
8 that could also include an integrated filter mesh; is that
9 correct?

10 A That would be another option.

11 MR. WILEY: Okay. No other questions. Thank
12 you.

13 JUDGE ESSEX: All right. Thank you.

14 Complainants?

15 MR. KUNDU: No redirect from us, your Honor.

16 JUDGE ESSEX: Based on the Staff's questions,
17 Respondents, do you have any further questions?

18 MR. PEARSON: No further questions, your Honor.

19 JUDGE ESSEX: All right. Mr. Phillips, thank
20 you very much for your testimony, and you're dismissed.

21 THE WITNESS: Thank you very much, your Honor.

22 JUDGE ESSEX: Complainants?

23 MR. KUNDU: Those are all of our witnesses, your
24 Honor.

25 JUDGE ESSEX: All right. Respondents, do you

1 have surrebuttal? I take this to be a yes since I'm seeing
2 movement, but no audio.

3 MR. NIENSTADT: Yes, your Honor.

4 JUDGE ESSEX: Professor, you may be seated. I
5 remind you you have been sworn in this, and you are still
6 under oath.

7 DIRECT EXAMINATION

8 BY MR. NIENSTADT:

9 Q Dr. Howle, do you have a binder in front of you
10 that's titled "witness binder, Laurens Howle (rebuttal)"?

11 A Yes, I do.

12 Q Could you, please, turn to Exhibit RX-1086C
13 inside that binder.

14 A Okay.

15 Q Is that your rebuttal witness statement?

16 A Yes, it is.

17 Q Does it contain your answers to questions posed
18 by counsel?

19 A Yes, it does.

20 MR. NIENSTADT: I will pass the witness. Thank
21 you.

22 JUDGE ESSEX: All right.

23 MR. KUNDU: Your Honor, I don't have any
24 questions.

25 JUDGE ESSEX: All right. Staff?

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1 MR. WILEY: No questions, your Honor.

2 JUDGE ESSEX: Doctor, that was short and sweet.
3 I appreciate your help. I appreciate the binder. And you
4 are excused.

5 THE WITNESS: Thank you, your Honor.

6 JUDGE ESSEX: Respondents, do you have anything
7 else?

8 MR. MEI: Your Honor, we don't have anything
9 else, but I think the parties do need to introduce exhibits
10 into the evidence, maybe after break.

11 JUDGE ESSEX: Well, I will tell you, do you have
12 any other witnesses? Are we all done here with the
13 hearing?

14 MR. KUNDU: Yes. We don't have any more
15 witnesses, your Honor.

16 MR. WILEY: Staff doesn't intend to call any
17 witnesses.

18 JUDGE ESSEX: Okay. I tell you what we'll do.
19 I am going to close the proceeding and things and let you
20 sort out and then give the exhibits to the court reporter.
21 If there's a disagreement and you need my help in any way,
22 I live around here, and the Staff at least knows how to get
23 ahold of me, probably the rest as well. So instead of
24 waiting and holding it open, I will just hold it open only
25 for you guys to do the exhibits; if there's a problem, I

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1 will be upstairs for a while and that.

2 So we are going to close the hearing at this
3 point, holding it open only for the receipt of exhibits.
4 It's very seldom we get one done this quickly. I want to
5 thank the parties and counsel with the way they've
6 conducted themselves. One of the great pleasures I have
7 being here is seeing the professionalism of the attorneys
8 and witnesses before me. And this is no exception. So I'm
9 going to close by thanking the parties and Staff for the
10 way they conducted this hearing.

11 We are now adjourned, and if you need me, I will
12 be upstairs.

13 MR. KUNDU: Actually, your Honor, I have one
14 quick question. I just thought of it. I'm sorry.

15 JUDGE ESSEX: Okay. We come to order again. We
16 are no longer adjourned. Go ahead.

17 MR. KUNDU: I apologize. Yesterday, you set a
18 75-page briefing limit for the initial brief. Pursuant to
19 Ground Rule 11.3, Complainants were planning on doing
20 findings of fact, at least with respect to claim
21 construction. Does the 75 pages include the findings of
22 fact?

23 JUDGE ESSEX: Oh, yes. Normally, we don't
24 require findings of fact. You can call it anything you
25 want, but stop writing after 75 pages, because that's when

1 I will stop reading.

2 MR. KUNDU: All right. Thank you, your Honor.

3 JUDGE ESSEX: Having answered that, I'm going to
4 try to adjourn again. Thank you all very much.

5 (Whereupon, at 2:58 p.m., the hearing was
6 concluded.)

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1 E X H I B I T S

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3 Rivera Direct Exhibits:

4 CX 5

5 CX 6C

6 CX 9C

7 CX 10C

8 CX 12C

9 CX 15C

10 CX 16C

11 CX 80C

12 CX 225

13 CX 235C

14 CX 236C

15 CX 238C

16 CX 245

17 CX 286C

18

19 Ditta Direct Exhibits:

20 CX 29C through CX 38C

21 CX 54C through CX 68C

22 CX 76C

23 CX 183C through CX 193C

24 CX 195C

25

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1 Phillips Direct Exhibits:

2 CX 5

3 CX 287

4 CX 292

5 CX 294

6 CX 295

7

8 CPX Exhibits:

9 CPX 1

10 CPX 2

11 CPX 3

12 CPX 5

13 CPX 6

14 CPX 11

15

16 Phillips Rebuttal Exhibits:

17 CX 288 through CPX 292

18

19 Exhibits Without Sponsoring Witness:

20 CX 248C

21 CPX 7

22 CPX 8

23 CX 251C

24 CX 252C

25 CX 254C

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1 CX 255
2 CX 256
3 CPX 10
4 CX 258C
5 CX 260C through CX 262C
6 CX 263
7 JX 1 (CX 264C)
8 CX 266C through CX 268C
9 JX 2C (CX 265C
10 CX 273C
11 CX 274C
12 CX 276C
13 CX 283C
14
15 Ditta Cross Exhibits:
16 RX 1050C through RX 1053C
17 RX 1055C
18 RX 1065C
19 RX 1065C
20 RX 1079C
21 RPX 1001 through RPX 1004
22 RPX 1006
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1 Rivera Cross Exhibits:

2 RDX 1002C

3 RDX 1008

4

5 Phillips Cross Exhibits:

6 RX 1020

7

8 Vu Direct Exhibits:

9 RX 1071C

10 RX 1072 through RX 1076

11 RX 1084C

12

13 Howle Direct Exhibits:

14 RX 1085C

15 RDX 1001

16 RDX 1003

17 RDX 1005 through RDX 1007

18 RPX 1005

19

20 Howle Rebuttal Exhibits:

21 RX 1049

22 RX 1086C

23

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1 Exhibits Without Sponsoring Witness:

2 RX 1001 through RX 1007

3 RX 1012 through RX 1019

4 RX 1021

5 RX 1023 through RX 1027

6 RX 1030C through RX 1037C

7

8 Corporate Witness Deposition Exhibits:

9 RX 1078C

10 RX 1008

11 RX 1051C

12 RX 1079C

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CERTIFICATE OF REPORTER

TITLE: In The Matter Of: Certain Beverage Brewing
Capsules, Components Thereof, and Products
Containing the Same
INVESTIGATION NO: 337-TA-929
HEARING DATE: 06-16-15
LOCATION: Washington, D.C.
NATURE OF HEARING: Hearing

I hereby certify that the foregoing/attached transcript is a true, correct and complete record of the above-referenced proceeding(s) of the U.S. International Trade Commission.

DATE: 06-16-2015

SIGNED: Mark A. Jaga
Signature of the Contractor or the
Authorized Contractor's Representative

I hereby certify that I am not the Court Reporter and that I have proofread the above-referenced transcript of the proceedings of the U.S. International Trade Commission, against the aforementioned Court Reporter's notes and recordings, for accuracy in transcription in the spelling, hyphenation, punctuation and speaker identification and did not make any changes of a substantive nature. The foregoing/attached transcript is a true, correct and complete transcription of the proceedings.

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