

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NESPRESSO USA, INC.,
Petitioner,

v.

K-FEE SYSTEM GMBH,
Patent Owner

IPR2023-00485 (Patent 11,230,430 B2)
IPR2023-00502 (Patent 10,994,923 B2)

Held: June 12, 2024

BEFORE: GRACE KARAFFA OBERMANN, JON B. TORNQUIST, and
JAMES J. MAYBERRY, Administrative Patent Judges.

IPR2023-00485 (Patent 11,230,430 B2)

IPR2023-00502 (Patent 10,994,923 B2)

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The above-entitled matter came on for hearing on June 12, 2024,
commencing at 1:00 p.m., via video teleconference.

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

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3 JUDGE TORNQUIST: We are here for an oral
4 hearing today in IPR2023-485, and IPR2023-502, Espresso USA,
5 Inc. vs. K-FEE System GMBH. We're addressing U.S. Patents
6 11,230,430, just for the '485 patent, and 10,994,923 for the '502.
7 Who do we have from Petitioner?

8 MR. MCCRAW: Good afternoon, Your Honors.
9 Clayton McCraw of Mayor Brown on behalf of Petitioner
10 Nespresso USA. And with me today, I have my associate Chantel
11 Lafayette, my partner Amanda Bonner, our associate Ryan Regan,
12 and our summer associate joining from our New York office,
13 Michael Antifaoff.

14 JUDGE TORNQUIST: Welcome. Okay, and Patent
15 Owner?

16 MR. CARSTEN: Good morning, Your Honors.
17 Doug Carsten of McDermott Will & Emery on behalf of Patent
18 Owner K-FEE GMBH. Along with me is my colleague, Kavya
19 Rallabhandi. Lead counsel is Michael Chu, who's with me as well.
20 Josh Reville, Ian Brooks from my office as well, who will be
21 handling a little piece of the argument today. And then Adam
22 Burrowbridge, Ben Pleune from Alston & Bird, and then patent
23 counsel is here as well, Your Honor.

24 JUDGE TORNQUIST: Okay, great. Welcome.

25 MR. CARSTEN: Thank you.

1 JUDGE TORNQUIST: Per our oral hearing order,
2 each side will have 75 minutes to present argument here today.
3 Petitioner bearing the burden of proof, you'll go first. You can
4 reserve some time for rebuttal. And we'll hear from Patent Owner.
5 You can also reserve time for rebuttal, and we'll hear the rebuttal
6 arguments. I should say just before, so everyone's on the record,
7 I'm here with Judge Obermann, who is at the hearing here today,
8 and Judge Mayberry is attending remotely. Okay. With that,
9 Petitioner, when you're ready, just let us know how much time
10 you'd like to reserve.

11 MR. MCCRAW: Certainly. And out of the 75
12 minutes today, I'd like to reserve 35 minutes for reply, please.

13 JUDGE TORNQUIST: All right. All right. Does
14 that look correct?

15 MR. MCCRAW: That looks correct. Thank you,
16 Your Honor.

17 JUDGE TORNQUIST: When you're ready.

18 MR. MCCRAW: Okay. May it please the court.
19 Can we go to slide 7, please? Thank you. Now, as Your Honors
20 previewed, we have two IPRs today, which I'll be referring to as
21 the '430 patent IPR and the '923 patent IPR. And there's some
22 overlap, which we'll talk about, and there's also a few separate
23 issues that are separate for the particular IPR. There's also some
24 differences in the claims. In the '430 patent, it's dealing with a
25 system that has a machine that identifies the capsule, and if it

1 doesn't recognize the capsule, the pump will not operate.

2 And as I'll explain today, Your Honor, exactly as laid out
3 in the petition, this is like the Yoakim, Jarisch, and Rossi
4 references. And for the '923 patent, the claims are even broader.
5 They simply relate to a capsule with a barcode having grooves and
6 ribs on the body. And that is exactly like Yoakim, Jarisch, and
7 Rapparini. And I'd like to start today by first addressing the
8 common issues across the two IPRs.

9 So first, I'd like to address how Yoakim discloses a
10 capsule satisfying the negative claim limitation free of a filter
11 inside the cavity. Then I'd like to address how it would have been
12 obvious to combine Yoakim with the Jarisch reference as both are
13 directed to improvements in centrifugal brewing systems and using
14 optical codes. After that, I'd like to address the separate limitations
15 for the IPRs and also priority. But of course, that's my plan. If
16 Your Honors would like to hear about any of the other issues in
17 any particular order, I'm at your service and I'm happy to do it in
18 that order.

19 Slide 15, please. So, I'd like to start with free of a filter
20 inside of the cavity. This is a limitation found in both of the
21 patents. And as the petition lays out, it's clear from a complete and
22 total reading of Yoakim that Yoakim discloses that a filter in the
23 cavity is an optional feature. It positively recites it as an optional
24 feature. And as the trial developed, Your Honors, and the briefing
25 continued, K-Fee's own evidence about Yoakim actually

1 demonstrated even further that Yoakim in fact discloses that a
2 filter in the cavity is optional. And what I'd like to do, Your
3 Honor, is walk you all through where this is found in Yoakim. But
4 first, I'd like to start --

5 JUDGE MAYBERRY: Excuse me, counsel.

6 MR. MCCRAW: Yes. Thank you.

7 JUDGE MAYBERRY: This is Judge Mayberry.
8 Before you dive in, I do have a quick question for you. Are you
9 reading the limitation free of a filter that is located inside of the
10 cavity, the same as the cavity is free of a filter? At first blush, to
11 me, it seems like the cavity is free of the filter is perhaps,
12 encompasses a larger volume of the cavity, as opposed to just
13 inside of the cavity. I'm interested in your take.

14 MR. MCCRAW: Well, Your Honor, I think you hit
15 on a good point, which is inside of the cavity means something.
16 And I think in Patent Owner's papers, they sort of try to just
17 conflate it and say, you need to be lacking a filter altogether, you
18 need to be lacking a filter in any portion of the capsule, but you are
19 correct. Inside of the cavity means you have a cavity and it has to
20 be inside of it. And so, I do think that that matters, Your Honor.
21 And we are reading the limitation to say, optionally, as found in
22 Yoakim, it is optional to have a filter inside of the cavity. I hope
23 that answers -- does that answer your question, Your Honor?

24 JUDGE MAYBERRY: Not quite. I'm sure I wasn't
25 clear. It's that in the '923 patent with Claims 1 and 10, it just says

1 a cavity that is free of a filter. The word inside isn't there.

2 MR. MCCRAW: Right.

3 JUDGE MAYBERRY: So, I'm curious as to what
4 significance that has.

5 MR. MCCRAW: Right. Well, Your Honor, I think
6 the same thing is going on here because you have to have the
7 cavity and it has to be, you can't have a filter in it. So, yes, inside,
8 I think, is even clearer. But that doesn't allow the other language
9 in the '923 certainly doesn't allow the filter to be in some other
10 portion that's not the cavity. I think that aspect of it remains the
11 same. So, hopefully, that's helpful.

12 Slide 17, please. So, I'd like to start with the law,
13 because I do think that frames the issue here. And there's no
14 dispute between the parties that free of a filter is a negative claim
15 limitation. And the law here, Your Honor, is if alternative
16 embodiments are positively recited, they can be explicitly
17 excluded in the claims. And no express statements excluding a
18 filter required. Now, that's something that in K-Fee's papers, they
19 say Petitioner has failed to show any express embodiment that is
20 explicitly excluding a filter. But that is not what's required here,
21 Your Honor. And so, let's go to slide 18, please. So, these are a
22 couple of the excerpts from Yoakim that I'd like to talk about.
23 And they're on the left. And on the right, you see you have the
24 Patent Owner's patents that have sort of a commensurate disclosure
25 that they say satisfies this limitation, at least for priority. Now, I'd

1 like to start with 461, it's in the bottom left. I think the language is
2 very clear, Your Honors. It says, optionally. And if I was using
3 the Elmo right now, I'd circle it.

4 Optionally, the capsule may comprise a filter part
5 delimiting the cavity. And it explains that that part can be added
6 inside the capsule as a filter cylinder. And if you look on the right,
7 you can see that they say, additionally, the cavity could contain,
8 for example, a filter. These two disclosures, Your Honors, are
9 effectively identical. And I also think the image, and it's actually a
10 slide of K-Fee's that is instructive here. Could we go to K-Fee's
11 slide 80, please? Thank you so much. So here, they've actually
12 explained this, I think, very clearly that a filter in the cavity is
13 optional. So, as you see here on the left, you've got the same
14 language, and it explains that you have a filter part 708, delimiting
15 the cavity, and if you look on the right, you can see in Figure 45,
16 you have the actual cap (INDISCERNIBLE), and then inside of
17 that, you have the filter that is optional.

18 So, Your Honor, with Judge Mayberry, this would satisfy
19 certainly, you know, either interpretation you have there. So, this
20 is a clear example of an optional filter. It's positively recited. It's
21 shown, and it's optional inside of the cavity. And we really don't
22 have to go much farther than that, Your Honors. I think this alone
23 satisfies the limitation, but there are more, and I do want to show
24 them. So, if we could go back to --

25 JUDGE OBERMANN: Why aren't the slits a filter in

1 the cavity?

2 MR. MCCRAW: Well, Your Honor, this
3 embodiment does not have any slits. Are you referring to the top
4 of the membrane when it's pierced?

5 JUDGE OBERMANN: No, I'm talking about, I think
6 it's in the, I think it's slits 810 in Yoakim.

7 MR. MCCRAW: Is that a different embodiment,
8 Your Honor? I'm not seeing any slits in this particular
9 embodiment.

10 JUDGE OBERMANN: Not that embodiment, but the
11 Patent Owner cites to the slits that are in the lid of the capsule in
12 Yoakim.

13 MR. MCCRAW: Let me make sure I'm following,
14 Your Honor. Oh, are you referring to Figure 16, Your Honor?

15 JUDGE OBERMANN: I thought it was 26 in the
16 '502 case.

17 MR. MCCRAW: Oh, okay. Oh, possibly Figure 28.
18 Is that what you're referring to, Figure 28 and 29?

19 JUDGE OBERMANN: I'm sorry, it is figure 16.

20 MR. MCCRAW: Oh, okay.

21 JUDGE OBERMANN: Elements 810 in the lid.

22 MR. MCCRAW: Yes. Now, this, Your Honor, I
23 want to explain how this came to be. Now, this is a paragraph, I
24 think the associated paragraph for Figure 16, I believe is 210. And
25 I believe this is a paragraph that K-FEE actually claims supports

1 their interpretation. And one of the things they've argued, Your
2 Honor, is that some of the figures we've pointed to are, quote,
3 unquote, schematics, and they're not detailed drawings. And
4 therefore, it's unclear whether they lack a filter in the cavity. And
5 we cited this, Your Honor, on reply to say, the paragraph you cited
6 210 is lacking filter. In fact, we have a detailed drawing here that's
7 not a schematic. And it shows a cover that is fixed to the capsule.

8 And it is -- it has holes that the liquid exits. And it says,
9 optionally, you could have those slits sized to act as a filter, or
10 optionally, you may not. But in any event, Your Honor, they're
11 not inside of the cavity. They're not part of the cavity. The cavity
12 heals steel -- strike that, I'm sorry. In either patent the cavity is
13 lacking a filter here because these are just slits that are actually in
14 the lid. So, you have holes that are in the lid and they're just
15 showing where those would be in the actual top of the lid, which is
16 the boundary of the capsule, Your Honor.

17 JUDGE OBERMANN: Where, I'm sorry, I think you
18 just said that Yoakim itself discusses the slits 810 as being either
19 small enough to filter or not. Where is that?

20 MR. MCCRAW: Sure. Your Honor, that's in
21 paragraph 210.

22 JUDGE OBERMANN: Okay.

23 MR. MCCRAW: Yoakim, could we pull that up,
24 please?

25 JUDGE OBERMANN: I see a sentence that says the

1 slits are sized so as to act as a filter.

2 MR. MCCRAW: Oh yes, okay, thank you, Your
3 Honor. Well, there are other paragraphs that certainly are clear
4 that the possible slits in any of the embodiments could be sized or
5 not sized to act a filter, but even if this is positively recited to act
6 as a filter, Your Honor, it's not in the cavity. And I also want to
7 point out that this embodiment by no means is necessary to meet
8 this limitation because we have several other limitations that -- or
9 several other paragraphs that do meet the limitation. But I do want
10 to emphasize for this question of yours, this is not in the cavity.
11 So, this acts as a filter.

12 JUDGE OBERMANN: Well, the claims in this case
13 don't say in. What if we say as long as it's, you know, I mean, it's
14 the lid of the capsule, right?

15 MR. MCCRAW: Right. So that would be the
16 boundary. And I actually think K-Fee's own expert has stated that
17 that is not, that's not in the cavity. In the cavity itself, it has to lack
18 a filter. It's in the cavity. It's part of the cavity. The boundary of
19 the capsule is not. K-Fee's own patent explains that it's --

20 JUDGE OBERMANN: It's below the flange
21 according to the Patent Owner in their sur-reply.

22 MR. MCCRAW: Yes. So, that is their sur-reply.
23 That is the first time they're making that argument, Your Honor.
24 We've never heard any position from them that anything other than
25 the boundary of the capsule is what delineates the cavity. For the

1 first time ever, we've now heard on sur-reply that they think it's the
2 flange, which I don't even think is supported in the patent itself. If
3 we go to the patent and we look at the definition and several places
4 where it discusses cavity, we say it says here, I'm going to take you
5 to a couple examples, Your Honor, because I think this what they
6 said on sur-reply for the first time is improper. Yes. Could you
7 please pull up the '923 patent? Great. I'd like to go to column 5 if
8 we can toward the top. So, here's one example, Your Honors, and
9 this is line 6 through 9 of column 5. Therefore, the grooves are
10 part of the base element's wall, optionally located on the inner side
11 facing to the cavity. So, the cavity is now inner to the wall. We
12 know that. It's not part of the wall, it's inner to the wall. Another
13 example, Your Honor, is in column 8, lines 5 and 6.

14 JUDGE OBERMANN: Can I direct your attention
15 for a minute to paragraph 271 in Yoakim?

16 MR. MCCRAW: Yes.

17 JUDGE OBERMANN: Because there Yoakim
18 defines the cup shaped body and internal lid as delimiting the
19 enclosure of the capsule. So, how do I read Yoakim to not include
20 a permanent filter in the form of slits 810 if they're in the internal
21 lid that delimits the enclosure of the capsule?

22 MR. MCCRAW: Your Honor, I actually, I'm glad
23 you pointed out 271 because I think that is maybe one of the
24 clearest disclosures of an optional filter because it confirms that
25 the filter itself in no way even, I'm sorry, the capsule itself in no

1 way even needs a filter in any way. It simply can just have the
2 liquid exit. So, if we look at the first sentence of 271, it says
3 preferably the capsule comprises an internal filter portion placed at
4 the periphery of the enclosure. That sounds like a filter inside of
5 the cavity that's optional. Now, if we go to the last sentence, and
6 this is important, Your Honor, it says, in another mode, meaning if
7 we do this differently, optionally, the filter could be part of the
8 device.

9 So, we now know that the filter is nowhere even in the
10 capsule. It's part of the device. So, Your Honor, doesn't have to
11 make a decision about cavity. You don't have to make a decision
12 about filter. This is simply in the device, and the liquid is exiting.
13 I think that is a very clear disclosure that Yoakim doesn't need a
14 filter, Your Honor. And what I'd like to go to, could we go to our
15 slide 21, please? So, I think this summarizes it well, because
16 Yoakim is very clear that the filter could be present in the sidewall,
17 it could be present in the lid, or it could be part of the device in the
18 center, and that's 271. And, Your Honor, that is just -- you don't
19 have to make any decision about cavity or filter. It's in the device.

20 JUDGE TORNQUIST: Can I ask you a question? In
21 the last sentence that you were reading of 271, it also talks about
22 the puncturable membrane and piercing members. Do you
23 understand that to be the membrane that's sealed along the flange?

24 MR. MCCRAW: The membrane would be what is
25 above the flange and closing off the capsule from the outside

1 space. And I think we have testimony from K-Fee's expert,
2 Howle, himself, that that is not actually part of the cavity. One
3 example of that, Your Honor, I think is Exhibit 1067, page 49, line
4 19 through page 50, line 5. I think there's also another more
5 explicit quote that confirms that the puncturable membrane is not
6 in the cavity. And I do want to get you that quote. Oh, here it is,
7 Your Honor. I apologize. This in our reply at 9, Exhibit 1067.
8 This is K-Fee's expert admitting that the pierced cover of
9 membrane does not constitute a filter in the cavity. And that's
10 page 65, line 23 through page 66, line 4.

11 JUDGE TORNQUIST: You probably don't even
12 need to go there, because I think that was actually Patent Owner's
13 argument that the membrane defined the cavity.

14 MR. MCCRAW: Correct. That does seem to be their
15 argument, Your Honor. Okay.

16 JUDGE TORNQUIST: So, you have 271. Let's just
17 go back to Figure 29, which I think is what your Figure 16
18 argument is. I think the argument, at least, maybe they're showing
19 the same thing.

20 MR. MCCRAW: I don't know that they're necessarily
21 showing the same thing. One is a lid that's sealed, and it seems
22 that the holes are just in it or going around the body of the capsule,
23 whereas I do think the Figure 29 is a little bit different.

24 JUDGE TORNQUIST: Okay.

25 MR. MCCRAW: Could we please go to Figures 28

1 and 29 of the Yoakim reference? We'll zoom out just a little bit so
2 we can see them both. So, Your Honors here, I think 29 is a great
3 example where you have the lid. In this example, in 29, it is the
4 uttermost boundary of the capsule, and you have those slits that are
5 in it. It is not in the cavity, it is not part of the cavity. The cavity
6 is where the coffee is sitting, and you have here the slits that
7 basically effectively allow it to leave and go to the outside world.

8 So, no, Your Honor, that's not in the cavity. I'd also
9 like to go to Figures 30 and 31, which show this lid, and they show
10 it. That's it, that's the top of the capsule, that's where the liquid
11 leaves. And if we also go to Figure, I believe, is it 33? Thirty-
12 three. You can see that even when the capsule is in the machine,
13 that is the outermost boundary of it. That's the liquid is leaving
14 through that. So, Your Honor, that confirms that it is not in the
15 cavity.

16 JUDGE TORNQUIST: Their argument would be in,
17 say, Figure 29, is that that membrane is going to seal over the top
18 of that, and therefore, that membrane is defining the cavity, and
19 you're below it if you're filtering.

20 MR. MCCRAW: So, that seems to be their argument,
21 Your Honor, and there's a couple things I'd like to say about that.
22 First of all, and let me make sure I address this properly. First of
23 all, I think it's Yoakim paragraph 422 confirms you do not have to
24 have a membrane over that entire structure, so it does not have to
25 be there. It confirms that you could actually just have it, instead of

1 having a membrane over the entire lid and covering it, you would
2 just have a foil just over the slits itself, so the top of the cover
3 would continue to be the outermost boundary, and it would just be
4 slits that are covered.

5 So, you have an optional membrane here that's not
6 necessarily going over the top of the page. And another thing,
7 right, and I think, Your Honors, just to be clear, if you look at
8 Figures 28, 29, and certainly 33, it confirms just by looking at it
9 that that membrane is an optional membrane. But to the extent
10 there's any question that K-Fee wants to argue that the membrane
11 is actually what delineates the cover, I would like to point out that
12 six months ago, actually to the day, in this very room, over a
13 related patent with the same disclosure, Mr. Carsten stood up and
14 while talking about Yoakim, could we please go to the '491
15 transcript, please?

16 Because he actually was talking about this very issue
17 about what delineates the cavity and how the membrane impacts
18 that. And what he said, could we go to page 36, lines 9 through
19 11? So, he said it's perhaps easiest to see. This is respect to Figure
20 28. You can see that sort of shaded material. That's the beverage
21 material. That's the area that is the cavity. Well, that's pretty clear,
22 Your Honors. I think they've made our point. And another thing
23 I'd like to point out that I think is useful, could we go to page 39,
24 lines 5 through 8? This is also Mr. Carsten talking about the cavity
25 to Your Honor, Judge Mayberry.

1 JUDGE OBERMANN: Excuse me, counsel. Where
2 is this in your briefs?

3 MR. MCCRAW: Well, this is not in our briefs, but it
4 is an inconsistent position from K-Fee because I think in their sur-
5 reply for the first time, they're really trying to take this position
6 about whether the flange defines the boundary, and that's the first
7 time we're seeing it, Your Honor. So, we don't -- this is our first
8 opportunity to respond to that flange position. But line 5 of page
9 39, having said that, the lid can't be within the cavity. I think it's
10 clear, Your Honors. So, unless there's any other questions about
11 free of the filter in the cavity, I'd like to move on to the Yoakim-
12 Jarisch motivation.

13 Could we please go back to our slides? Let's go to
14 slide 85, please. So, this issue is also common to both of the
15 patents. K-Fee has argued that the Yoakim reference and the
16 Jarisch reference would not be combined. And what they've tried
17 to do, Your Honors, is make this as complex as possible, but in
18 reality, this is simple. There's no dispute that Yoakim is directed
19 to a capsule-based centrifugal brewing system. It's all in the
20 disclosure. It's certainly, it's in the title, and Jarisch has the same
21 title. It's directed to a centrifugal brewing system, and it's directed
22 to a capsule that's spinning and how to modify the code location in
23 a centrifugal brewing system.

24 These are innovations by the same applicant with
25 overlapping inventors. They're highly related, highly combinable

1 references, and so I want to start out by just showing you the
2 combination that we laid out, and this is the '923 and the '430
3 patent, and it explains a single-serve brewing system, capsule, and
4 concepts of Yoakim. You're going to be combining that with the
5 code location of Jarisch. Now, we've explained the combination,
6 but we've also explained how you're going to do it. Could we
7 please go to slide 86? Jarisch expressly discloses how to modify a
8 brewing chamber like the one in Yoakim to better position an
9 optical reader to allow it to read a code on the bottom of the
10 flange.

11 So, we've explained, Your Honor, that you're going to
12 be modifying the brewing chamber like the one in Yoakim,
13 according to what Jarisch is teaching you. And we have an image
14 annotated right here in this section of the petition. This is page 45,
15 and we're showing in red the optical path that we're talking about,
16 which is placing the detector at the base of the chamber. You have
17 a chamber that isn't an angle. It isn't an angle, but it's straight.
18 And then it goes up, and it goes back down, and they make it out
19 of a translucent material. It's very simple. K-Fee's challenge to
20 this is that they're going to add in all kinds of bends that don't need
21 to be there and complicate the optical path, but that's just not how
22 a POSITA would do this, looking at these two references.

23 So, can we go to 87, please? So, these are a couple of
24 the undisputed motivation factors. And at the first bullet, yes,
25 they're analogous art, but they're much, much more than that. This

1 isn't just coffee portion systems, espresso machines. These are
2 actually the exact same type. They are centrifugal brewing
3 systems with the same configurations. Can we go to slide 89,
4 please? So, this is Jarisch's disclosure. And so, in paragraph 44,
5 Jarisch is saying, we would modify, for example, a beverage
6 system like the one you see in the '053 WIPO publication, and
7 that's on the bottom left. That's Denisart.

8 Well, on the bottom right, that's the Yoakim
9 reference. Now, those are identical figures, effectively. And what
10 we're talking about is modifying the same brewing chamber, the
11 same type of centrifugal system. So, the idea that these two
12 patents are relating to different solutions, it just doesn't make
13 sense, Your Honor. Slide 90, please. Just as an additional
14 motivation, an additional commonality, both of these systems,
15 Jarisch and Yoakim, are using optical codes to optimize the
16 brewing parameters. Slide 91, please. And this is what's in our
17 petition. Our expert, Michael Jobin, who designs beverage
18 systems, he explained that due to the messy and harsh nature of the
19 coffee grounds and the extraction process, it's beneficial to move
20 that optical code out of the way, where it's pierced, where it can
21 impact having the code on the membrane.

22 You just want to get it out of a less harsh
23 environment. Ninety-two please. And of course, KSR does not
24 require us to have an express motivation, but in this instance, we
25 do. In paragraph 22 of Jarisch, it says the bottom of the rim is

1 sufficiently away from the liquid injection and beverage delivery
2 area. So, there's a lower risk for the code to become unreadable.
3 That's an express motivation in Jarisch for why you want to
4 modify the Yoakim reference. So, Your Honors, this is a classic
5 case of obviousness, analogous art and express motivation and
6 express teaching of how to accomplish it. So, Your Honor, we
7 think the motivation to combine here is clear and I would move on
8 unless Your Honors have any questions about this.

9 JUDGE TORNQUIST: Just to be clear, in your
10 proposed combination you're sort of removing the flare. You
11 wouldn't have the flare that they've been pointing to. I forget, 61,
12 Figure 61 of Yoakim.

13 MR. MCCRAW: So, let's go to slide, could we go to
14 slide 102, please? So, I think this is what you're referring to, Your
15 Honor. And you're referring to this flare. I think it's in maybe an
16 area. It's kind of near where it says 224 on the right in Figure 61.
17 Your Honor, the flare is not any different from what is in Yoakim
18 and Jarisch. As you see, there is a similar flare. You have a
19 straight line, and it's going at an angle. So, there's no reason you
20 wouldn't have that angle, track the capsule if you needed to, for
21 example, to provide some kind of holding.

22 And in fact, if we go to slide 101, Jarisch is clear that
23 you do want the device to hold the capsule, which makes sense.
24 We're both talking about centrifuges here. You can't have a
25 system that doesn't hold the capsule. It wouldn't spin. It would

1 wobble. It wouldn't actually operate. You need to grip it in order
2 to spin it. And that's just basic for any centrifugal system. And
3 Yoakim, sorry, Jarisch, says the same thing. It says the device
4 holds the capsule with a holding means, and it drives it with the
5 driving means. And so, the idea that you aren't going to have the
6 capsule, the brewing chamber hold onto the capsule, just doesn't
7 make sense.

8 And if we go back to 102, please. Again, we've got
9 an angled chamber here that can easily go down the same angle of
10 the capsule. And we don't need to go straight. As you can see on
11 the left here, Your Honor, there's plenty of room down below in
12 Jarisch to encompass, you know, different size capsules. I know in
13 their sur-reply for the first time, K-Fee said that these capsules,
14 this chamber wouldn't accompany different sized beverages, but
15 that just doesn't make sense, Your Honor, because just looking
16 down there's plenty of space.

17 So, Your Honors, you -- I don't see any issue with
18 taking the chamber what's on the left and applying that bend and
19 simply just continuing it with what you see on the right. And we
20 know that can be the case. We know that can be the case because
21 Yoakim at no point ever says it has to have that bend. And we said
22 that in our reply brief and we really never got a response on sur-
23 reply. It does not have to have that bend. And could we just go to
24 Yoakim Figure 54 please? If we could blow this up so we can see
25 54 and 55 at the same time. Sorry, zoom out is what I meant. You

1 can see here -- zoom in just a little bit. Perfect. So, you can see
2 here you have only a straight angle here. You don't have any sort
3 of modified bends or anything. It's just it's straight along the side
4 and there's no reason to believe that Jarisch would be any different.

5 So, you don't have to have some angle to go straight
6 down that K-Fee is insisting on. And at no point has K-Fee ever
7 argued or articulated that Yoakim would be rendered inoperable.
8 That's simply not the case. So, there's substantial reconstruction.
9 It simply fails, Your Honors. And if there's any other questions on
10 the combination, otherwise I'd move on to some of the individual
11 issues.

12 So, I do want to address grooves, Your Honor. So, if
13 we could go back to our slides, please. I'd like to go to slide 28.
14 We're talking, and this is solely in the '923 patent, we're talking
15 about a wall region, including radially spaced and vertically
16 oriented grooves that are free from extending entirely to the
17 bottom region. So, all this claim requires is that there are some
18 grooves that do not extend entirely to the bottom region. Could we
19 go to slide 29, please?

20 So, I want to make this point. K-Fee has never
21 disputed in its Patent Owner response or in its reply brief that the
22 claimed grooves in Figure 6 and 6BIS satisfy this limitation.
23 They're not disputing that it's satisfied. They're saying that a
24 POSITA looking at Rapparini would ignore Figure 6, and they
25 would only utilize Figure 10. And that's improper, Your Honor.

1 Now, if we could go to slide 30. They're ignoring the
2 combination we mapped here. We said a POSITA would have
3 been motivated to modify Yoakim and Jarisch with the grooves
4 and ribs of Rapparini. And in our combination, we are solely
5 looking at Figure 6, and there's no reason you wouldn't. Can we
6 go to slide 31, please? This is what we mapped in our petition,
7 Your Honor. You can see we have grooves that do not extend
8 entirely into the bottom region down there in five. It says here in
9 paragraph 11, you have short ribs. It talks about varying the length
10 of the ribs, and you have short ribs extending only along the side
11 region.

12 They don't extend to the bottom region. And K-Fee
13 has never said otherwise. And I think we know that. Could we go
14 to their infringement position, please? Might be the next slide.
15 You could just keep going. Perfect. Thank you. Slide 36. I think
16 we know, Your Honors, why K-Fee is not saying that Figure 6
17 fails to meet the limitation, because if you look on the left, Exhibit
18 1049, this is what these grooves on here is what they're accusing of
19 satisfying the limitation. So, you know, that's their position of
20 what actually satisfies that limitation. So, I'm not surprised, Your
21 Honors, that K-Fee is not challenging Figure 6.

22 So, what I want to get to is the motivation. Can we go
23 to our slide 32, please? Rapparini tells you why you would do
24 this. They explain, and this is well-known, this is far beyond
25 Rapparini. We have a technical background in our petition that

1 explains that for decades, you've known to take thin walled
2 structures, add grooves to them for structural stability. And
3 Rapparini says, you can vary those. You want some short ribs.
4 We know you want some short ribs. So, there's no issue here.

5 I also want to take on what they've said about the
6 reason you go to Figure 10. Could we go to slide 42, please?
7 They're saying -- they're misconstruing the petition to try to get
8 themselves to Figure 10. The petition was clear that it relied on
9 rounded bottom capsules. This is actually, this is from Jobin's
10 declaration himself in the petition. It says, Yoakim, Jarisch, and
11 Rapparini all contemplate similarly shaped capsules, circular,
12 symmetrical, including a flange and including a rounded base.
13 And K-Fee is trying to just twist this Figure 7 to say, oh, it's not
14 rounded. Well, we can see here there's a line going across it at the
15 bottom and the lines are curving.

16 You also see the absolute base of it at 106 and it
17 eclipses what's behind it. This is a rounded bottom capsule. And
18 there's nothing about this shape that would suggest someone would
19 go to a mocha pot capsule. So, could we go to slide 43? And just
20 to be clear, if that wasn't enough, if you look at Yoakim, they have
21 capsules that look exactly like Jarisch and exactly like Rapparini.
22 So, there's no concept that Yoakim is not using. Yoakim has to
23 have a flat bottom capsule. And I also would like to go to, let's
24 see, go to the next slide, please. So, K-Fee is suggesting that a
25 POSITA would go to Figure 10, which is, if you look at the

1 description of Figure 10 in the patent in Rapparini, it's a mocha pot
2 insert.

3 We actually even asked Howle if that, K-Fee's expert,
4 Dr. Howle, if that constituted a single-serve capsule and he didn't
5 have an answer. So, this is just a separate type of system and I
6 don't see why a POSITA would ignore Figure 6 and go to Figure
7 10. I think what they've argued is improper. So, that's all I have
8 on grooves.

9 I'd like to quickly address -- well, I have five minutes
10 left. I'd like to address whatever Your Honors are most interested
11 in. Is there anything in particular? Otherwise, I'll just go on to
12 turbulent flow.

13 JUDGE TORNQUIST: That's fine.

14 MR. MCCRAW: Okay. Let's go to slide 48, please.
15 So, these are Dependent Claims in the '923 patent saying that the
16 grooves in the cavity generate turbulence. The petition, let's go to
17 slide 49, establishes it would have been obvious to utilize
18 Rapparini to cause the fluid to move in different directions
19 generating turbulence. And Jobin's opinion here is supported by
20 evidence known in the art demonstrating it was obvious to use
21 grooves to impact fluid flow. If we go to slide 51, these are
22 examples of the prior art that have grooves and they talk about the
23 concept that you would use, you would use the capsule grooves to
24 influence fluid flow and increase turbulence.

25 So, it's disclosed and Your Honor, the only challenge

1 here is that we needed to experiment and demonstrate it. But
2 actually, I think K-Fee's own patent is as helpful here. Could we
3 go to 52, please? So, this is K-Fee's own patent saying that
4 grooves provide a more pronounced turbulence than what's already
5 known in the art and can be done by straightforward means. So,
6 they're admitting that it's known to use turbulence in the art and
7 that it can be done easily. And when we deposed Dr. Howle on
8 this, when we asked him at, this is Exhibit 1067, page 88, lines 16
9 through 25, he admitted that it's well within the skill of the art to
10 modify grooves in that manner.

11 Last, Your Honor, I'd like to describe indentations.
12 Could we go to slide 76, please? So, this is in the '430 patent. So,
13 now we're moving from the '923 to the '430 and they have a series
14 of claims requiring a base element, including indentations. This is
15 a basic, basic limitation. They're just saying, effectively, there's
16 some kind of, you know, dent in the capsule is really what would
17 be within that. Let's go to slide 77. We know, Yoakim describes
18 the capsule can have teeth or slits or some kind of relief to engage
19 the capsule to drive it. And we know that's beneficial. So, you
20 would want to use that. And it says the capsule has the tooth
21 structure on its outer surface. Now, if we go to slide 78, you can
22 see that those teeth could be replaced by any other kind of
23 structure, like a relief or be hollow. Let's go to slide 79. We know
24 they're on the capsule body sidewall. It says it there. It says the
25 capsule has a body.

1 You say in another area of the patent in paragraph
2 420, they're talking about the sidewall of the body. So, when you
3 see sidewall, it's the sidewall of the body. And that's all you need,
4 Your Honor. It's not a complicated limitation. And so, all they've
5 done is tried to twist some language to say that there's an outer
6 surface. Could we go back to slide 77? We're saying the capsule
7 is two-structured on its outer surface. And they're somehow saying
8 that the outer surface is not talking about the outer surface of the
9 capsule. And it just doesn't make sense. We ask them in our
10 reply, what is the outer surface? And they have no answer. They
11 have no answer. They're just trying to say that outer surface is
12 somehow distinct. But the outer surface is the outer surface.

13 JUDGE TORNQUIST: So, if we look at figure 23,
14 which you have up. The front side, it looks like it might be
15 ambiguous because we have these teeth coming down, potentially
16 from the flange. It looks like on the backside of that, it's coming
17 down below the flange into the sidewall. And that's your position,
18 right?

19 MR. MCCRAW: It is, but it's also important to look
20 at slide 78 as well.

21 JUDGE TORNQUIST: Seventy-eight?

22 MR. MCCRAW: Seventy-eight, because it says -- so,
23 even if Your Honor is sort of concerned about the shape of those
24 teeth and that particular embodiment, you've got to take the full
25 Yoakim disclosure, which says those teeth could be replaced by

1 other structures, such as elements in relief or being hollow. For
2 example, slits or pins or anything like that. So, it's explained that
3 you can have other types of features that would be indentations in
4 this wall of the capsule. And I do want to point out that K-Fee has
5 never challenged that what we're pointing to here constitutes an
6 indentation. They're only saying that it's not on the sidewall of the
7 capsule. And so, it's on the sidewall of the body, not on the flange,
8 and I think that's very clear.

9 And Your Honor, unless you have any other
10 questions, I think I'll probably cede the rest of my time for reply.

11 JUDGE TORNQUIST: Okay. Okay.

12 MR. MCCRAW: Thank you. Mr. Easton, would you
13 be so kind to activate the old one for me? Thank you, sir. No, no.

14 JUDGE TORNQUIST When you're ready and just
15 when you are ready, let us know how much time you'd like
16 to reserve in rebuttal.

17 MR. MCCRAW: Well, thank you, Your Honor.
18 Pardon me? Can you give the HDMI for me?

19 MR. CARSTEN: Yes, certainly. Here you go. Let
20 me see if I can do this without knocking everything over. There
21 you go. Thank you. Good afternoon and may it please the Board.
22 I think I'll be taking 55 minutes of the time of the 75 minutes and
23 reserving 20 minutes for rebuttal if possible.

24 COURT REPORTER: I'm sorry, this is a court
25 reporter. Can you state your name?

1 MR. CARSTEN: Hi, this is Doug Carsten. I'll be
2 presenting most of the arguments on behalf of K-Fee, and my
3 colleague, Ian Brooks, will be handling I think two of the
4 arguments, and he will introduce himself --

5 COURT REPORTER: Thank you.

6 MR. CARSTEN: -- when he steps up. Thank you.

7 COURT REPORTER: Thank you.

8 JUDGE TORNQUIST: When you're ready.

9 MR. CARSTEN: Thank you, Your Honor. So, I
10 think that I was going to start with a dramatic flair for the
11 introduction, but I don't know that we absolutely need that. As Mr.
12 McCraw indicated, two patents, the '923 and the '430, there's a
13 whole host of arguments that have been presented through the
14 course of the papers. The ones that I'd like to focus on are one
15 where Mr. McCraw started. I think free of a filter is an important
16 argument, because it dispatches entirely of one patent and the
17 lion's share of the claims in the second. The second argument I'd
18 like to focus on is the argument about grooves, which Mr. McCraw
19 touched upon as well. And that's dispositive of the other patent, all
20 the claims. And so, if the panel were to side with us on those two
21 arguments, there's no further work that would need to be done in
22 terms of grappling through the other arguments, or the priority, et
23 cetera.

24 So, let's start with those two if I could, and see where
25 that gets us timewise. In terms of the free of a filter located inside

1 of the cavity, Judge Mayberry, you had an interesting question.
2 And that is, well, the claim terms are slightly different. I agree
3 with you. I do think that one set of the claim terms are slightly
4 broader than the other. But I submit with respect that under
5 either -- under the proper claim scope of either of those terms,
6 Yoakim does not teach a capsule that is free of a filter in the
7 cavity.

8 And I think, Judge Obermann, you were right on it. It
9 really does come down to the slits and the openings that are
10 described in the various embodiments. Now, mind you, let's sort
11 of orient ourselves in terms of where we start here. Where we start
12 here is the petition. And the petition, in all its glory, provided two
13 sentences pertaining to these arguments. That's it. They cited
14 maybe four or five references or citations. And so, the lion's share
15 of what you heard Mr. McCraw tell you about are things that were
16 never raised in the petition.

17 JUDGE OBERMANN: You raised paragraph 271 in
18 your response. And I would like to hear your theory on why that
19 last sentence of paragraph 271 in Yoakim does not indicate that
20 Yoakim contemplates expressly another mode where the filter is
21 part of the device or formed by the puncturable membrane and
22 piercing members. That seems to indicate quite plainly that the
23 slits that you're contemplating as a permanent filter are also
24 optional.

25 MR. CARSTEN: Well, I don't believe that they are

1 optional at all in terms of the slits. There is this alternate link at
2 the 271.

3 JUDGE OBERMANN: Two seventy-one, I read that.
4 If you read it in its entirety, it seems to be clearly talking about the
5 filter that can be placed in the internal lid, which are those slits.
6 And it seems to plainly contemplate that there is another mode
7 where that filter is not part of the lid at all.

8 MR. CARSTEN: Well, preferably the capsule
9 comprises an internal filter portion placed at the periphery of the
10 enclosure.

11 JUDGE OBERMANN: Even the word preferably
12 indicates that it is optional.

13 MR. CARSTEN: Right, an internal filter. So, there
14 are two filter elements. As we --

15 JUDGE OBERMANN: Yes, I understand that. And if
16 you read the second sentence, it says the internal filter portion can
17 be an internal perforated lid, and I believe that's what you're
18 relying on so that even if the other filter that we think of, you
19 know, conventionally as sort of a paper filter inside the cavity isn't
20 absent, my understanding is your position is that the perforations
21 in the lid are there, and this paragraph seems to be saying in the
22 last sentence that there is another mode where that filter could be
23 part of the device instead of the perforations in the lid.

24 MR. CARSTEN: Right. And if I could point your
25 attention to our slide 81, Figure 42 and 41, my understanding or

1 read of Yoakim is this is what we're talking about here. So, in this
2 embodiment, which was referenced, there is a layer at the top
3 which we've colored in in yellow, that is the filter -- is a filtering
4 membrane. There's an additional membrane, the cover on top of
5 that, which seals the cavity and completes the cavity. And I was
6 sort of surprised, Judge Obermann, when I heard Mr. McCraw
7 exclaim surprise that this notion that the membrane is what defines
8 the cavity was new to him, because when you actually look at their
9 petition and how they actually map their prior art assessment here,
10 they actually point to that membrane as being the top of the cavity.

11 It's not the lid with the slits in Figure 28, for example,
12 it's the top of the cavity. And let me grab if I just have a moment.
13 And this is at page 56 of the petition, Your Honor. Page 56 of the
14 '430, almost getting a little overloaded. This is for elements 1C
15 and 7C. And those are claim elements, 1C and 7C, that require a
16 cover over the cavity. And so, those claim terms, that specific
17 claim term, was not at issue in the '491 IPR that we argued about
18 six months ago. And so, I don't know why Mr. McCraw was
19 pointing out what I said then, but this is a totally different claim
20 scope with different claim elements.

21 And what we see here is that Nespresso unequivocally
22 said that in terms of mapping the cover, that Yoakim discloses a
23 cover fastened at the top side of the flange to close the cavity.
24 Period, full stop. And that cover is the foil membrane. It goes on
25 to say, Yoakim come further discloses that the foil lid is attached

1 to the peripheral rim of the capsule body. That's what defines the
2 cavity. That's what Nespresso understood and claimed define the
3 cavity.

4 And under that approach, Judge Obermann, to come
5 back to your specific question, whether or not it slits within that
6 cavity, or a separate discrete filter porous material, like 271
7 suggests in that cavity, it's still a filter in that cavity. And so, I
8 don't quite understand the argument that a passage that was never
9 relied upon in the petition that is readily, that supports us, frankly,
10 is somehow held to be evidence that we're not within the scope of
11 the claim.

12 And so, I think that Yoakim, when you actually map
13 it through and map it through carefully based upon the actual
14 development of the argument and not giving heed to the new
15 arguments that Mr. McCraw is making today, you'll see that each
16 and every one of the Yoakim embodiments contains by its very
17 terms a slit that is sized to exclude solid and allow liquid to pass,
18 or a porous membrane that acts as a filter. And so, I know that Mr.
19 McCraw really seems to like the word optionally. In fact, I think I
20 made a little note here that, you know, in respect to paragraph 422
21 when pressed, he said, well, that's just optional too. But of course,
22 the word optional doesn't appear there anywhere. But looking
23 through and tracking through the arguments here, there is but one
24 conclusion that can be reached. And that is that every portion of
25 Yoakim that is relied upon by Nespresso contains a filter element

1 in the cavity, period, full stop. I hope I've answered your question,
2 Judge Obermann.

3 JUDGE OBERMANN: Kind of.

4 MR. CARSTEN: Kind -- oh, well, I want to give you
5 a full and complete answer, Judge Obermann.

6 JUDGE OBERMANN: It says that the filter can be
7 part of the device or be formed by the puncturable membrane. So,
8 this clearly contemplates something else.

9 MR. CARSTEN: Well, I think I submit with respect
10 that the figures I had just on the screen, 41 and 42, that is item 184
11 there could be conceived or considered to be part of the device. Or
12 it could be conceived to be, you know, a puncturable membrane.
13 And so, I think that's entirely consistent with this embodiment of
14 41 and 42. Moreover, I'll note that while Figure 42 was identified
15 in the petition originally, during his deposition, Mr. Jobin testified
16 that, oh, wait, that's a typo. I didn't mean to say paragraph 42 or
17 Figure 42. I meant figure 52.

18 And so again, I think this embodiment, even if you're
19 going to give it credit as not a typo and intentionally in the
20 petition, despite their own expert's admission to the contrary, that
21 this is entirely consistent. Because you'll see, Your Honor, you've
22 got that foil membrane at the top, and that foil membrane,
23 according to Nespresso, is precisely what defines the cavity.

24 JUDGE TORNQUIST: Counsel, you just mentioned
25 this, I believe you just said Figure 41 or 42 are showing a device.

1 MR. CARSTEN: Well, a capsule, a device. A device
2 is a capsule, I think, right?

3 JUDGE TORNQUIST: Well, that's what I'm trying to
4 figure out. It said in the reference, right? If you look at the claims,
5 the claims are either to a capsule or to a device.

6 MR. CARSTEN: Oh, I understand. This is not the
7 system that we're talking about here. We're talking about the
8 capsule. And maybe I misspoke. I don't know. I don't know that
9 there's much ado about that. There are some figures in Yoakim
10 which focus on the system aspect. And they've got schematics of a
11 capsule in a larger system. There are other figures which are really
12 targeting and directed to the capsule aspect. I use it in the sense,
13 Your Honor, of there are method claims in the world and there are
14 device claims in the world and these are device claims. And that's
15 the context in which I said it.

16 JUDGE TORNQUIST: We have to be a little more
17 specific then with the language that we're worried about in 271.
18 That last sentence says, in another mode, the filter could be part of
19 the device. Where is that?

20 MR. CARSTEN: Oh, I believe the device is exactly
21 what we're looking at here in 41 and 42. That is a device, I think.

22 JUDGE TORNQUIST: It looks like a capsule to me.

23 MR. CARSTEN: As I said, the capsule is a device.

24 JUDGE TORNQUIST: That's what I'm trying to
25 figure out.

1 MR. CARSTEN: Okay.

2 JUDGE TORNQUIST: Because if you look in
3 Yoakim, its claims actually are to either a capsule or a device.

4 MR. CARSTEN: Understood.

5 JUDGE OBERMANN: A brewing device.

6 MR. CARSTEN: It's a brewing device, not a device,
7 right? I mean, so it is a brewing device. And so, you know, I
8 think in patent context, when I refer to claims that are not methods
9 in a utility patent, I talk about devices. And so, I don't think there's
10 any sense here whatsoever that by using the word device, they're
11 talking broadly about the system and only the system. The device
12 includes, even if you want to consider it to be a system, the device
13 would actually include the capsule as well. I think in every
14 brewing device claim, Your Honor. So, I don't know that that's
15 appropriate to put that much weight on the term, the single word
16 device on an embodiment, frankly, that they never pointed to or
17 saw the light of day. I think it's a brand new argument, frankly.
18 Have I done a little bit better job with you, Judge Obermann? I
19 hope so.

20 JUDGE OBERMANN: We'll see.

21 MR. CARSTEN: Okay. Well.

22 JUDGE MAYBERRY: Excuse me, counsel.

23 MR. CARSTEN: Yes.

24 JUDGE MAYBERRY: Judge Mayberry here.

25 MR. CARSTEN: Yes, Judge Mayberry.

1 JUDGE MAYBERRY: Just to wrap this up a little
2 bit, if we do not agree with you and we think that Yoakim uses the
3 word device, to mean the brewing device for the brewing machine,
4 how would that then affect our reading of paragraph 271?

5 MR. CARSTEN: Let me put 271 --

6 JUDGE MAYBERRY: Doesn't that put the filter in
7 the brewing machine?

8 JUDGE OBERMANN: And I would go one step
9 further, because when I look at Yoakim's paragraphs 22 and 23,
10 they are clearly referring to a device that is other than the capsule
11 and has things going on. So, I don't see how you get beyond, I
12 mean, they're using device itself rather than the capsule. So, we're
13 talking about a brewing device in paragraph 271.

14 MR. CARSTEN: I think the brewing device, well, it
15 says, let me get the specific language in front of us, Your Honor.
16 Filter could be part of the device or be formed by the puncturable
17 membrane and piercing members. You know, that statement, I
18 don't think that I submit with respect, this entire paragraph is
19 talking about the capsule. It says --

20 JUDGE OBERMANN: That when you read Yoakim
21 in its entirety, device has a different meaning.

22 MR. CARSTEN: I recognize the point. I think that
23 device is used to talk about the system as a whole and the capsule
24 is part of that system as a whole. I believe if you look at the
25 claims and so forth, they all include claim limitations targeting the

1 capsule itself. And so, I don't read this is a clear and unmistakable
2 disavowal to say, absolutely, when I'm saying device here, I'm
3 taking it out of the capsule and putting it into some aspect that's
4 divorced from the capsule. Any further questions about free of a
5 filter?

6 JUDGE TORNQUIST: No. You can move on.

7 MR. CARSTEN: Okay. Thank you, Your Honor. I'd
8 like to shift gears over to the groove argument if I might. Before
9 moving on to groove, I'd also just note for the record that this
10 argument pertaining to the meaning of device is not something that
11 Nespresso has ever raised anywhere in their papers. So, I think
12 that would be a brand new argument.

13 JUDGE OBERMANN: It's not. It's in their reply.
14 And I think it does fairly respond to the raising of paragraph 271 in
15 the response. So, we'll see. We'll see.

16 MR. CARSTEN: Turning to the limitation groove,
17 Your Honor. The claim limitation at issue here, the claim
18 language, was always a good place to start. And I'm going to put
19 up there Nespresso slide 28, free from extending entirely to the
20 bottom region. So, grooves that are free from extending entirely to
21 the bottom region. Now, when Nespresso crafted their petition,
22 181, they elected to rely solely upon elements or Yoakim capsules
23 that were frustoconical. That's all they relied upon. Now, I heard
24 an argument that Figure 27 is somehow rounded, but that bottom
25 looks awfully flat to me, and it is frustoconical.

1 And so, those are frustoconical devices, sorry to use
2 that word again, but capsules that they're relying upon. They then
3 seek to combine that with Rapparini Figure 10. And instead of
4 turning to what you'd expect, and I can actually show you here,
5 I've got the who's who and greatest hits of all of the Yoakim
6 frustoconical capsules that are relied upon. So, these are all the
7 capsules that are relied upon. This is our slide 179. It's properly
8 sided up at the bottom. And then I've got slide 180, also properly
9 sided up at the bottom.

10 All of the capsules that you can see are frustoconical.
11 But instead, even though Rapparini does include a frustoconical
12 capsule at Figure 10, shown here at slide 182, rather than do that,
13 they actually look at the Figure 6 and 6 bis moiety, which is a
14 round bottom altogether. There's no explanation for that. There's
15 no explanation provided by Mr. Jobin as to why a person of skill in
16 the art would gravitate to that sole embodiment, as opposed to any
17 other embodiment, particularly those that are frustoconical in
18 shape.

19 I suspect the reason is because every other
20 embodiment that is frustoconical and Rapparini has grooves that
21 extend entirely to the bottom region. And so, I think this isn't truly
22 hindsight driven that they're seeking just the one element that is
23 different from everything they've relied upon in terms in Yoakim
24 to say oh, you'd gravitate here. Now, Mr. McCraw also --

25 JUDGE MAYBERRY: Excuse me, counsel.

1 MR. CARSTEN: Yes. Yes, Mr. Mayberry.

2 JUDGE MAYBERRY: Could you put up that image
3 again because I think we kind of --

4 MR. CARSTEN: Yes. Sorry if I pulled it too fast on
5 you. This is slide 182 of ours, Judge Mayberry.

6 JUDGE MAYBERRY: Okay. And I've got the claim
7 language in front of me and you can correct me if I'm wrong. It
8 says the wall region includes radially spaced and vertically
9 oriented groups that are free from extending entirely to the bottom
10 region. Is that -- that's what we're talking about?

11 MR. CARSTEN: That's the claim language as I
12 understand it, Your Honor, yes.

13 JUDGE MAYBERRY: So, I've got figure 10 right in
14 front of me, and it has six radially spaced and vertically oriented
15 grooves that extend into the bottom region. Right? Isn't that what
16 I see right here?

17 MR. CARSTEN: I would respectfully submit that
18 there are 12 such grooves that extend to the bottom region.

19 JUDGE MAYBERRY: Oh, see, I only see six. I see
20 six other ones that do not.

21 MR. CARSTEN: I think that I submit that, Your
22 Honor, the -- you see the dotted lines of the six grooves that Your
23 Honor isn't reading as extending to the bottom region. Those
24 nibble into the bottom region. There's a carve out in that bottom
25 region for each one of those grooves, and we see that as being

1 extending into the bottom region. If the claim said extending to
2 the bottom then that might be a different element and I'd have a
3 different read because in theory you might read the bottom to
4 mean the bottom point, the point in the middle of bottom region.
5 But that's not what the claim says. The claim says bottom region
6 here.

7 JUDGE MAYBERRY: And excuse me, counsel, am
8 I understanding you? So, like at the 12:00 position of that figure
9 10?

10 MR. CARSTEN: Yes, Your Honor.

11 JUDGE MAYBERRY: We see a groove. Is that
12 correct?

13 MR. CARSTEN: Yes, Your Honor.

14 JUDGE MAYBERRY: And it comes, like as you
15 move down towards the middle of that figure, it comes to an end.
16 Are you saying that it doesn't come to an end there? It continues
17 all the way in like the other six. Or are you saying that where it
18 comes to an end there is actually in the bottom?

19 MR. CARSTEN: I'm saying the latter, that where it
20 comes to an end there is in the bottom region.

21 JUDGE MAYBERRY: Okay. Not in the -- it's not --
22 that's not the end of the side wall. You're saying it actually limps
23 into the bottom region.

24 MR. CARSTEN: Well, it actually -- you can see the
25 carve out from the from the bottom region to accommodate that

1 groove at the bottom of the capsule, Your Honor. And so that
2 extends into the bottom region. That's very different. If I may just
3 put another slide up on top here. This is slide 184, which has the
4 Figure 6BIS that we talked about. You can see that there are the
5 differing lengths, and where you draw the bottom region matters
6 on this. In our view, the frustoconical shape, if you extend it all
7 the way down the side wall such that it nibbles into the bottom
8 region, such that it carves out a portion of the bottom region, that
9 extends into the bottom region.

10 JUDGE MAYBERRY: All right. Thank you,
11 counsel. I understand your position.

12 MR. CARSTEN: Okay. Now, Mr. McCraw put up a
13 couple of different -- the Sweeney and Rubino references, I
14 believe, during his presentation. This is slide 183. For the
15 proposition, I think generally that grooves were understood to
16 increase turbulence or cause turbulence. And he put up a passage
17 from one of the priority documents and said, see, even the
18 inventors here knew this. But that passage that he cited was
19 interesting, because it didn't say it's well understood to use grooves
20 to cause turbulence, as you might expect if you're relying upon a
21 priority document for purposes of your obviousness argument. It
22 said more turbulence can be caused using grooves.

23 And so that's part of the invention. And under 35
24 USC § 103, it is legal error to point to and rely upon how the
25 inventors, or what the inventors thought about their invention, how

1 they came up with their invention in order to negate the
2 patentability of that invention. So that's a risky trap. And I would
3 submit, Your Honors, that Sweeney and Rubino, those elements,
4 notably, Mr. McCraw stood here and told you that these elements
5 were only being relied upon to teach the grooves causing
6 turbulence and awareness in the prior art of that. He didn't go so
7 far as to say these taught grooves that go, that extend, that are free
8 from extending into the bottom region.

9 And this gets to your question, Judge Mayberry, these
10 two examples do go down into the bottom region in very much the
11 same way as the Figure 10 frustoconical device, sorry, capsule,
12 more precise, capsule, that that's relied upon or described in
13 Rapparini does. So, they're not saying these extend down to the
14 bottom region. And these are every bit the same in the sense of the
15 Rapparini for those, the six grooves that Your Honor, you were a
16 little concerned about.

17 Now, Mr. McCraw put up slide one, well he put up
18 the Figures 58, 59 and 60 from Yoakim and said, well look, you
19 know, Yoakim talks about curved capsules as well. Those were
20 never relied upon. Those came up way late. There was no expert
21 testimony whatsoever from them saying that a person of skill in
22 the art would gravitate towards those rounded capsules in Yoakim.
23 And just as an aside here, there's also Claim 4, which is the one --
24 which in slide 190, requires that the grooves not intersect the
25 flange. And I submit that even if you're going to look at the round

1 bottom, these -- Claim 4 survives because they do intersect the
2 flange. And just for the record, that argument has made at Patent
3 Owner's sur-reply at pages 24 and 25.

4 With that, Your Honors, I will switch over gears to
5 my colleague, Ian Brooks, who's going to handle two claim
6 limitations pertaining to Dependent Claims. And then I'll get back
7 with you and I'd like to cover the motivation to combine Yoakim
8 and Jarisch, I think that's quite important and dispositive of all
9 assertions of unpatentability in both cases, as well as hit whatever
10 other issues Your Honors may be troubled by. Thank you. Mr.
11 Easton, would you be so kind as to switch over to our computer
12 please? Thank you.

13 MR. BROOKS: Good afternoon, Your Honors. For
14 the record, my name is Ian Brooks. As Mr. Carsten said, I wanted
15 to start by talking about the '430 patent and sidewall includes
16 indentations limitations. So that would put us at Patent Owner's
17 demonstrative 122. And as you saw earlier, these limitations
18 appearing in Claim 7, and Dependent Claims 5 and 8 through 10 of
19 the '430 patent require a sidewall having indentations or
20 alternatively a sidewall of the base element includes indentations.
21 The parties have treated these limitations to be fairly equivalent.
22 And so, I'll treat them the same. Of course, at any point during the
23 presentation, anyone has a question, please feel free to interrupt
24 me. I'm happy to be of service as best I can.

25 If we could go to 123. I'd like to start just reiterating

1 what the Petitioner's petition identifies as the sidewall that includes
2 indentations. And what they identify specifically, as Mr. McCraw
3 pointed out, is Figure 23 of Yoakim and this dotted line that
4 appears around the flange there. And paragraph 215 of Yoakim
5 explains that this tooth structure that is seen here, that's identified
6 as 75 in Yoakim Figure 23, is on the outer surface.

7 And I think that's important as we go to the next slide.
8 What Mr. McCraw did not address is the fact that Yoakim tells us
9 in paragraph 16 that his enclosure has a flared design with a
10 widening sidewall and an outer surface or structure for engaging
11 external rotational driving means. And so, Yoakim is teaching a
12 sidewall structure in addition to an outer surface. And you don't
13 have to take my word for it. Mr. Jobin, petitioner's expert, at
14 deposition agreed with that point. He was asked, do you
15 understand that the widening sidewall is different from the outer
16 surface?

17 And he said yes, that is different from the sidewall.
18 That's Exhibit 2019, pages 69 to 70. And so, we have Yoakim and
19 then confirmed by Mr. Jobin that the sidewall in Yoakim's Figure
20 23 is different from the outer surface where the tooth structure
21 exists and what is being identified as the so-called indentations in
22 Yoakim.

23 JUDGE TORNQUIST: So where is this outer
24 surface?

25 MR. BROOKS: So, the outer surface would fit

1 between the flange, which if we go to the next slide, you see there
2 in the colored area, the flange is what is identified in Yoakim as
3 element 72. And the tooth surface is lavender color there. And
4 then it's defined as the outer surface. And then beneath that is the
5 wall, the sidewall in Yoakim. And so, it's a -- I think you could
6 look at Yoakim's body as three elements. A flange, the outer
7 surface, and then beneath that outer surface is the sidewalk.

8 JUDGE MAYBERRY: Excuse me, counsel.

9 MR. BROOKS: Yes.

10 JUDGE MAYBERRY: Judge Mayberry here. So, is
11 your position resting on how Yoakim has termed its features? So,
12 what Yoakim says is the flange, what Yoakim says is the sidewall,
13 and then what Yoakim says is the outer surface?

14 MR. BROOKS: That is the position, yes. What
15 Yoakim teaches is essentially three structures, a flange, a sidewall,
16 and an outer surface. Our claims require a rim or flange and a
17 sidewall in which indentations appear. Here in Yoakim --

18 JUDGE MAYBERRY: I'm sorry to interrupt you.
19 Don't we have to go look at, you know, what the claims say and
20 what the specification would indicate what the patent says the
21 sidewall is?

22 MR. BROOKS: Yes, absolutely. And I would
23 submit that if you look at Figure 23, what is identified as the outer
24 surface here would be an additional unclaimed element. And so,
25 what is between the flange and the sidewall is this outer surface

1 that is different and distinct from what even the '430 patent would
2 describe as the sidewall.

3 JUDGE MAYBERRY: Would you agree that the
4 challenged patent defines the sidewall as the side of the capsule
5 going all the way up to the flange?

6 MR. BROOKS: The patent describes a wall region,
7 2.1, and it does describe that wall region as basically ranges from
8 the flange to the bottom region.

9 JUDGE MAYBERRY: All right. Thank you.

10 MR. BROOKS: Yeah. And so, next we get to the
11 obviousness contention here. Recognizing that Yoakim is not
12 squarely on point here, Petitioner puts in a sentence at the end in
13 the petition about the obviousness of indentations in the sidewall.
14 I note that that contention is based on the same portion of Yoakim
15 paragraph 215 regarding engaging the capsule in the device. And
16 that just doesn't get them there. Yoakim, they're strictly using
17 hindsight of our patent to suggest that you would take the teeth or
18 the slits or whatever is in that outer surface and move it down into
19 the sidewall. Our patents identify this method, but it is Yoakim
20 teaching to have those teeth as the manner of engaging the capsule
21 in the capsule holder. And it is that method that Yoakim describes
22 as the manner in which to engage.

23 Now, Yoakim also identifies another manner of
24 engaging the capsule, which is this snug-fit embodiment that is in
25 the multi-volume capsule device in Yoakim, where the capsule is

1 designed to fit snugly and use friction on a smooth surface capsule
2 along with the smooth surface capsule holder in order to engage
3 the capsule. And so, to suggest that Yoakim's paragraph 215
4 would motivate or indicate to a person of ordinary skill in the art to
5 add indentations to the capsule is pure hindsight.

6 The next point that also I think is worth making here
7 is that by modifying the flange to include the outer surface that's
8 depicted here in this embodiment, you're impacting the general
9 combination of elements that Petitioner is relying in its petition,
10 which require adding a code to the bottom side of the flange,
11 you're taking away from surface area that would enable you to do
12 that by adding in this specific limitation here, or elements here
13 from Yoakim. Now, if there are no other questions on this
14 particular limitation, I'd like to talk about turbulence.

15 JUDGE TORNQUIST: So, I just have a question.
16 I'm looking at 23. I like your annotation here with the purple.
17 You have the white coming up almost as teeth in between the
18 purple pieces that come down. That's the sidewalk, correct?

19 MR. BROOKS: Yes.

20 JUDGE TORNQUIST: Okay. So, what is the
21 functional difference or the structural difference between that and
22 what's in purple?

23 MR. BROOKS: What's in purple comes out from the
24 structure there. So, the purpose of it is to come out so that it can
25 gauge a mating structure, which is in Figure 24 of Yoakim.

1 JUDGE TORNQUIST: Isn't it just bulges in the
2 sidewall then? That's what I'm trying to -- I understand what the
3 quote you gave us, but I'm looking at this structurally and it just
4 looks like it's the sidewall and there's indentations going out or?

5 MR. BROOKS: Well, respectfully when Mr. Jobin
6 was asked at deposition whether that was the sidewall, he said it
7 was different. So, I think from this record, a person of ordinary
8 skill in the art reading Yoakim would view this differently.

9 JUDGE TORNQUIST: Okay. Obviously, we'll look
10 very closely at that.

11 MR. BROOKS: Thank you. All right. If we could
12 go to slide 193. So, next I'd like to talk about the grooves in the
13 cavity generate turbulence of water in the cavity. This is Claims 7
14 and 13 of the '923 patent. If we go to 195, what Petitioner relies
15 on for grooves in the cavity, excuse me, generating turbulence in
16 the cavity through grooves Rapparini. Now, Rapparini is not about
17 grooves generating turbulence. Rapparini is about adding ribs for
18 structural rigidity during filling and packaging of its capsules.
19 There's no suggestion in Rapparini that these ribs would provide
20 any benefit during brewing or maintain the capsule structure once
21 water is added. Rapparini itself is silent about turbulence.

22 So, what they do, if we go to Petitioner's slide 49,
23 when you heard Mr. McCraw point to is Mr. Jobin's testimony, his
24 declaration paragraph 278, the highlighted portion here, where he
25 states in a conclusory manner that discontinuities such as the ribs

1 of the type of Rapparini would cause fluid to move in various
2 directions resulting in turbulence and mixing. That's a conclusory
3 statement of Mr. Jobin. He does not provide any evidence of that
4 that the grooves themselves, or the ribs themselves, from
5 Rapparini would induce turbulence in any configuration. And the
6 record shows that whether turbulence is generated by grooves, it's
7 not a necessary property. Simply adding grooves and turbulence
8 will result.

9 There is the possibility for laminar flow. There's the
10 possibility for turbulent flow. But what the record is missing is
11 any indication that Rapparini's grooves, ribs, if added to Yoakim's
12 capsule, would generate turbulence. And in fact, Dr. Howele
13 explained that whether you get turbulent flow is dependent upon a
14 number of properties, including structure, direction, speed,
15 pressure, volume flow, and other parameters. And that's at
16 paragraph 85 of Exhibit 2017.

17 And so, I submit to the panel, there is no evidence
18 presented as to why a person of ordinary skill in the art would
19 achieve turbulent flow in Yoakim's capsule or look to Rapparini
20 for that result. And you heard Mr. McCraw point to, as Mr.
21 Carsten noted, the teachings of our patent in order to try to fill that
22 gap. And I submit that that's complete hindsight. And it's telling,
23 if you look at 52 of Petitioner's presentation, this is the portion of
24 the third German application that Mr. McCraw pointed to. And it,
25 as Mr. Carsten noted, is explaining what our inventor understood

1 and developed in preparing the invention.

2 It's that the shaping of the channel structure can
3 provide a more pronounced turbulence of the extraction liquid in
4 the cavity, or else a more uniform laminar flow of the extraction is
5 achieved. And so, depending upon the channel structure, our
6 inventor understood that you may get turbulent flow, you may not
7 get turbulent flow. And so, it's not a necessary result from adding
8 grooves to Yoakim's capsule that you're going to achieve
9 turbulence. And if we go to, sorry, 51, and so what Petitioner also
10 looks to try to fill this gap is the Rubino and Sweeney references.
11 And I submit there's no connection between what's taught in
12 Rubino and Sweeney and Rapparini, to lead one to believe that
13 Rapparini would generate turbulence. Specifically, there are some
14 key differences here.

15 Looking at Rubino, first of all, I note there is no
16 mention of turbulent flow in Rubino. What it does describe is
17 internal grooves in the capsule, in this particular embodiment you
18 see here. But this embodiment is different from Yoakim and how
19 it operates in that the liquid here passes through the capsule. So, it
20 goes in the top and out of the bottom. Yoakim teaches putting
21 liquid in the top and using centrifugal force to drive the water out
22 of the -- the liquid out of the top. And so, this is a completely
23 different structure. It's not suggestive of using grooves in a
24 capsule in the system of Yoakim in order to achieve turbulent
25 flow.

1 Now, Sweeney is a similar capsule in that, as it notes
2 here, the brewed beverage is directed downwardly towards the
3 pierced container bottom. And so, this is a similar one where
4 water enters at the top, exits at the bottom. And what Sweeney
5 teaches is channels that are formed in that capsule in order to help
6 achieve turbulent flow in that particular system. But the fact that
7 they can identify potential flow in Rubino or Sweeney does not
8 suggest that the addition of Rapparini and its ribs to a capsule in
9 Yoakim would ultimately result in turbulent flow. I submit the
10 record does not provide any connection in order for one to make
11 that conclusion.

12 Now, if there are any questions, I'd like to address
13 them. Otherwise, I will pass it back to Mr. Carsten.

14 JUDGE TORNQUIST: So how does one know if the
15 grooves are going to generate turbulent flow -- turbulent flow?

16 MR. BROOKS: So, as Mr., excuse me, as Dr. Howle
17 explained, there are, you could model it, you could experiment.
18 There may have paper, papers or studies that provide it. In the
19 case of Sweeney, he tells us that there is turbulent flow. Our
20 inventor in the third German application explained that it depends
21 on the type of structure. And so, I submit that in order to know,
22 you would have to provide some means of demonstrating it, and
23 that's what's absent here.

24 JUDGE TORNQUIST: Okay.

25 MR. BROOKS: Thank you.

1 MR. CARSTEN: Thank you, Your Honors. This is
2 Doug Carsten again for the court reporter. So, I think Mr.
3 McCraw didn't touch on the challenge to experts and why he
4 claims Mr. Jobin should be entitled to more deference than Dr.
5 Howle. I think I'm aware of the '491 final written decision where
6 Dr. Howle was credited as a mechanical engineering expert, but
7 not as a person of ordinary skill in the art. I would just submit that
8 the record is more extensive in that regard. In this case, the level
9 of ordinary skill in the art requires a bachelor's degree, five years
10 of experience with beverage, designing and developing beverage
11 systems or similar products, as well as experience with sensors.

12 And he takes the box on each and every one of those
13 aspects. We have record evidence, both from his declaration, from
14 his CV, as well as from his deposition testimony where Mr.
15 McCraw asked about his experience as a preference to some
16 questions. And on redirect, he gave us ample development or
17 particulars about his similar products experience. I know there's a
18 slide that I saw in which there's a suggestion that medical device
19 experience is somehow not qualifying as similar experience.
20 That's simply wrong. Mr. Jobin himself pointed to some of his
21 own medical device experience in connection with the case. And,
22 you know, if you look through those three or four pages of the
23 record for Dr. Howle, I think it's 101 to 104 or so, you'll see that
24 this is a man, he's been a professor for 30 years.

25 Lots of experience developing and designing,

1 including as a licensed professional engineer which requires four
2 years of experience as well as then passing a test afterwards, which
3 he qualified for in terms of the experience prong in 2000. I submit
4 with respect that there is, but no question that Dr. Howle is a
5 person of ordinary skill in the art and was likely at the time of the
6 priority dates here, but certainly is today. And there's no reason to
7 discount any of his information. In fact, I would submit that given
8 his background he is even more qualified than Mr. Jobin. Unless
9 there are questions about the expert issues, I just want to move on.

10 JUDGE TORNQUIST: Thank you.

11 MR. CARSTEN: Let's talk a little bit about
12 motivation to combine, which is an issue that Mr. McCraw talked
13 about. I'd like to really focus in on, at least initially here, the
14 Jarisch and Yoakim combination, because that really is
15 fundamental to both grounds, or each ground in each of the IPRs.
16 This is slide 204. And now, Mr. McCraw put a similar figure up
17 here, and said, well, you know, there really is no trouble. There's
18 no trouble doing this at all. A person of skill in the art could
19 accomplish this transition.

20 Well, just remember though, they started with
21 Yoakim as the primary reference, Yoakim in view of Jarisch. So,
22 they're starting with Yoakim and then adding Jarisch. Well, there
23 was really no evidence provided from Mr. Jobin about how a
24 person of ordinary skill in the art might accomplish this change,
25 this alteration, this amendment. And we're not seeking or

1 requiring a per se bodily incorporation of any of these elements,
2 but we would like to know what exactly the theory for changing
3 this device in its operation would be. And there's no evidence
4 whatsoever on the record from Mr. Jobin about how to accomplish
5 that. It's just absent. And that's conclusory expert testimony that
6 this would be able to be done. Dr. Howle, on the other hand,
7 provided a great degree of discussion about exactly -- the
8 challenges that would be encountered.

9 And in his opinion, this would require hundreds of
10 hours and require extraordinary levels of expertise. And the
11 reasons are pretty plain when you actually look at it. So, this one,
12 the one on the left, which is the Jarisch approach, actually has the
13 code on the bottom of the flange and requires you to submit a light
14 source up through the device element and to read the code and then
15 bounce it back. And it does that through this use of an external
16 mirror to guide the light source. It goes through a transparent
17 section, reads, and then comes back. Well, when you try and do it
18 here on and apply that lesson, the obvious thing to do, I suppose,
19 would be to try to put it somewhere down below because you've
20 taken this element two, three, one, that element and flipped it over.

21 You've taken the ID and flipped that onto the other
22 side. But if you put the detector towards the bottom, you have to
23 figure out what am I going to try to make transparent to get to that
24 element, to get to that ledge on the capsule? And when you do
25 that, you have to make, in this instance, a righthand turn. So, how

1 do you get light to make a righthand turn? Well, that's a problem
2 that is absolutely unidentified and unsolved in Mr. Jobin's
3 testimony. But assuming you could make it do the righthand turn,
4 then you have to get it through this barrier and then return back.
5 And again, this time do a lefthand turn and out through the bottom.

6 Well, we just heard Mr. McCraw's response to that
7 today, which was, oh, that's pretty easy. You just make this a
8 straight shot. Well, funny, it'd be nice to have heard Mr. Jobin say
9 that, as opposed to just attorney argument. But recall, if you will,
10 that this series of Yoakim disclosure is designed to accommodate
11 multi-volume capsules. And that space, they said, look at all this
12 real estate you have down there. That real estate is designed to
13 receive a bigger volume capsule. And that's important because
14 you need a bigger volume capsule to make a bigger volume
15 beverage. And these are designed for the American market where
16 we like our vente lattes.

17 JUDGE TORNQUIST: And so just for the record,
18 would you put on the record which slide you have?

19 MR. CARSTEN: Oh, I am. I apologize. This is slide
20 103. Their slide, Nespresso slide 103. And so, if you go ahead
21 and sort of take Mr. McCraw at face value and say, okay, I'm
22 going to make that just a straight line to make it easy so I can
23 avoid those right hands. Well, you've got interference. It just
24 doesn't work. There's still that piece of the capsule that's out there
25 lingering. It would be cut off. And so, it's not a trivial exercise

1 here. These are sophisticated devices that require many different
2 areas to cooperate together in order to brew these beverages.

3 Moreover, this change to transparency, you're putting
4 that transparent element directly into the flow pad of the coffee.
5 You see those arrows coming out from Figure 62 on each side.
6 That's where the beverage comes out. And when the beverage
7 comes out, it pools throughout that entire chamber that you see on
8 the left and on the right, a little drain area on the right. So, now
9 you're taking this transparent material, subjecting it routinely to
10 coffee, the product of the coffee brewing, as well as descaling
11 conditions, et cetera. Dr. Howle goes through all of the challenges
12 that would be expected to be encountered and how his, in his
13 estimation, this is not a trivial project. This is requiring
14 extraordinary skill in the art and hundreds of hours. It's essentially
15 an invitation to a research project.

16 Nothing more than that. This is not a simple, oh, I'll
17 take this and simply apply it here. And that's just the threshold.
18 So, remember, they don't have a simple, well, if you combine
19 Yoakim and Jarisch, Bob's your uncle, you're done, argument here.
20 In one instance, it's three references. In another instance, it's four
21 references. And so, it's not just take these two elements and figure
22 out a way to make this work. And when you include the third
23 element, when you include for the '923 patent, the Rapparini
24 grooves, well, they're relying upon a spherical capsule. The
25 spherical capsule is a totally different shape.

1 And remember, Yoakim operates by virtue of a
2 friction fit of the capsule to hold it in place. If you start messing
3 around with the area that's designed to hold the capsule, as you
4 would need to do in order to accommodate this change, now
5 you've eliminated some of the safety issues that are fundamental to
6 why Yoakim is the way Yoakim is.

7 Moreover, and we haven't talked about this yet, the
8 Jarisch disclosure includes a gap in between the chamber and the
9 capsule itself. That gap is designed to allow this capsule to rotate
10 around. And it's depicted, if your eyes are better than mine, you'll
11 be able to see it in some of these figures. Let me see if I can find a
12 reasonable exercise or depiction of it. But that gap is required.
13 Now, that gap is absolutely anathema and contrary to what's
14 required in Yoakim. And this is now our slide 210. And there is
15 absolutely no discussion whatsoever in Mr. Jobin's testimony.

16 You have one system that's designed to spin a capsule
17 in one way that requires there to be clearance between the capsule
18 holder and the capsule versus a friction fit holder, and that's the
19 safety mechanism there. You know, I see I'm into my red time,
20 but if there are any other questions, we're here at your pleasure. If
21 there are any other questions you have on any of the arguments
22 I've raised, and if I haven't touched on something, it doesn't mean I
23 don't believe in it, it just means we want to focus in on what we
24 think is the easiest pathway for resolution for you all. But please
25 feel free to ask any questions you have, Your Honors.

1 JUDGE TORNQUIST: I just have one question.
2 There's a couple of different modes, 62, 61 has one different one
3 with sizes, 63 has a different one, and this is Figure 63 of Yoakim.
4 Would your argument change for this figure because this looks like
5 the sloping wall could adjust to different volumes.

6 MR. CARSTEN: I think I know the one that you're
7 talking about. Plus 63 you're right. It does continue the taper
8 down, right. And so, maybe that does eliminate or alleviate some
9 of the concern that you might be able to make it a straight shot.
10 But when you do that straight shot remember you have to get
11 through that bridging space and as Dr. Howle explained, every
12 time that there's a barrier every time that there's a gap that you're
13 sending transmitting light through you see some reflection and
14 some refraction.

15 And so, you lose the beam at every time. Every time
16 that you have to make it to a left turn or a right turn or every time
17 you go through a boundary or a border. And so, again this is not a
18 straightforward exercise in I'm just going to move this based upon
19 my whimsy.

20 JUDGE TORNQUIST: The record you know I may
21 not remember the record completely at this point but I thought that
22 the Petitioner said that in Jarisch they have to go through
23 something as well at the top end.

24 MR. CARSTEN: I think there are some, well,
25 actually in Jarisch, let me just put it up here for you, and I'll try to

1 zoom this in. Obviously, if you're beaming light at something and
2 receiving it there's going to be at least one return, right? But here
3 you've got the light source, I apologize this is obscured a little bit.
4 You have the light source which receives the material through
5 here. And so, you still have that gap. That gap is important
6 because that gap is where the liquid comes out.

7 And so, if you don't have that gap, if you try to reduce
8 that, or try to take that away, then you've changed fundamentally
9 the operation of the device altogether. Now, remember this is
10 Jarisch. And they're saying that we want to -- we want to -- I'm
11 sorry, start with Yoakim. This is Yoakim. Start with Yoakim and
12 then apply Jarisch to it. At the end what it seemed like they were
13 arguing is I just want to leave Jarisch alone and then apply Yoakim
14 to it, which is what we essentially heard.

15 It's just straighten this out. Well, that's the approach
16 of Jarisch. Jarisch is not their primary lead reference. It's Yoakim
17 in view of Jarisch, not Jarisch in view of Yoakim. And so, I
18 submit that there are some challenges even -- or difficulties even in
19 terms of the Yoakim approach.

20 JUDGE TORNQUIST: But I guess my question is,
21 keep this up, but look at the 72 on the Jarisch. It looks like the
22 light beam still has to go through something that's holding the
23 capsule in place to read the code on the underside of that flange.

24 MR. CARSTEN: Yes, it -- as I said, any time that
25 you're reading a code, there's going to be at least one boundary and

1 there could be more.

2 JUDGE TORNQUIST: Okay. That's what I just
3 want to make sure I understood.

4 MR. CARSTEN: Yes.

5 JUDGE MAYBERRY: Excuse me, counsel.

6 MR. CARSTEN: Yes, Judge Mayberry.

7 JUDGE MAYBERRY: Judge Mayberry here. Your
8 argument we just heard from you now would you characterize it as
9 that there would be no reasonable expectation of success in
10 arriving at the claimed invention?

11 MR. CARSTEN: Yes, I would. I think it's actually
12 twofold. I don't know. Your Honor, if you told me, hey, Carsten,
13 go climb Mount Everest, I think I would have a motivation to
14 combine me and Mount Everest's question as well as a reasonable
15 expectation of success. And because it's such a long shot that I
16 would have an issue of reasonable expectation of success and that
17 would also poison my motivation to combine the two. But yes, in
18 short, yes, it is absolutely a reasonable expectation of success, as
19 well as a failure of proof by the by the Petitioner here.

20 JUDGE MAYBERRY: But then once you agree to
21 that, that really only applies to the '430 patent, which is not a
22 machine in addition to a capsule. The '923 patent claims are
23 directed to only a single-serve capsule. So, all we need to know is,
24 is there a reasonable expectation of success of putting Jarisch's
25 code on the bottom side of the flange? Because I just need to get

1 to the claimed invention.

2 MR. CARSTEN: That's exactly right. I think that's
3 correct, Your Honor. So, the trouble here is the module
4 modifications on the system, not necessarily moving the code to
5 the bottom of the rim. We have arguments, I focused on that. We
6 have arguments about why a person of skill in the art would not be
7 motivated to move it to the bottom of the rim. And I think you can
8 see some of those because it puts things into the pathway of the
9 coffee.

10 Dr. Howle talks at length about some of the reasons
11 why a person of skill in the art would not be motivated to put it on
12 the bottom of the rim. Moreover, when you actually read Jarisch,
13 this is an alternative embodiment from Jarisch. It's not even the
14 first set of figures of Jarisch, which all have them on top. So, I
15 think there's a motivation to combine question there that we have
16 addressed separately. My presentation is focused on the
17 reasonable expectation of success.

18 JUDGE MAYBERRY: All right. Thank you.

19 MR. MCCRAW: Thank you, Your Honors. This is
20 Clayton McCraw. On behalf of Petitioner, I'll wait for the time to
21 restart, and I'll also let my associate here get the HDMI cable. I'm
22 sorry.

23 JUDGE TORNQUIST: As you are setting up--I had
24 you with 36 minutes left.

25 MR. MCCRAW: I think that's right, Your Honor. I

1 seated with about one minute left. Thank you. Would you tell us
2 soon as you can get that on the screen, I'm ready to go. All right.
3 Thank you, Your Honors. I'd like actually to start just where we
4 left off with Yoakim and Jarisch. It's fresh, and I think there's a lot
5 of points here that need correction from my friend, Mr. Carsten.

6 I want to go back to the basics. I think their expert
7 has tried to make this hyper complicated. I want to look at slide
8 89. You have the system they're saying they would modify on the
9 left, and you have the Yoakim reference on the right. And if I may
10 approach, may I approach the screen, and just use my hand for a
11 moment.

12 JUDGE TORNQUIST: Sure.

13 MR. MCCRAW: So, what you can see here, they're
14 saying that this concept of no bend, and you wouldn't modify that,
15 doesn't exist. Look at the Denisart reference. It goes up the side,
16 and then it goes up. It has the same bend. They're effectively
17 saying that the Jarisch reference doesn't work, which is not what
18 the teaching is. And Your Honor, so they've said that this would
19 work. They said you would take this system and modify it with
20 our brewing chamber. And so, I just think that's very clear.
21 Everything you've heard from Mr. Carsten is effectively bodily
22 incorporation. It is insisting on keeping the bend in Figure 61, as
23 that is not the teaching of Yoakim. I also want to add that Jarisch
24 is extremely clear that it needs a tight fit.

25 They're saying they manufactured a gap that no one

1 other than their expert says is there. Our expert looked at the
2 figure and said, I can't see whether there's a gap. And actually, if
3 you look at Jarisch itself, if we could go to slide, let's see, the slide
4 that has paragraph 23 on it, I believe it might be 101. Yes. So, as
5 we know from paragraph 23, the device has a capsule holding
6 means for holding the capsule and driving the capsule. And
7 associated with this because we've been talking about Figure 4 of
8 Jarisch all along. Can we pull up Jarisch in the PDF please? It's
9 Exhibit 1005 and I just want to go to paragraph 31.

10 This is the Figure 4 we've been talking about all
11 along, and Mr. Carsten is saying that there must be this gap, and
12 that Yoakim -- Jarisch describes a gap. Well, there's no gap
13 anywhere described in Jarisch. And in fact, if you read the
14 description of what they're saying Figure 4 is they say an alternate
15 position of the code when placed on the underside of the rim of the
16 capsule and the capsule is fitted into a capsule holder. They're
17 talking about a capsule that's fitted in there. This concept of a gap
18 has been manufactured Your Honors. So, I do want to address
19 that. This concept that came up on sur-reply for the very first time
20 that Yoakim insists on multi-volume capsules and Jarisch wouldn't
21 operate with multi -volume capsules. Well, that's just not the case.
22 Could we go to slide 103, please?

23 So, as you can see here, Your Honors, looking in the
24 center, you're looking at the Jarisch chamber. There, again, if I
25 may approach the television.

1 JUDGE TORNQUIST: Just so you know, Judge
2 Mayberry can't see you. So, try to use as many words as you can
3 to explain what you're doing.

4 MR. MCCRAW: Thank you, I appreciate that, Judge
5 Tornquist. So, you have the capsule here in the center, and I'm
6 bringing my finger down along it. But if you go lower, you can
7 have that same curve lower with a larger capsule, and the same
8 curve lower with a larger capsule, and then you've got a huge
9 amount there. Which makes sense, Your Honor, because Jarisch is
10 about adjusting the brewing parameters, which is going to be the
11 volume of the capsule. You have Yoakim here on the right with
12 all these different capsules that look exactly the same in fit in this
13 body.

14 So, all of this that they're saying about Figure 61, can
15 we please go to 102? Is simply just bodily incorporation. They
16 are insisting on a bend that doesn't need to be there, Your Honor.
17 And our testimony has been clear from the very start exactly how
18 to do this. Can we go to slide 86, please? They say that there's no
19 evidence in the record about how you would do this combination,
20 but our own expert testified that reading Jarisch and reading
21 Yoakim together as a whole, that a person skilled in the art would
22 be motivated to make this change, and they'd understand exactly
23 how to do it because Jarisch tells you exactly how to do it.

24 And we said right in our petition that it tells you how
25 to modify a brewing chamber like the one in Yoakim to position

1 the optical reader. And then we showed the image with the
2 annotation exactly where the light flash goes. I don't know how to
3 be clearer than that, Your Honor.

4 So, I think all of the evidence I just identified rebuts
5 really everything that Mr. Carsten said. The one thing I'll add is
6 they talk a lot about what Dr. Howle -- these optical properties that
7 he mentioned. I just want to note that he didn't actually do any real
8 analysis. He just grabbed a theoretical paper about optics and said,
9 threw his hands up in the air and said, oh, this is going to be really
10 complicated. But he didn't actually apply any of that to the
11 particular combination and embodiment. So, I don't think it's
12 reliable evidence in any event, Your Honors.

13 So, with that, I think that addresses, oh, one more
14 thing, Your Honor. If we could go to slide 94. They made a
15 comment, or Mr. Carsten made a comment that there has to be
16 some kind of outlet here, which is circled for the liquid to exit and
17 there can't be anything in the way. And I think what he was
18 getting at is the concept that you wouldn't need to use a code on
19 the bottom of the flange because the liquid just exits. I just want to
20 point out that Yoakim is clear, and this is in 507. This is in our
21 reply brief.

22 Preferably, outlet 229 forms a flow restriction,
23 including the restriction valve. And that restriction valve is what's
24 discussed above. And what's discussed above about that
25 restriction valve, as we cited in our reply brief, is 382, 385, 436.

1 These are all paragraphs of Yoakim, Figures 35 and 38. So, that
2 restriction valve is there. It builds up pressure in the chamber. It
3 gets all that coffee everywhere, right over where that is. There's
4 absolutely a motivation to combine this Yoakim and Jarisch.

5 So, with that, unless there's any questions, I would
6 like to move to some of the other points that Mr. Carsten made. I'd
7 like to go back to the filter issue. Let's start from there. Judge
8 Mayberry, at the beginning of the hearing, you asked a question
9 about the sort of distinction between inside the cavity and the
10 cavity itself. And I just want to note that the claims themselves, if
11 we look at claim one of each patent, of the '923, it defines the
12 cavity. And so, I'm looking at, and we don't have to put this on the
13 screen, but I'm looking at Claim 1 of the '923 patent, and it says,
14 the cavity being closed by a metal cover.

15 So, the cavity and the metal cover are distinct
16 elements. So, I think any question you had about the inside
17 language is solved by the language being clear that the cavity is
18 separate from the metal cover. It's closed by the metal cover.
19 Same thing in the '430 patent. We have a cover that is fastened to
20 a top side of the flange to close the cavity. It's very clear about
21 how it's defined. And so, there's no filter in the cavity. So, I just
22 want to clarify that one point.

23 JUDGE TORNQUIST: Well, let me just ask if the
24 cover is the metal membrane on top, the cavity is what's below it,
25 and that would be your lid with the slits?

1 MR. MCCRAW: Well, it doesn't have to be a lid
2 with the slits, Your Honor. That is a particular embodiment in
3 Figures 28 and 29. But I do want to note, I believe it might be
4 Figure 7, is just a capsule with a membrane on it. It has no lid. It's
5 just pierced with holes. And that's not a lid with slits. That's a
6 membrane over it. So, you don't have to have that lid with slits.
7 That's one particular option. But these capsules are not all the
8 same. They all work with Yoakim, but they're not all the same.
9 So, you can have just a membrane.

10 JUDGE TORNQUIST: So, that matches up then with
11 271, Yoakim, and it says at the end that it could be a membrane
12 with piercings?

13 MR. MCCRAW: Well, yes. Well, you would have
14 that as an option. But it even says, I do want to be clear about 271,
15 because 271 says you can have the filter be in the system, or you
16 could structure optionally the membrane to serve as a filter. But
17 that is by no means required. And in fact, we do have testimony
18 from K-Fee's expert, Dr. Howle, and I think I put it into the record
19 already, saying that piercing the membrane is not a filter in the
20 cavity. So, that's clear. K-Fee's admitted that.

21 A couple other points quickly. They've insisted that
22 the paragraphs we've discussed in our reply brief are somehow
23 new argument. And I just want to be clear, Your Honor, that K-
24 Fee has injected all of the paragraphs into the case via its Patent
25 Owner response and has said that those paragraphs actually

1 support their position. But they've injected it into the record.
2 They can't claim to be prejudiced by it, and we've responded to it.
3 And it's clear that those paragraphs confirm our argument and
4 evidence from the start that a filter in the cavity is an optional
5 feature.

6 And so, their evidence, I just want to be clear because
7 we're consistent with the Apple v. Apple case, and
8 we're consistent with Rembrandt that we are using the same
9 reference for the same legal theory, and we are expanding that
10 argument. And I think there's a great quote from the Apple v.
11 Apple case that I think really confirms this because,
12 and this is page 706 of that case, it says, it's unreasonable to hold
13 petitioners to such a high standard that if they chose to rely on one
14 example of an algorithm, they must either discuss all potential
15 permutations or all variables or risk waiving the opportunity to
16 further discuss other relevant examples in their reply.

17 I think that quote, Your Honor, explains exactly what
18 happened here, which is we identified a particular option of how
19 this capsule is described and all the permutations of that capsule
20 and how it operates are throughout. And so, our argument, they
21 ruled that that is not a new argument that's improper on reply.
22 We're being very consistent. And I just want to make sure that's
23 clear.

24 One thing that Mr. Carsten said that I just want to
25 address. At one point, he made the comment about paragraph 271,

1 that there was no unmistakable disavowal. I don't understand that
2 to be related in any way to the requirement of what we're
3 disclosing here. This is not a claim construction issue about
4 disavowal. This is about a negative claim limitation, which you
5 have to describe, an optional feature that's positively recited.
6 That's all we have to show.

7 And I also want to address this device issue, because
8 Mr. Carsten, at a couple points, was suggesting somehow, and I
9 don't understand it, that the capsule is the device. And if we look
10 at paragraph 255 of Yoakim, Your Honor, it says, the liquid
11 delivered from the capsule can also be filtered by a filtering means
12 provided in the capsule. Such a configuration has many
13 advantages because the device is simplified, meaning the machine,
14 the filter does not require cleaning. So, they're saying, yes, this
15 just confirms the same point. You could have the filter in the
16 device. Now, that has the advantage of just having one filter. If
17 you put the filter in the capsule, you've got to --

18 JUDGE OBERMANN: Can I just ask a question?
19 Did you cite that in your --

20 MR. MCCRAW: We absolutely did, Your Honor.
21 Yes, in our reply brief. I do want to address that point. At one
22 point, Your Honor, Mr. Carsten was suggesting that the figure in
23 Figure 42 of Yoakim was --

24 JUDGE OBERMANN: Doesn't 255 sort of cut
25 against you in a way, because doesn't it indicate that the capsule is

1 the device?

2 MR. MCCRAW: I don't believe so, Your Honor. Let
3 me take another closer look. It says, the liquid delivered from the
4 capsule can also be filtered by a filtering means provided in the
5 capsule. Such a configuration has advantages by putting a filter in
6 the capsule because the device, meaning the machine, is
7 simplified. It means the filter doesn't require cleaning. Right?
8 You wouldn't clean a filter in a capsule because it gets thrown
9 away.

10 You would clean a filter in the machine if it stayed
11 there. So, this just confirms that it's an option, and that's all you
12 have to do. You certainly don't even have to show that, and 255 is
13 cited -- oh, 255, actually, Your Honor, is even cited in the Patent
14 Owner response. So, it's not even just in our reply.

15 I want to get to the point that Figure 42, Mr. Carsten
16 suggested that is the capsule of the invention somehow, and that
17 applies to every other capsule, and there's nothing in the disclosure
18 of Yoakim that suggests that. Yoakim discloses various
19 permutations of capsules that work within its system. We also
20 have a series of other embodiments, Your Honor, that I just want
21 to be clear also satisfy this limitation that weren't discussed today.
22 We have 343 from Yoakim. We have 288 from Yoakim. And so,
23 every portion relied on by the Petitioner and also by Patent Owner,
24 candidly, confirms that a filter is optional.

25 And unless there's any questions on filter, I would like

1 to go to groove with some of my remaining time. Can we please
2 go to slide 28? So, we're back to the groove limitation. I think
3 they're improperly narrowing the teaching of the petition. They
4 somehow say that we are arguing that the capsule in Yoakim is
5 frustoconical, and we've just never said that. If we could get to
6 slide 31, please. Actually, let's go to slide 42. We've said from the
7 start, Your Honor, these are rounded base capsules.

8 So, I don't understand this idea that we've claimed to
9 be, you know, modifying a frustoconical capsule. But in any
10 event, Your Honors, at one point in the institution decision cited
11 the Intel Federal Circuit case saying that you don't have to have the
12 best option. You don't have to select the best option, it just has to
13 be an option that would have been obvious. And so, Your Honors,
14 I think even if Mr. Carsten, you know, runs this argument relating
15 to Figure 10, you still have the option in Figure 6, and you don't
16 have to achieve the best option, but you don't even have to get
17 there because clearly all of these capsules are rounded and a
18 POSITA would look at Figure 6. It's not hindsight. Could we go
19 to the slide 139? Thirty-nine perhaps.

20 I just want to point out here, in our technical
21 background, we have demonstrated extensive knowledge in the art
22 about printing grooves on the body of the capsule, and even if you
23 look at 1035, which is cited in our background of our petition, you
24 have another example of grooves that don't extend all the way
25 down the body into the bottom region. And so, this idea that

1 they've invented something novel by claiming grooves that don't
2 extend into the bottom region, this is just a basic, obvious concept
3 that's been known for a long time. Can we go to slide 45, please?

4 And I just want to note, Judge Mayberry, you are
5 absolutely correct that in Figure 10, the grooves that are shown do
6 not extend into the bottom region five. You can see bottom is
7 labeled five and it's right there in the center and those grooves
8 otherwise just go along the side. It actually says the language
9 sidewall, I'd like to find that. It's highlighted, I apologize. The
10 short ribs run only along the sidewall. They don't run to the
11 bottom region.

12 I'd like to address turbulence next, Your Honor,
13 unless there's any questions about grooves. Let's go to 52 and 53.
14 Fifty-two first, please. This -- Mr. Carsten has mentioned to you
15 that this explains the invention. You have a more pronounced
16 turbulence. But I want to be very clear. The claim language has
17 no amount of turbulence in it. It just says turbulence. And so, this
18 is a passage admitting, this is not a passage of creating an
19 invention. It says the bottom, it's not highlighted, but it's the
20 bottom three lines, more pronounced turbulence of the extraction
21 liquid in the cavity in relation to the prior art. We're admitting that
22 it's doing more turbulence than what's known in the prior art, and
23 we know turbulence is known in the prior art. This is not a novel
24 or a non-obvious feature. Can we go to slide 55, please?

25 JUDGE TORNQUIST: What about the statement

1 right after that, or you could get laminar flow?

2 MR. MCCRAW: Right. Well, I think what addresses
3 that, Your Honor, would be where K-Fee's expert has actually said
4 it's well within the skill of the art at the time of the invention to
5 configure grooves to be either laminar or turbulent. And so, it's
6 just known how to do it one way or the other. This is not some
7 kind of highly technical operation. You can just put grooves in a
8 way that would generate turbulence. And it was known. We have
9 prior references that our expert relied on that said, hey, we have
10 turbulence.

11 Now, one thing I would do want to note, at one point,
12 Your Honors, Mr. Carsten tried to indicate that Claim 4 of, I think
13 it's the '923 patent, is not met because having something to do with
14 grooves in the claims. That is nowhere in their papers. They say
15 that it's in their sur-reply, but they sort of jam it in talking about
16 other claims. But if you go back to their Patent Owner response,
17 they never challenge that Claim 4 is not met by the claims, and
18 they never challenge that that grooves go into the ribs. So, that's
19 an argument that's waived. It's a new argument they had to make it
20 in their Patent Owner response.

21 I'd like to quickly go to the '430 indentations. We
22 could go to slide 79. Okay. Actually, could we go to the slide
23 that has the dotted lines on it? That's the one. Seventy-eight. So,
24 I believe it was Mr. Brooks stood up and said, well, look what
25 they're arguing with this green arrow. They're saying that that's

1 where it's located. Your Honor, we were just trying to give some
2 visual indication that that's the general location of where those
3 indentations are. We're not trying to say they're on the flange.
4 We're just trying to say, you see these teeth.

5 We all know what we're talking about. And we also
6 indicate here at the bottom, the teeth could be replaced by other
7 equivalent structures. So, we know it doesn't have to have this
8 configuration, and we know it's on the body. Could we go to K-
9 Fee slide 125 actually? So, Your Honors, they've colored in this
10 slide and I think this actually proves our point about the
11 indentations. You have a series of white and purple that push into
12 the capsule, Your Honor. And also, like I mentioned in the other
13 paragraph where it says those things could be replaced with any
14 other kind of feature on the capsule body sidewall. There's just no
15 dispute that that is on the capsule body sidewall.

16 And what they're trying to do, Your Honor, is just
17 extract every little bit of juice out of a deposition quote where they
18 got Mr. Jobin to say that the outer surface and the body wall are
19 two different things. But he's just saying that those are just
20 mentioned differently. It's the outer surface of the sidewall. At no
21 point have we taken the position that there's three structures in the
22 Yoakim's capsule, that just doesn't make sense. That's not
23 disclosed anywhere. And I've continued to ask, where is the
24 additional structure that's not the sidewall?

25 And there's never been an answer as to where it is.

1 And if we could go to slide 79 of our deck, please. I just want to
2 note here, and this is the bottom right paragraph, and that's 420 of
3 Yoakim, we're on slide 79. When Yoakim's talking about the
4 sidewall, they're saying the sidewall of the body, the surface of the
5 body. So, this idea that there's an additional body doesn't make
6 sense. I'd also like to go to slide 81. We also know how this
7 capsule is made. It's molded by injection or deep drawn in
8 aluminum. The way that's going to work, Your Honor, is there's
9 going to be a flat piece of aluminum it's going to be stamped.
10 There are no additional surfaces added. That's how this capsule is
11 made. So, we know that whatever stamp is going to be there is
12 going to be on the outer surface of the sidewall.

13 JUDGE TORNQUIST: Their argument really wasn't
14 that you were going to add something, right? It was just that they
15 called it something different, therefore it is.

16 MR. MCCRAW: Their argument is effectively a
17 word game, Your Honor. If someone were to say you have a
18 sidewall, yes, that sidewall has an outer surface and an inner
19 surface, and they said, gotcha. Jobin in his deposition said outer
20 surface and sidewall aren't the same thing. That's effectively their
21 argument.

22 I'd like to get to the obviousness issue of indentation,
23 because I think, you know, we have K-Fee trying to say that by
24 adding the sole limitation that you have a capsule and we put
25 indentations on it, we have this novel non-obvious capsule. Your

1 Honor, indentations in a body of a capsule. It's just that simple.
2 Can we go to slide 39, please? For years, for years, there's been
3 some form of indentation on thin-walled structures. This concept
4 that they've invented that, it's just not there.

5 JUDGE TORNQUIST: And do those indentations
6 make it too difficult to read the --

7 MR. MCCRAW: No. Can we go to 78? No, Your
8 Honor, because those indentations would be on the sidewall, they
9 wouldn't be necessarily on the flange. And so, you need to read
10 the code on the flange. If you have some structure that's gripping
11 the capsule, you still have the straight area and that straight area to
12 the flange. It doesn't have to impact the flange in any way. So, no,
13 I don't think there's any evidence that it actually impacts the code
14 reading. And we know that both from Yoakim and Jarisch, you do
15 want to grip the capsule to spin it.

16 And so, and we also know from Yoakim and Jarisch
17 that you want to read an optical code. And so, you're not going to
18 impede that in the design. And then again, I want to be clear, and
19 that's on this slide, I'm on 78. You don't have to have the teeth that
20 are configured in this way. It indicates they could be replaced by
21 other equivalent structures, such as a series of elements of relief or
22 hollow. So, there's a level of ordinary creativity that I think a
23 POSITA is going to have here. And they're not going to force this
24 particular embodiment in the way of the of the code reading. And
25 so, our combination is not complicated, Your Honor. It's just you

1 have a system of Yoakim that has the overwhelming majority of
2 the features and K-Fee's claims.

3 You have the Jarisch modifying it to say, let's have a
4 more reliable code reading. And then we have Rapparini saying,
5 we know to put grooves on the capsule. This is not a comp. I
6 understand that there's three references, but they're all done in very
7 predictable ways. So, I don't think this is a complicated
8 obviousness combination.

9 I also want to go for a moment and talk about Dr.
10 Howle. So, can we go to slide 158? Your Honors have already
11 found in the '491 proceeding that Dr. Howle does not meet the
12 definition of a POSITA it in this case, nothing has changed. They
13 now are relying on a series of what was a completely improper
14 redirect where it was effectively staged where they asked a long
15 winded series of questions about his background to try to get it into
16 the record. I want to go to Howle's deposition, which I think we
17 have that in a PDF. That's Exhibit 1067.

18 Now, Mr. Carsten said that I asked a question that
19 elicited his technical background. That is not true. Can we please
20 go to page 30? Here's the question I asked. How did you
21 determine the plain and ordinary meaning of the claim terms of the
22 '923 patent? Can we zoom back in, please? This is page 30, lines
23 4 to 5. Did I ask about his technical background? And then what
24 he injected into the record solely so they could stage this on sur-
25 reply was similar to the '430 patent, based on my experience over

1 40 years of experience. That's their reason for the lengthy redirect
2 that they've injected into the records. So, first of all it's improper,
3 but in any event it doesn't establish anything.

4 JUDGE OBERMANN: What about their argument
5 that Dr. Jobin in part qualifies himself, or Mr. Jobin by referring to
6 his experience with medical devices?

7 MR. MCCRAW: So, Jobin's medical device that he
8 has and it's not it's really not very many because the bulk of his
9 experience is actually in design of mechanical beverage.

10 JUDGE OBERMANN: I understand that but one of
11 the paragraphs they cite to us and I'll have to find it, he says that
12 medical devices are very similar to brewing devices.

13 MR. MCCRAW: He -- I believe that the paragraph
14 you're referring to Your Honor is paragraph 23 where he says we
15 have an eye medication dispenser including fluid cartridges like
16 single-serve capsules with a particular fluid dispensing technology.
17 That's not any medical device. That's a very particular fluid
18 dispensing cartridge system, that yes, he found that particular
19 device to be similar. But what we've seen from Dr. Howle is a
20 series of basic mechanical instruments that any engineer, any
21 mechanical engineer is going to use them in their course of work.
22 Could we please go to slide -- let's go to slide 159. He talks about
23 having this Ph.D.

24 JUDGE OBERMANN: I'm sorry, it was actually
25 paragraph 12 where he says he's referring to medical devices and

1 instrumentation. Many of these products and technologies were
2 comparable in complexity to coffee makers with replaceable
3 capsules.

4 MR. MCCRAW: Correct, Your Honor. That's right.
5 He does say that. And then he follows that with a series of
6 paragraphs that explain his experience with those devices. And the
7 device that is medical, that he's pointing to, is very different from
8 anything you're seeing from Dr. Howle.

9 JUDGE OBERMANN: Okay. I don't know if it was
10 argued by either side, but part of the definition requires, and I don't
11 know if it's five years' experience or just some experience with
12 identifiers.

13 MR. MCCRAW: Correct.

14 JUDGE OBERMANN: Is that separate or is that just
15 balled up into all this? Because I didn't see anybody arguing about
16 whether or not either witness has that experience.

17 MR. MCCRAW: Well, certainly, Mr. Jobin does.
18 And they've never argued that he does not. They've never argued
19 he does not meet the level of skill in the art. But for Dr. Howle, I
20 think what we see here, can we go back to --

21 JUDGE OBERMANN: But did you argue it in a
22 brief?

23 MR. MCCRAW: We did argue in a brief. I believe
24 it's our reply brief. We explained that Dr. Howle's other related
25 experience, which shouldn't even be considered, but we explained

1 that it does not meet the limitation. Sorry, not limitation. I'm
2 thinking too much about the claim.

3 JUDGE OBERMANN: But you didn't particularly
4 argue about sensors for recognizing an identifier.

5 MR. MCCRAW: We said that what he has
6 demonstrated doesn't meet the definition and that includes sensors
7 for identifiers. And I don't think he's demonstrated any kind of
8 sensor for identifier and I think what's also important is about what
9 he's talked about. At no point has he established that it's five
10 years. He's never established five years of continuous work on
11 anything. He identified a couple products here and there. I want
12 to go to --

13 JUDGE MAYBERRY: Excuse me, counsel.

14 MR. MCCRAW: Yes.

15 JUDGE MAYBERRY: Judge Mayberry. I am loathe
16 to interrupt your reply, but one question. Are you suggesting that
17 we should by ourselves exclude the evidence that was in the
18 deposition? Because you did not provide a motion for excluding
19 evidence, did you?

20 MR. MCCRAW: You are correct, Your Honor, and I
21 appreciate that Your Honors generally disfavor motions to
22 exclude. And I know that you all are well equipped to evaluate the
23 record and evaluate what is proper and what's not proper. And so,
24 I think you all can evaluate and understand, which we stated in our
25 reply brief, that it is an improper reply. So, Your Honor, we didn't

1 want to burden you with a motion to exclude as you understand
2 that it's not a proper reply, and we stated that in our reply brief.

3 JUDGE OBERMANN: So, it really goes to the
4 weight?

5 MR. MCCRAW: Absolutely. It goes to the weight.
6 And I also want to note that in our reply brief, we did explain that
7 Jobin has substantial experience with sensors recognizing
8 identifiers. That's on page 28 of the '430 reply brief. And so, Dr.
9 Howle's generic experience with medical devices, there's no
10 evidence that it's similar to anything we're doing here, and he's
11 already admitted he does not have five years of experience. Can
12 we go to 161? It doesn't get clearer than this. He said in a
13 deposition, I don't have, it cannot be disputed, I don't have industry
14 experience of five years or more. And so, your generic experience
15 that is undefined in terms of the years with medical devices is not
16 going to satisfy this. And I think if there's any question about his
17 competence, I encourage you to read his deposition transcripts,
18 because --

19 JUDGE OBERMANN: How do we deal with that,
20 though, because he's limiting it to beverage brewing?

21 MR. MCCRAW: Well, that's correct. It's part of it.
22 We know he's conceded that. And what he has added to the
23 record, Your Honor, is not five years of experience in related
24 designs. It's generic experience. And so, can we go to the next
25 slide, please? Next slide after that. I mean, let's go through what

1 he's put here in the paper on slide 133. Strain gauges,
2 thermocouples, ultrasonic sensors, these are just generic
3 instruments that a mechanical engineer is going to use.

4 JUDGE OBERMANN: Can I just stop you for one
5 second? And again, I'm sorry to interrupt, but did you cite us to
6 page 27 for Mr. Jobin's five years of practical experience with
7 sensors and -- because I'm not seeing a time. He has 30 years of
8 general experience. Which of these sources on page 27 will tell us
9 that he has the five years' requisite experience?

10 MR. MCCRAW: Your Honor, I don't think the
11 definition is five years in sensors alone. I think the definition is
12 five years in single-serve beverage systems, including experience
13 with sensors, and he has all of that.

14 JUDGE OBERMANN: Well, where's the five years
15 in the practical coffee capsules? Because I see you have actual
16 hands-on coffee experience in addition to his 30 years of general
17 experience. Where's his five years?

18 MR. MCCRAW: Well, Your Honor, I'd like to note
19 that at no point has K-Fee ever tried to articulate that Mr. Jobin is
20 not a person of skill in the art. So, I don't think this is disputed.
21 But if --

22 JUDGE OBERMANN: If you're asking us to give
23 Mr. Jobin's testimony more weight than Dr. Howle, I'd like to be
24 satisfied that he has the qualifications that you say are lacking.

25 MR. MCCRAW: Absolutely. I understand, Your

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1 Honor. And so, if you look at page 28 of our '430 reply brief, you
2 can see we've cited Dr. Howle's, I'm sorry, Mr. Jobin's, his
3 declaration at Exhibit 1003, paragraphs 5 through 30. And we
4 have walked you through precisely --

5 JUDGE OBERMANN: This is in the first case. Did
6 you cite it in the second case?

7 MR. MCCRAW: Yes, I'm talking about the second
8 case.

9 JUDGE OBERMANN: The second case, the reply
10 brief?

11 MR. MCCRAW: Correct, Your Honor.

12 JUDGE OBERMANN: Page 28.

13 MR. MCCRAW: And we walk through paragraphs 5
14 through 30. And this is truly what Jobin does. Jobin is a beverage
15 system designer. He has designed for Margaritaville. He's
16 designed an actual Margarita dispensing device with rotary blades
17 and a motor with electronic controls. For Skybar, he developed a
18 wine preservation and dispensing system. For Symbol
19 Technologies, he developed a handheld barcode scanner. So, he's
20 used these types of optical devices. For Knighton, he developed a
21 portable x-ray scanner that incorporates barcodes.

22 And I think most importantly, he's actually, for a
23 major beer company, developed a home-based beer dispenser
24 system with a focus on identification technologies to prevent
25 counterfeit cartridges and use solutions while he was designing

1 that using the cartridge shape or ribs or RFID tags or barcodes.
2 He's worked on these exact types of systems. This is what he does
3 for a living. He's not a professor. He's a designer. He's a product
4 designer. So, he is the person Your Honors should be listening to
5 when it comes to what these patents mean and what was known in
6 the art. He's also been hired by the patent office itself as an expert
7 in coffee systems.

8 JUDGE OBERMANN: Is that in the record?

9 MR. MCCRAW: I believe it is, Your Honor. That
10 should be --

11 JUDGE OBERMANN: Oh, I see it I think, paragraph
12 28.

13 MR. MCCRAW: And so, Your Honors, I believe I've
14 reached all my time. If there's any other questions I'm happy to
15 answer them. But otherwise, thank you.

16 JUDGE TORNQUIST: Okay. Any questions?
17 Okay. Thank you very much.

18 MR. CARSTEN: Good afternoon. So, 14 minutes to
19 go I'm not sure exactly how much I have, maybe it'll be a little less
20 than that, but hopefully we'll get some of our afternoon back. A
21 couple things just to pick up where my friend Mr. McCraw left off.
22 He pointed you to a rather innocuous question that was asked
23 during the deposition and said, that can't give rise to a redirect
24 about your experience. Well, here's a question. I'm just asking
25 you more generally in the coffee arts. And as your experience as a

1 purported expert, what you mean, what you understand, residue to
2 mean. He's absolutely asking about the man's experience.

3 Here's at page 100 of Exhibit 1046 -- 1067, excuse
4 me. Are there any particular experiences that you had as an
5 engineer in the past 40 years that are particularly relevant to the
6 work you've done with respect to the '502 and '485 IPRs? If that's
7 not a question that begs for exploration on redirect and provides
8 fair ground. Moreover, they simply haven't objected to Dr. Howle.
9 They're just casting aspersions on the man. That redirect
10 establishes that he has more than five years of experience in
11 similar products. And, Judge Obermann, you're absolutely right.
12 And we have a slide of it, slide 231, excuse me.

13 Yeah, Mr. Jobin absolutely relies upon his own
14 medical device experience and touts that. And this is not just at
15 the paragraph 12 that's cited here. He does it again at a paragraph
16 eight. He does it again at paragraph 27. So, I think it's a tempest
17 in a teapot. I raised it because of the issue with respect to the '491.
18 And I wanted to make sure that Dr. Howle was given his
19 appropriate credit with respect to his status as a person of ordinary
20 skill in the art.

21 So, Mr. McCraw quoted the Apple case for the
22 proposition that you can switch algorithms, for example, at the
23 reply stage as a Petitioner and still be in good shape. That, the
24 Apple case, there was a finding that the algorithms that were being
25 spoken of were the same algorithm. It was just a different place in

1 which the same algorithm was being spoken about. And that
2 makes sense. What we have here, the shifting decision to rely
3 upon different embodiments from Yoakim, from different passages
4 in Jarisch at the reply stage, without the benefit of an expert
5 declaration. Mind you, they could have put in Mr. Jobin's
6 declaration to establish why a person of ordinary skill in the art
7 would be motivated to look at those other embodiments and
8 consider them. They failed. They're hiding behind that.

9 So, they didn't give us the opportunity to cross-
10 examine Mr. Jobin about his reliance on those other embodiments,
11 and whether they're the same or different and how they affect. All
12 you have is the benefit of Mr. McCraw and humbly me standing
13 before you telling you what all this means. Neither of us are
14 qualified as an expert in this case. You have attorney argument.
15 And that's fine. That was their choice. But it's their burden. And
16 this falls directly against the Biomed case, the Henny Penny case,
17 Intelligent Biosystems, all the cases that we've cited, all the
18 reasons why it's so important that you all get the benefit of the
19 experts to really go head to head on the meat of the matter. We
20 saw this in the free of a filter argument.

21 Their petition was two lines. There was no analysis
22 whatsoever. I was surprised to hear a criticism that Dr. Howle, in
23 picking up a textbook and looking at some information, that that's
24 sort of unworthy of any credence or weight whatsoever. But Mr.
25 Jobin didn't even pick up a textbook when it came time to identify

1 how one would go ahead and implement the inclusion of the
2 Jarisch approach into Yoakim. And it's their burden to do that.
3 Just an utter failure of proof. I think that my colleague, Mr.
4 Brooks, has a brief couple of things to say about where Mr.
5 McCraw spent the bulk of his time, namely on the side walls with
6 indentations and the turbulence. And then I'll get up and close it
7 out.

8 JUDGE OBERMANN: I just had one question.

9 MR. CARSTEN: Oh, yes.

10 JUDGE OBERMANN: Did PO waive the arguments
11 in their response to that Claim 4?

12 MR. CARSTEN: No. I think I cited exactly the place
13 where we do talk about it. I think it's the Patent Owner's sur-reply
14 at 24 to 25.

15 JUDGE OBERMANN: That's not good enough. If
16 you're going to contest Claim 4, you needed to do it in your
17 response.

18 MR. CARSTEN: Well, we did generally talk about
19 the failings of the reaching the bottom. And I believe the
20 indentations on the top. I don't think we specifically called out
21 Claim 4. But we did criticize that in our Patent Owner response.
22 If you'd like, while I'm here, I can see if I can find that passage for
23 you, Judge Obermann.

24 JUDGE OBERMANN: Okay. Thank you.

25 MR. BROOKS: Just a couple of brief points. And of

1 course, if there are any questions, happy to field them. First point,
2 with respect to turbulence, there was a suggestion in Mr.
3 McCraw's presentation that the combination is Yoakim, and then
4 some general knowledge of putting caps, excuse me, putting
5 grooves on a capsule and generating turbulence. The combination,
6 as clearly articulated in the Petitioner reply at 18, is that they're
7 taking Yoakim, applying Rapparini's ribs to Yoakim's capsule, and
8 that somehow is resulting in turbulence. But as I noted earlier,
9 there is nothing in the record that demonstrates that the particular
10 configuration of ribs in Rapparini would result in turbulence. And
11 simply adding grooves does not get you to turbulent flow.

12 With respect to indentations, I just wanted to make
13 one clarifying point. Petitioner in their paper, and also Mr.
14 McCraw when he stood up, makes reference to the body in figure
15 23 in that capsule. I think the paragraph 215 of Yoakim is quite
16 clear that the body is not merely the edges of the sidewall, but it's
17 the entire capsule structure, including the flange or rim, the sides,
18 and the bottom. And so, I wanted to make that point clear. If there
19 are no specific questions on those two, I'll give Mr. Carsten a
20 chance to close out.

21 JUDGE TORNQUIST: No. Thank you.

22 MR. CARSTEN: May I have just a moment, Your
23 Honor? I'm still reviewing the section that you pointed me to. We
24 point out at page 29, and again, as I indicated, Your Honor, I don't
25 think we tied it directly to Claim 4 specifically. But we pointed

1 out that in Rapparini Figure 10, that the short ribs run along the
2 entire height of the sidewall of the container 2A. And the claims,
3 the Independent Claims require that the grooves not extend all the
4 way to the bottom. Claim 4 requires that it not extend all the way
5 to the top. So, I believe that preserves the argument.

6 JUDGE OBERMANN: That's in a section directed to
7 Claims 1 and 9.

8 MR. CARSTEN: I'm sorry, Your Honor. I just
9 closed my binder. I apologize. What we did in the -- what we did
10 in this document, Your Honor, was he identified the Independent
11 Claims that the claim limitation depended from and the claim to
12 depends from Claim 1, that's a Dependent Claim, so we didn't
13 identify the Dependent Claims in the headings at any point in the
14 document I understand. If you all had any other questions for me.
15 Well, we have four minutes back and I sincerely appreciate your
16 time and energy.

17 JUDGE TORNQUIST: Okay. Thank you very
18 much. Okay. I'd like to thank the parties. It was an excellent
19 argument. Both sides clearly understood the record quite well.
20 Thank you and this hearing is adjourned.

21 (Whereupon the above-entitled matter went off the
22 record at 3:37 p.m.)

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