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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

K-fee System GmbH, Plaintiff, v. Nespresso USA, Inc., Nestlé Holdings, Inc. d/b/a Nestlé USA, Inc., and Nestlé S.A., Defendants.	Case No. 2:21-cv-3402 GW(AGRx) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF NESPRESSO USA, INC.'S MOTION FOR SUMMARY JUDGMENT OF NONINFRINGEMENT** Judge: Hon. George H. Wu Hearing Date: May 12, 2022 Time: 8:30 a.m. Trial Date: December 6, 2022

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Defendant Nespresso USA, Inc. ("Nespresso") moves for summary judgment that it does not infringe any claim of U.S. Patent Nos. 10,858,176, 10,858,177, and 10,870,531 (the "Asserted Patents").

I. INTRODUCTION

K-fee's core infringement theory—that the code used on the capsules of the accused products meets the "barcode" limitation of the claims—is flatly precluded by the Court's Claim Construction Order, Dkt. 111. That Order construes the term "barcode" as having a meaning "understood by the clear and unequivocal statements K-fee made to the EPO," and specifically excludes from the scope of "barcode" "the type of bit code used in Jarisch," a patent application of Nespresso's affiliate that describes and illustrates the accused capsules and coding system. *Id.* at 13. In the EPO, K-fee argued that Jarisch discloses a "'bit code,' but not a barcode because the barcode . . . is always constructed of bars having variable widths and therefore contains more than only two binary symbols, such as '0' and '1'." Dkt. 71-3 at 11 (emphasis in original). As explained in detail in the accompanying declaration of Christian Jarisch, a Nespresso affiliate employee and inventor on the Jarisch application, [redacted]

Since the issuance of the Court's Claim Construction Order three weeks ago, Nespresso has repeatedly asked K-fee to explain how it can continue to prosecute this action in good faith given the Court's construction of the term "barcode." K-fee has not done so, and it cannot do so. On the contrary, K-fee knows that [redacted] Indeed K-fee was able to protect its European patent—and procure the U.S. patents asserted in this action—precisely by *distinguishing* that bit code from the "barcode" element that is present in each and every asserted claim in this action.

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There was only one proper course left for K-fee in the wake of the Court's claim construction if it wanted to pursue its infringement claims, and that was to stipulate to a judgment of noninfringement and challenge the Court's claim construction in the Federal Circuit. Instead, K-fee has chosen to push ahead without any viable infringement theory whatsoever.

What is more, ever since Nespresso notified K-fee of its intention to file a summary judgment motion of noninfringement based on the Court's claim construction, K-fee has been busy putting new *procedural* facts on the ground that it hopes will somehow substantiate its forthcoming Rule 56(d) opposition. This includes a 99-topic Rule 30(b)(6) deposition notice, K-fee's first (and highly belated) efforts to subpoena documents from non-parties located in Europe, and an unending river of complaints about Nespresso's document production and the timing of depositions. No doubt the Court will soon hear much on these procedural matters from K-fee, but what it will *not* hear is any infringement theory that survives the Court's Claim Construction Order.

"Barcode" is an element of every claim of the Asserted Patents, and in view of the Court's Claim Construction Order, K-fee cannot show that the accused products contain a "barcode." As such, K-fee cannot establish the existence of an element essential to its case, and summary judgment should accordingly be granted.

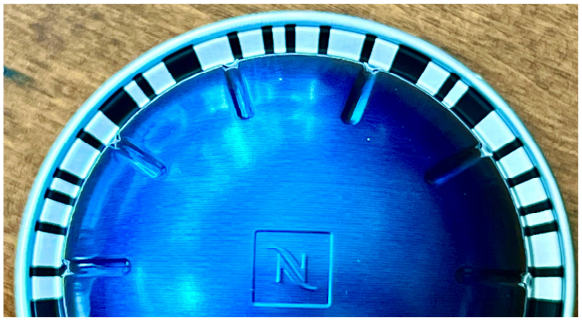
II. <u>THE UNDISPUTED FACTS</u>

A. The Accused Products

In this action, K-fee contends that Nespresso's line of single-serve coffee capsules and related coffee systems sold in the United States under the trade name "Vertuo" (the "Accused Products") infringe the Asserted Patents. SUF #1. It is undisputed that each claim of every Asserted Patent in this action, whether directed to a method or a system, requires a capsule with a "barcode" on the bottom side of the flange, or rim, of the capsule. SUF #2.

B. The Vertuo Code

On the underside of the flange, the Vertuo capsules have a code that can be read optically by a Vertuo coffee machine to determine brewing parameters and other information for the particular capsule variety (the "Vertuo code"). It can be seen, for example, in the image below as a series of light and dark areas. SUF #3.



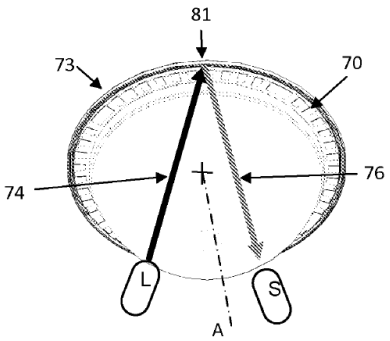
[redacted]

[redacted]

C. Jarisch

[redacted]

Nespresso's affiliate's PCT patent publication, WO 2011/141532, published on November 17, 2011 and titled "CAPSULE SYSTEM AND METHOD FOR PREPARING A BEVERAGE BY CENTRIFUGATION" ("Jarisch"). SUF #12. Specifically, Jarisch discloses a "bit code" on the "bottom side of [the] capsule" composed of "surfaces . . . arranged in a circular pattern," where "absorbing surfaces" represent the "bit '0'" and "reflective (diffusing) surfaces" represent the "bit '1.'" SUF #13.



Declaration of Christian Jarisch ("Jarisch Decl.") Ex. 5 at Fig. 5.

III. LEGAL STANDARD

Summary judgment shall be granted where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Rule 56 "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Parth v. Pomona Valley Hosp. Med. Ctr.*, 630 F.3d 794, 798–99 (9th Cir. 2010) (summary judgment should be entered against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial").

To demonstrate a genuine issue, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . [T]he nonmoving party must come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) (quotations and citations omitted). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). A dispute is genuine only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248.

Summary judgment of noninfringement should be granted "where the patent owner's proof is deficient in meeting an essential part of the legal standard for infringement, since such failure will render all other facts immaterial." *Telemac Cellular Corp. v. Topp Telecom, Inc.*, 247 F.3d 1316, 1323 (Fed. Cir. 2001) (citation omitted). "To find literal infringement, each limitation of the claim must be present in the accused device. Any deviation from the claim precludes such a finding." *Id.* at 1330 (affirming summary judgment of noninfringement). "Since the ultimate burden of proving

infringement rests with the patentee," an accused infringer may establish that summary judgment is proper "either by providing evidence that would preclude a finding of infringement, or by showing that the evidence on file fails to establish a material issue of fact essential to the patentee's case." *Novartis Corp. v. Ben Venue Labs., Inc.*, 271 F.3d 1043, 1046 (Fed. Cir. 2001). The burden then shifts to the party asserting infringement to provide "specific facts showing there is a genuine issue for trial." *Id.* (citing *Celotex*, 477 U.S. at 324). If the non-moving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. *Id.* (citing *Celotex*, 477 U.S. at 322).

IV. ARGUMENT

A. The Court's Claim Construction Order Excludes From The Scope Of "Barcode" Bit Codes Constructed Of Two Binary Symbols

On March 11, the District Court issued its Final Order on Claim Construction in this matter (Dkt. 111). The Claim Construction Order construes the claim term "barcode," which is a limitation in every claim of the Asserted Patents, as a "code having bars of variable width, which includes the lines and gaps." Dkt. 111 at 13. Of particular significance to this motion, the Court further construed the term barcode as *excluding* "the type of bit code disclosed in Jarisch/D1." *Id.* "Jarisch/D1," as used in the Claim Construction Order and in the EPO, refers to PCT Publication No. WO 2011/141532 A1, *i.e.*, the Jarisch reference discussed above. *Id.* at 12 n.4.

The Court ruled that "[a]s this case proceeds, [K-fee] will not be heard to advocate for a different scope of 'barcode' than that used to defend its related European patent." *Id.* at 13. In the EPO, Nespresso's affiliate argued that K-fee's European patent lacked novelty over Jarisch. *Id.* at 7–8. In response, K-fee submitted and discussed numerous references that K-fee contended "unambiguously differentiate[] between" a barcode and a bit code. Dkt. 71-3 at 11–16. The Claim Construction Order explains that, in the EPO,

K-fee specifically distinguished the claim term "barcode" from a bit code constructed of only two binary symbols:

> Next, K-fee explained [in the EPO] that prior art reference D1 [Jarisch] did not disclose a "barcode." *See id*. at 11 (Nestec argues "that a barcode is referenced therein. But this conclusion is incorrect . . . [because] the code is at that location explicitly and exclusively referred to as 'bit code.'"). In distinguishing the claimed "barcode" from the type of "bit code" disclosed in the prior art, K-fee explained, ***the disclosed bit code "comprises a code constructed of two different areas: a reflective area that represents '1' and an absorbing area that represents '0'. The 'bit code' disclosed here is therefore strictly a binary code constructed of two binary symbols*** ('0' and '1')."

Dkt. 111 at 12 (emphasis added). By contrast, K-fee told the EPO that a barcode always contains "more than only two binary symbols":

> Therefore, [Jarisch] discloses a "bit code", but not a barcode, ***because the barcode – as shown above – is always constructed of bars having variable widths, and therefore contains more than only two binary symbols, such as "0" and "1."***

Id. (emphasis added); *see also id.* at 13 ("the scope of the barcode does not include the type of bit code disclosed in Jarisch/D1").

In support of these contentions, K-fee submitted the sworn expert testimony of its expert Dr. Ralf Jesse, who testified that "the use of barcodes regularly implies that <u>more than two different optically recordable elements and/or symbols are used that can be analyzed when the barcode is read.</u>" Dkt. 71-4 at 7 (emphasis in original). Dr. Jesse thus concluded that although Jarisch "discloses the use of various versions of 'codes' or 'bit codes' (e.g., binary codes), it does not disclose the use of a barcode." *Id.*

The Court agreed "that the relevant EPO prosecution history is part of the intrinsic record here." Dkt. 111 at 10.

B. The Court Should Grant Summary Judgment Of Noninfringement As To Each Asserted Claim Because K-fee Cannot Establish The Existence Of An Element Essential To Its Infringement Case

As the plaintiff asserting infringement, it is K-fee's burden at trial to prove that the "barcode" limitation is met by the Accused Products. Here, "barcode" is an element of every claim of the Asserted Patents, whether they are method or system claims, and K-fee cannot show that the Accused Products contain a "barcode" as construed in the Claim Construction Order. *See Parth*, 630 F.3d at 798–99 (summary judgment should be entered against a party "who fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial"); *Celotex*, 477 U.S. at 322 (Rule 56 "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial").

1. The Code Used By The Accused Products Is Indisputably Excluded By The Court's Claim Construction

K-fee's core infringement theory—that the code used on the capsules of the Accused Products meets the "barcode" limitation of the claims— is flatly precluded by the Court's Claim Construction Order. That Order specifically and explicitly excludes from the scope of the claim term "barcode" the type of bit code used in Jarisch, *i.e.*, a code that is based on no more than two binary characters such as 0's and 1's. Dkt. 111 at 13.

[redacted]

Jarisch Decl. Ex. 3.

Jarisch describes [redacted]: surfaces arranged in a circumferential pattern where an absorbing surface signifies a "0," and a reflecting surface signifies a "1." SUF #13. A light beam is projected on the rim and is reflected to a light sensor: "[a] bit such as '0' or '1' is thereby provided to the control unit." Decl. Ex. 5 (Jarisch) at 9:7–9. These facts are not in dispute, and cannot be disputed.

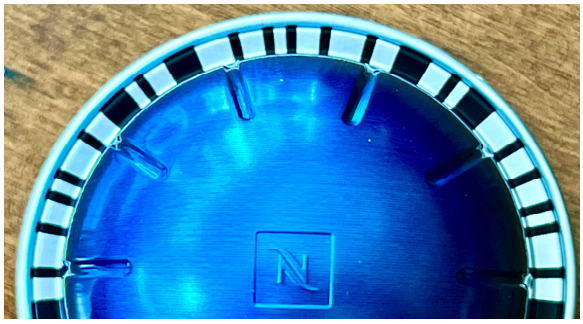
Because the Court's claim construction of "barcode" unambiguously excludes the type of code used by the Accused Products, K-fee cannot show "the existence of an element essential to [its] case," *Parth*, 630 F.3d at 799, and summary judgment of noninfringement as to every claim of the three Asserted Patents should be granted forthwith.

2. In Any Event, The Code Used By The Accused Products Is Indisputably Not "A Code Having Bars Of Variable Width," Which

Provides An Independent And Alternative Basis For Summary Judgment Of Noninfringement

As discussed above in Section IV.B.1, K-fee's infringement theory is affirmatively precluded by the Court's claim construction excluding a bit code of the type used in Jarisch. But even if it were not, summary judgment of noninfringement would still be required by the fact that the bit code of the accused products is indisputably not a "code having bars of variable width." Dkt. 111 at 13. This is an alternative and independent reason why summary judgment of noninfringement is required.

In addition to construing "barcode" as "not includ[ing] the type of bit code disclosed in Jarisch/D1," the Court "construe[d] 'barcode' as having its plain and ordinary meaning (*i.e.*, a *code having bars of variable width*, which includes the lines and gaps)." *Id.* (emphasis added). [redacted]



[redacted]

[redacted] *Id.* Thus, even if the angular segments were assumed to be "bars," they would not be "bars of varying width," as the Court's claim construction requires. These facts are not in dispute, and cannot be disputed.

Indeed, this was *precisely* the distinction that K-fee made in submissions to both the EPO and the PTO when it urged the EPO that Jarisch does not disclose a barcode:

> [Jarisch] discloses a "bit code", but not a barcode, ***because the barcode – as shown above – is <u>always constructed of bars having variable widths, and therefore contains more than only two binary symbols</u>, such as "0" and "1."***

Dkt. 111 at 12 (emphasis added). Having made that explicit representation, K-fee "will not be heard to advocate for a different scope of 'barcode' than that used to defend its related European patent." *Id.* at 13.

Thus, the Vertuo code is *not* "a code having bars of variable width," as required by the Court's construction, *id.*, and the Court should grant summary judgment on this independent and alternative basis.

V. CONCLUSION

For the foregoing reasons, Nespresso respectfully requests that its motion for summary judgment of noninfringement be granted.

Dated: April 1, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2022, I caused the foregoing document to be served via electronic mail on all counsel of record.

/s/ Christine Ranney
Christine Ranney