

1 GIBSON, DUNN & CRUTCHER LLP
Wayne Barsky, SBN 116731
2 wbarsky@gibsondunn.com
2029 Century Park East
3 Suite 4000
Los Angeles, CA 90067-3026
4 Telephone: 310.552.8500
Facsimile: 310.551.8741
5

6 Additional counsel listed on Signature Page

7 *Attorneys for Defendants Nespresso USA Inc.*
8 *and Nestlé Holdings, Inc.*

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA

11 K-fee System GmbH,

12 Plaintiff,

13 v.

14 Nespresso USA, Inc., Nestlé Holdings,
15 Inc. d/b/a Nestlé USA, Inc., and Nestlé
S.A.,

16 Defendants.
17
18
19
20
21
22
23
24
25
26
27
28

Case No. 2:21-cv-3402 GW(AGRx)

**NESPRESSO'S OPENING CLAIM
CONSTRUCTION BRIEF**

District Judge: Hon. George H. Wu
Date: March 3, 2022
Time: 8:30 a.m.
Place: Courtroom 9D, Ninth Fl.
350 West 1st Street
Los Angeles, CA 90012

Action Filed: April 21, 2021
Trial Date: TBD

TABLE OF CONTENTS

	Page(s)
1 I. Introduction	1
2 II. Factual Background	2
3 III. Legal Standards.....	4
4 IV. Argument	6
5 A. “barcode” (’176, ’177, and ’531 Patents)	6
6 1. K-fee Argued for Nespresso’s Proposed Construction Almost	
7 Word for Word in Europe	6
8 2. K-fee Should Be Held to Its Repeated and Unequivocal	
Representations	8
9 B. “wall region with an electrically conductive section” (’177, ’531	
10 Patents); “base element comprises an electrically conductive	
section” (’531 Patent).....	11
11 1. K-fee’s Construction Is Inconsistent with the Plain Meaning	
12 of the Term “Section,” and Indeed Renders the term	
Superfluous	11
13 2. K-fee’s Construction Is Inconsistent with the Specification	14
14 C. “media chute” (’176, ’177 Patents).....	14
15 D. “grooves are free from extending all the way into a region of the	
16 base element that is immediately adjacent to the flange” (’531	
Patent).....	17
17 E. “lower section” / “upper section” (’531 Patent)	20
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

TABLE OF AUTHORITIES**Page(s)****CASES**

<i>ALA Eng'g Ltd. v. Magotteaux Int'l S/A,</i> 657 F.3d 1264 (Fed. Cir. 2011)	5
<i>Apple Inc. v. Motorola, Inc.,</i> 757 F.3d 1286 (Fed. Cir. 2014)	5, 8
<i>Caterpillar Tractor Co. v. Berco, S.p.A.,</i> 714 F.2d 1110 (Fed. Cir. 1983)	4
<i>Choon's Design, LLC v. Idea Vill. Prod. Corp.,</i> 776 F. App'x 691 (Fed. Cir. 2019)	21
<i>Cohesive Techs., Inc. v. Waters Corp.,</i> 543 F.3d 1351 (Fed. Cir. 2008)	21
<i>Davis v. Wakelee,</i> 156 U.S. 680 (1895)	10
<i>Gillette Co. v. Energizer Holdings, Inc.,</i> 405 F.3d 1367 (Fed. Cir. 2005)	5, 8, 9
<i>Glaxo Group Ltd. v. Ranbaxy Pharms., Inc.,</i> 262 F.3d 1333 (Fed. Cir. 2001)	5, 8
<i>Halliburton Energy Servs., Inc. v. M-I LLC,</i> 514 F.3d 1244 (Fed. Cir. 2008)	12
<i>i4i Ltd. P'ship v. Microsoft Corp.,</i> 598 F.3d 831 (Fed. Cir. 2010), <i>aff'd</i> , 564 U.S. 91 131 (2011)	12
<i>Interval Licensing LLC v. AOL, Inc.,</i> 766 F.3d 1364 (Fed. Cir. 2014)	17
<i>K-2 Corp. v. Salomon S.A.,</i> 191 F.3d 1356 (Fed. Cir. 1999)	13
<i>Markman v. Westview Instruments, Inc.,</i> 52 F.3d 967 (Fed. Cir. 1995)	4, 7
<i>Merck & Co. v. Teva Pharm. USA, Inc.,</i> 395 F.3d 1364 (Fed. Cir. 2005)	13

TABLE OF AUTHORITIES**Page(s)**

1	<i>Nautilus, Inc. v. Biosig Instruments, Inc.</i> ,	
2	572 U.S. 898 (2014).....	17
3	<i>New Hampshire v. Maine</i> ,	
4	532 U.S. 742 (2001).....	10
5	<i>Pfizer, Inc. v. Ranbaxy Labs. Ltd.</i> ,	
6	457 F.3d 1284 (Fed. Cir. 2006)	9
7	<i>Phillips v. AWH Corp.</i> ,	
8	415 F.3d 1303 (Fed. Cir. 2005)	4, 7
9	<i>Power Mosfet Techs., L.L.C. v. Siemens AG</i> ,	
10	378 F.3d 1396 (Fed. Cir. 2004)	13
11	<i>PSC Computer Prods., Inc. v. Foxconn Int'l, Inc.</i> ,	
12	355 F.3d 1353 (Fed. Cir. 2004)	13
13	<i>Renishaw PLC v. Marposs Societa'</i>	
14	<i>per Azioni</i> , 158 F.3d 1243, 1250 (Fed. Cir. 1998).....	4
15	<i>Seachange Int'l, Inc. v. C-Cor Inc.</i> ,	
16	413 F.3d 1361 (Fed. Cir. 2005)	9
17	<i>SimpleAir, Inc. v. Sony Ericsson Mobile Commc'ns AB</i> ,	
18	820 F.3d 419 (Fed. Cir. 2016)	4, 13
19	<i>Starhome GmbH v. AT&T Mobility LLC</i> ,	
20	743 F.3d 849 (Fed. Cir. 2014)	5, 8
21	<i>V-Formation, Inc. v. Benetton Group SpA</i> ,	
22	401 F.3d 1307 (Fed. Cir. 2005)	6, 10
23	<i>Wasica Fin. GmbH v. Cont'l Auto. Sys., Inc.</i> ,	
24	853 F.3d 1272 (Fed. Cir. 2017)	13
25	<i>Wilson Sporting Goods Co. v. Hillerich & Bradsby Co.</i> ,	
26	442 F.3d 1322 (Fed. Cir. 2006)	21
27	STATUTES	
28	35 U.S.C. § 112(b).....	19

1 Nespresso USA, Inc. (“Nespresso”) respectfully submits its opening claim
2 construction brief for the patents asserted by K-fee System GbmH (“K-fee”).

3 **I. Introduction**

4 At the heart of the parties’ dispute in this matter is the meaning of the term
5 “barcode,” which appears in each and every asserted claim. Nespresso’s proposed
6 construction of “barcode” is taken virtually verbatim from what K-fee repeatedly and
7 unequivocally represented this term means in related proceedings. In documents K-fee
8 submitted to the U.S. Patent Office (“PTO”) during prosecution, K-fee successfully
9 argued to the European Patent Office (“EPO”) *in favor* of the construction now proposed
10 by Nespresso in connection with identical claim language in a related patent having the
11 same relevant disclosure. And while it now *opposes* that very same construction in this
12 Court, K-fee explained to the EPO in detail exactly what a “barcode” is, and what it is
13 not, in order to distinguish prior art cited by the EPO that would otherwise have
14 invalidated its patent. Indeed, K-fee successfully obtained European patents precisely
15 by advancing the very claim construction of “barcode” that K-fee now tells this Court is
16 wrong. Thus, K-fee was in favor of Nespresso’s proposed construction before it was
17 against it.

18 Notwithstanding its previous representations to the EPO, which are part of the
19 intrinsic record of the asserted patents, K-fee is now attempting to read the claim term
20 “barcode” on *precisely* what it said *did not* constitute a “barcode” in Europe. And while
21 K-fee knows this history well, and knows that there is a concrete dispute between the
22 parties with respect to the term “barcode,” it represents to this Court that the term should
23 nonetheless be given its “plain and ordinary meaning.” Indeed, before the EPO, K-fee
24 submitted numerous publications and other evidence in support of its interpretation of
25 the term “barcode,” including two textbooks authored by its expert there. Yet in this
26 proceeding, K-fee’s expert states that he is “not aware of any extrinsic evidence that
27 supports the notion that all barcodes” are limited in the way K-fee was advocating in
28 Europe.

1 K-fee's proposed construction of the term barcode is contrary to the intrinsic
 2 record, which includes K-fee's unequivocal statements to the EPO that a barcode
 3 excludes what K-fee now says it includes. Moreover, K-fee should not be permitted to
 4 tell the EPO that "barcode" means one thing in order to avoid a finding of invalidity,
 5 and then tell this Court it means something else entirely to assist its infringement
 6 contentions against Nespresso. K-fee cannot have it both ways. Barcode should be
 7 construed to mean and exclude what K-fee successfully represented it meant and
 8 excluded in Europe (in which case there can be no infringement by Nespresso). If it is
 9 not, then this is yet another reason why K-fee's claims are invalid: they are obvious over
 10 the very same prior art K-fee successfully distinguished in Europe with the definition of
 11 "barcode" it now resists.

12 **II. Factual Background**

13 On April 21, 2021, K-fee filed suit against Nespresso alleging that Nespresso
 14 infringes three patents related to beverage systems and methods using single-use
 15 capsules: U.S. Patent Nos. 10,858,176 (the "176 Patent"); 10,858,177 (the "177
 16 Patent"); and 10,870,531 (the "531 Patent") (collectively, the "Asserted Patents"). K-
 17 fee's complaint asserts infringement through the manufacture, use, sale and/or lease, and
 18 offer for sale and/or lease of Nespresso's Vertuo Next, VertuoPlus, Evoluo, and Vertuo
 19 product lines (the "Accused Products"). (D.I. 1, ¶ 14.) The Asserted Patents relate to
 20 beverage systems and methods utilizing a single-use "portion capsule." Each asserted
 21 claim requires that the portion capsule include a flange and a barcode located on the
 22 bottom side of the flange.

23 The meaning of the term "barcode" was squarely at issue in a related European
 24 proceeding between K-fee and Nespresso's affiliate involving a European counterpart
 25 to the Asserted Patents. Nespresso's affiliate argued that K-fee's European patent lacked
 26 novelty over a reference called Jarisch, which discloses the heart of K-fee's alleged
 27 invention in Europe and the United States, a portion capsule with a barcode located in a
 28 particular location. (Ex. 1 (July 30, 2018 Opposition) at 7–8.) In response, K-fee argued

1 that Jarisch did **not** disclose a barcode, but rather a bitcode, among other reasons,
 2 “because the barcode . . . is always constructed of bars having variable widths, and
 3 therefore contains more than only two binary symbols, such as ‘0’ and ‘1.’” (Ex. 2 (May
 4 20, 2019 Response to Opposition and certified translation) at 12 (emphasis in original);
 5 *see also* Ex. 3 (May 19, 2019 Jesse Declaration and certified translation) at 7.) K-fee
 6 submitted all three of these documents to the PTO during the prosecution of the Asserted
 7 Patents. (*See, e.g.*, Ex. 4 (July 27, 2020 Supplemental IDS, U.S. Appl. No. 16/538,752)
 8 at 8–9; Ex. 5 (July 27, 2020 Electronic Acknowledgement Receipt of IDS, U.S. Appl.
 9 No. 16/538,752) at 9; Ex. 6 (July 27, 2020 Second Electronic Acknowledgement Receipt
 10 of IDS, U.S. Appl. No. 16/538,752) at 3.) The EPO accepted K-fee’s arguments (Ex. 7
 11 (August 9, 2021 EPO Interim Decision and certified translation) at 9–10), and thus K-
 12 fee benefited from its factual representation to the EPO about the definition of a barcode.

13 Like K-Fee’s EPO arguments against Jarisch, the Accused Products include a
 14 **bitcode** for adjusting relevant brewing parameters. The code on the Accused Products
 15 consists of a series of equally sized absorbing or reflecting surfaces where an absorbing
 16 surface represents a 0 and a reflecting surface represents a 1. It thus includes only the
 17 two binary characters, 0 and 1, that K-fee stated a “barcode” must include “more than.”
 18 Contrary to its winning arguments before the EPO, K-fee now alleges before this Court
 19 that this bitcode constitutes a barcode and, thus, infringes the Asserted Patents. But
 20 based on K-fee’s representations in Europe, the bitcode of the Accused Products is not
 21 a barcode, and thus cannot infringe the Asserted Patents.

22 Nespresso’s construction of the other terms at issue, “media chute” and the
 23 “electrically conductive section” terms, are consistent with the plain and ordinary
 24 meaning of those terms read in view of the intrinsic record. K-fee’s interpretations are
 25 not, as evidenced by its infringement contentions, and indeed are inconsistent with the
 26 purpose of those claim elements as set forth in the specification of the Asserted Patents.
 27 Finally, two claim terms from the ’531 Patent are indefinite, as they fail to specify any
 28 objective boundaries to the scope of the claim.

1 III. Legal Standards

2 Claim terms are “generally given their ordinary and customary meaning”; that is,
 3 “the meaning that the term would have to a person of ordinary skill in the art in question
 4 at the time of the invention.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312–13 (Fed. Cir.
 5 2005) (internal citation and quotations omitted). Though the claims are the focus of any
 6 claim construction exercise, they “must be read in view of the specification, of which
 7 they are a part.” *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed. Cir.
 8 1995). “The specification ‘is always highly relevant to the claim construction analysis.
 9 Usually, it is dispositive; it is the single best guide to the meaning of a disputed term.’”
 10 *Phillips*, 415 F.3d at 1315. “‘The construction that stays true to the claim language and
 11 most naturally aligns with the patent’s description of the invention will be, in the end,
 12 the correct construction.’” *SimpleAir, Inc. v. Sony Ericsson Mobile Commc’ns AB*, 820
 13 F.3d 419, 430 (Fed. Cir. 2016) (quoting *Renishaw PLC v. Marposs Societa’ per Azioni*,
 14 158 F.3d 1243, 1250 (Fed. Cir. 1998)).

15 In addition to consulting the specification, “a court ‘should also consider the
 16 patent’s prosecution history, if it is in evidence.’” *Phillips*, 415 F.3d at 1317 (quoting
 17 *Markman*, 52 F.3d at 980). The prosecution history, is “part of the ‘intrinsic evidence,’”
 18 and “consists of the complete record of the proceedings before the PTO and includes the
 19 prior art cited during the examination of the patent. Like the specification, the
 20 prosecution history provides evidence of how the PTO and the inventor understood the
 21 patent.” *Id.* (internal citations omitted).

22 The Federal Circuit has recognized that when the prosecution history of a related
 23 foreign patent application contains information relevant to determining the scope of
 24 patent claims or whether a claim is infringed under the doctrine of equivalents, that
 25 information ***must be considered***. *Caterpillar Tractor Co. v. Berco, S.p.A.*, 714 F.2d
 26 1110, 1116 (Fed. Cir. 1983) (“Though no authority is cited for the proposition that
 27 instructions to foreign counsel and a representation to foreign patent offices should be
 28

1 considered . . . there is ample such authority in decisions of other courts and when such
2 matters comprise relevant evidence they must be considered.”).

3 Although the Federal Circuit has “caution[ed] against indiscriminate reliance on
4 the prosecution of corresponding foreign applications in the claim construction
5 analysis,” *AIA Eng’g Ltd. v. Magotteaux Int’l S/A*, 657 F.3d 1264, 1279 (Fed. Cir.
6 2011), it routinely considers statements made by the patentee in foreign proceedings
7 in determining the proper construction of claims. *See, e.g., Gillette Co. v. Energizer*
8 *Holdings, Inc.*, 405 F.3d 1367, 1374 (Fed. Cir. 2005) (considering the patentee’s
9 arguments before the European Patent Office (EPO) and concluding that a “blatant
10 admission by this same defendant before the EPO clearly support[ed]” the court’s
11 construction); *Starhome GmbH v. AT&T Mobility LLC*, 743 F.3d 849, 858 (Fed. Cir.
12 2014) (“Although we view Starhome’s statements [made in a related foreign
13 application] with the requisite caution, they do provide yet another indication that the
14 patentees did not intend to depart from the ordinary meaning of ‘intelligent
15 gateway.’”); *Glaxo Group Ltd. v. Ranbaxy Pharms., Inc.*, 262 F.3d 1333, 1337 (Fed.
16 Cir. 2001) (noting that a statement in a related UK prosecution history “bolsters this
17 reading” of the claimed “essentially free from crystalline material” limitation in the
18 asserted U.S. patent).¹

19
20
21
22
23
24 ¹ Indeed, statements made in a foreign related filing can be so significant that courts
25 will consider them even when they are made after the issuance of the United States patent
26 at issue (although here, K-fee’s statements to the EPO were made before the Asserted
27 Patents issued). *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1312 (Fed. Cir. 2014),
28 *overruled on other grounds by Williamson v. Citrix Online, LLC*, 792 F.3d 1339 (Fed.
Cir. 2015) (finding that statements made “during prosecution of a related Japanese patent
further support” the court’s construction, noting that “[t]his court has previously found
that statements made in related, later-prosecuted U.S. patents may inform the meaning
of earlier issued claims”).

IV. Argument

A. “barcode” (’176, ’177, and ’531 Patents)

K-fee’s Proposed Construction	Nespresso’s Proposed Construction
“Plain and ordinary meaning without substituting synonyms for the individual words in this term/phrase”	“machine readable code consisting of parallel bars of different widths that encode more than only two unique binary characters such as 0 or 1”

1. K-fee Argued for Nespresso’s Proposed Construction Almost Word for Word in Europe

Nespresso’s proposed construction of the term barcode is based on K-fee’s own factual characterization of the *identical* claim term “barcode” in a European counterpart to the Asserted Patents, in documents that K-fee submitted to the PTO during prosecution and that are therefore part of the intrinsic record. *See V-Formation, Inc. v. Benetton Group SpA*, 401 F.3d 1307, 1311 (Fed. Cir. 2005) (“prior art cited in a patent or cited in the prosecution history of the patent constitutes intrinsic evidence”). K-fee clearly and unequivocally stated that a barcode does not include a code based on just two binary characters, such as “0” and “1,” which according to K-fee, would be a bitcode and *not* a barcode. K-fee made these arguments to distinguish its claims from the Jarisch prior art reference, which K-fee argued disclosed a “bitcode,” but *not* a barcode. In particular, K-fee stated: “[Jarisch] then 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.’” (Ex. 2 (May 20, 2019 Response to Opposition and certified translation) at 12 (emphases in original).) K-fee further explained:

It is readily apparent that not every “bit code” is automatically a barcode. For example *the first sequence of zeros and ones disclosed in [Jarisch] is not a barcode because the lines of other thicknesses, as are typical for the barcode, are absent*. But a Morse code is for example also a bit code, but not a barcode.

(*Id.* at 14 (emphasis added); *see also* Ex. 3 (May 19, 2019 Jesse Declaration and certified translation) at 7 (“[B]arcodes—in contrast to binary codes—are based on information printed onto a medium in the form of bars and gaps, which are then strictly optically readable by detecting lines and gaps, wherein the use of barcodes regularly implies that more than two different optically recordable elements and/or symbols are used that can be analyzed when the barcode is read.” (emphasis in original).) In short, K-fee argued that because a barcode is always constructed from bars of variable widths and, thus, includes more than just two binary characters, such as 0 and 1, the bitcode consisting of a sequence of zeros and ones disclosed in Jarisch—and used in the Accused Products—is not a barcode. The EPO accepted K-fee’s factual representations about a “barcode” wholesale. Specifically, in its Interim Decision upholding K-fee’s patent, the EPO stated:

In the opinion of the patent proprietor, . . . [Jarisch] addresses binary codes (see e.g. [Jarisch] page 7, line 6, 7) that exclusively represent two states in contrast to barcodes, which in addition to lines and gaps also rely on width as yet another parameter to represent information. . . . ***The opposition division is of the opinion that the binary code in [Jarisch] cannot be regarded as a barcode,*** specifically because [Jarisch] intends to differentiate itself from these barcodes, ***as also demonstrated by the patent proprietor.*** It is also not evident that the reflective and/or absorbing/diffracting surfaces disclose a barcode having variable widths.

(Ex. 7 (August 9, 2021 EPO Interim Decision and certified translation) at 9–10 (emphases added).)

As noted above, these documents are part of the intrinsic record and would necessarily be considered by a person of skill, thus providing important evidence of how the claims should be interpreted. *Phillips*, 415 F.3d at 1317 (explaining that the prosecution history is “part of the ‘intrinsic evidence,’” and “consists of the complete record of the proceedings before the PTO and includes the prior art cited during the examination of the patent”). Like the specification, the prosecution history provides evidence of how the PTO and the inventor understood the patent.” *Id.* (quoting

1 *Markman*, 52 F.3d at 980)). K-fee’s proposed interpretation is therefore contrary not
 2 only to its previous representations but also to the intrinsic record.

3 **2. K-fee Should Be Held to Its Repeated and Unequivocal**
 4 **Representations**

5 Having succeeded in saving its claims from invalidation in Europe based on an
 6 interpretation of barcode that excludes Jarisch’s bitcode, K-fee cannot be heard to argue
 7 in this Court that the term barcode in the Asserted Patents covers the exact bitcode it
 8 told the European Patent Office was excluded from the term “barcode.”

9 As discussed above in Section III, the Federal Circuit routinely considers
 10 statements made by the patentee in foreign proceedings in determining the proper
 11 construction of the claims. *See also Apple*, 757 F.3d at 1312 (“This court has also
 12 considered statements made before a foreign patent office when construing claims if
 13 they are relevant and not related to unique aspects of foreign patent law.”) (citing cases).
 14 For example, in *Gillette*, the Federal Circuit found that a statement by the “same
 15 defendant before the EPO” was a “blatant admission” that “clearly supports this court’s
 16 holding that those skilled in the art would construe the claims of the [asserted patent] to
 17 encompass razors with more than three blades.” 405 F.3d at 1371; *see also Starhome*,
 18 743 F.3d at 858 (statements made in a related foreign application “provide yet another
 19 indication” of meaning of claim term); *Glaxo*, 262 F.3d at 1337 (statement in related UK
 20 prosecution history “bolsters this reading” of the claimed “essentially free from
 21 crystalline material” limitation in the asserted U.S. patent); *Apple*, 757 F.3d at 1312
 22 (statements made “during prosecution of a related Japanese patent further support” the
 23 court’s construction).

24 The facts in this case are even more compelling than those in *Gillette*. At issue
 25 there was whether the claim term “comprising . . . a group of first, second, and third
 26 blades” in the asserted patent directed to wet-shave safety razors can encompass four-
 27 bladed razors (such as the accused QUATTRO®) or if it is limited to solely three-bladed
 28 safety razors. 405 F.3d at 1371. The Federal Circuit found that the prosecution of a

1 related patent “supports reading claim 1 as an open claim,” explaining that “[t]he
 2 defendant itself endorsed an open interpretation of ‘comprising’ when it argued to the
 3 European Patent Office (EPO) that a virtually identical claim in Gillette’s European
 4 counterpart to the [asserted patent] would not exclude an arrangement with four or more
 5 blades.” *Id.* at 1374. Nothing in the *Gillette* opinion indicates that those arguments to
 6 the EPO were in the intrinsic record of the asserted patent, as is the case here.

7 Here, K-fee’s representations were not directed to a patent-related term of art such
 8 as “comprising,” but rather to a pure issue of technical fact having nothing to do with
 9 patent law—the meaning of the term “barcode.” Thus, K-fee argued to the EPO that the
 10 identical claim term “barcode” ***excludes*** a bitcode like the one disclosed in Jarisch
 11 because a barcode is “always” constructed from bars of variable widths, and thus
 12 includes more than just two binary characters such as 0 and 1. As in *Gillette*, K-fee’s
 13 statements before the EPO constitute a “blatant admission by this same defendant before
 14 the EPO” that “clearly supports” Nespresso’s construction of the barcode term. *Id.*

15 Notably, K-fee’s statements were not made in the context of any requirement
 16 unique to foreign law. *Cf. Pfizer, Inc. v. Ranbaxy Labs. Ltd.*, 457 F.3d 1284, 1290 (Fed.
 17 Cir. 2006) (finding that “statements made during prosecution of foreign counterparts to
 18 the ’893 patent are irrelevant to claim construction because they were made in response
 19 to patentability requirements unique to [foreign] law”). Rather, they are squarely
 20 directed to how those of ordinary skill in the precise art implicated here understand the
 21 technical term “barcode” now at issue. These are exactly the types of factual statements
 22 upon which the Federal Circuit routinely relies in the claim construction process. *See*
 23 *supra* Section III.

24 In particular, here, where the EPO relied on K-fee’s statements in upholding K-
 25 fee’s patent, and K-fee thus benefited from those representations and distinctions over
 26 the prior art, K-fee should not be permitted to turn around and argue the opposite of what
 27 it argued in Europe in order to maintain an infringement case against Nespresso. *See,*
 28 *e.g., Seachange Int’l, Inc. v. C-Cor Inc.*, 413 F.3d 1361, 1372–73 (Fed. Cir. 2005)

1 (“Where an applicant argues that a claim possesses a feature that the prior art does not
 2 possess in order to overcome a prior art rejection, the argument may serve to narrow the
 3 scope of otherwise broad claim language.”); *see also New Hampshire v. Maine*, 532 U.S.
 4 742, 749 (2001) (“[W]here a party assumes a certain position in a legal proceeding, and
 5 succeeds in maintaining that position, he may not thereafter, simply because his interests
 6 have changed, assume a contrary position, especially if it be to the prejudice of the party
 7 who has acquiesced in the position formerly taken by him.”) (quoting *Davis v. Wakelee*,
 8 156 U.S. 680, 689 (1895)).

9 K-fee’s conclusory expert declaration (Ex. 8 (Singhose Decl.) ¶¶ 20–21) does not
 10 address, and cannot overcome, K-fee’s unequivocal factual representations to foreign
 11 patenting authorities. Dr. Singhose’s statement that “there is no language in the
 12 specification or prosecution history of the patents limiting the term barcode” (*id.* ¶ 20)
 13 does not address K-fee’s unequivocal arguments for Nespresso’s proposed construction
 14 in Europe, and therefore misses the point. It is also inaccurate, as the intrinsic record
 15 includes K-fee’s EPO filings containing these arguments, which any reliable opinion
 16 must take into account. Dr. Singhose goes so far as to state that “I am not aware of any
 17 extrinsic evidence that supports the notion that all barcodes are so limited.” (*Id.* ¶ 20.)
 18 But before the EPO, K-fee submitted numerous publications in support of its
 19 interpretation of the term barcode, including two textbooks by its expert Mr. Jesse and a
 20 Wikipedia article that Mr. Jesse relied upon in the opinion discussed above. (Ex. 3 (May
 21 19, 2019 Jesse Declaration and certified translation) at 9.) One of these textbooks and
 22 the Wikipedia article are cited on the face of the Asserted Patents, and are thus also
 23 intrinsic evidence. *See* ’176 Patent at 7; ’177 Patent at 6; ’531 Patent at 7; *V-Formation*,
 24 401 F.3d at 1311. Either Dr. Singhose was not made aware of these critical facts, or he
 25 ignores them, but either way, his opinion is fatally defective at least because of this
 26 omission.

27 K-fee should not be permitted to read the term “barcode” one way in Europe to
 28 save the validity of its patents and another way in the present case to maintain its

1 infringement allegations. This Court should hold K-fee to its clear statements before the
 2 EPO about the meaning of the term barcode by construing it to mean precisely what K-
 3 fee represented that it means—a “machine readable code consisting of parallel bars of
 4 different widths that encode more than only two unique binary characters such as 0 or
 5 1.”

6 **B. “wall region with an electrically conductive section” (’177, ’531 Patents);**
 7 **“base element comprises an electrically conductive section” (’531 Patent)**

8 Claim Term	K-fee’s Proposed Construction	Nespresso’s Proposed Construction
9 “wall region with an electrically conductive section”	10 “Plain and ordinary meaning without substituting synonyms for the individual words in this term/phrase”	11 “wall region where some but not all of the wall region is electrically conductive”
12 “base element comprises an electrically conductive section”	13 “Plain and ordinary meaning without substituting synonyms for the individual words in this term/phrase”	14 “wall region where some but not all of the wall region is electrically conductive”

15 Nespresso’s construction of the “electrically conductive section” terms gives
 16 meaning to all words in these claim terms, and is consistent with their context in the
 17 specification. Specifically, Nespresso’s construction makes clear that the “section” that
 18 is “electrically conductive” must be a distinct part of the “wall region” or “base element”
 19 that is less than the entire “wall region” or the entire “base element.” K-fee’s proposed
 20 construction, as suggested in its Complaint and infringement contentions, ignores the
 21 term “section,” contrary to black-letter law requiring that meaning be given to all claim
 22 terms. Specifically, as discussed further below, K-fee attempts to read the term
 23 “electrically conductive *section*” of the wall region/base element on the *entirety* of the
 24 wall region/base element.

25 **1. K-fee’s Construction Is Inconsistent with the Plain Meaning of the**
 26 **Term “Section,” and Indeed Renders the term Superfluous**

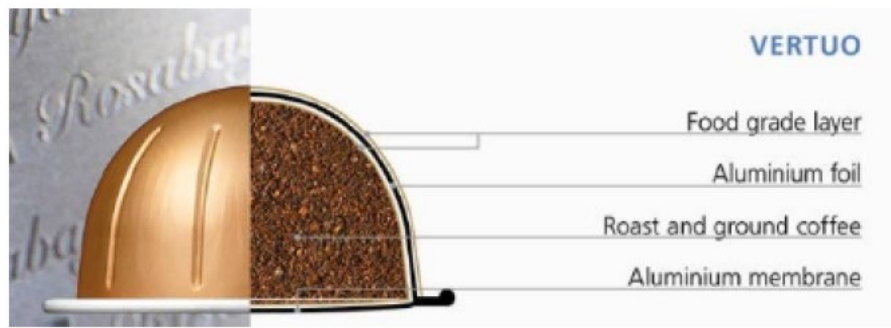
27 The plain meaning of the term “section” connotes a distinct part of a whole that
 28 is less than the whole itself. (Ex. 9, Oxford English Dictionary at 2 (“section: 2. A part

1 separated or divided off from the remainder; one of the portions into which a thing is cut
 2 or divided.”.) Thus, the children’s section at the library is one of many areas of books;
 3 others might be fiction, cooking, and periodicals. A section of a law school class is one
 4 group of students, not all of them. A section of a brief or opinion is one part of those
 5 documents, not the entire document.

6 K-fee could have drafted its claims to read that all or part of the wall region/base
 7 element is electrically conductive (assuming that was its intent), but it chose not to do
 8 so. It could have simply used one term—“region”—rather than two different terms,
 9 “region” and “section.” But, K-fee chose the phrase “electrically conductive *section*.”
 10 *See i4i Ltd. P’ship v. Microsoft Corp.*, 598 F.3d 831, 843 (Fed. Cir. 2010), *aff’d*, 564
 11 U.S. 91 131 (2011) (“Had the inventors intended this limitation, they could have drafted
 12 the claims to expressly include it.”); *Halliburton Energy Servs., Inc. v. M-I LLC*, 514
 13 F.3d 1244, 1255 (Fed. Cir. 2008) (emphasizing that claim language should “provide a
 14 clear-cut indication of the scope of subject matter embraced by the claim” and noting
 15 “that the patent drafter is in the best position to resolve the ambiguity in the patent
 16 claims”).

17 In its infringement contentions, K-fee points to a “base element” and “wall
 18 region” of the accused Vertuo capsules that are electrically conductive in their entirety
 19 (because they are made of aluminum) as satisfying the “electrically conductive section”
 20 claim terms:

21 “[E]ach capsule includes a base element having a wall region with an electrically
 22 conductive section made of aluminum foil. Aluminum is a metal, which is
 23 electrically conductive.”
 24
 25
 26
 27
 28



(Ex. 10 (Infring. Cont.) at Ex. 177, 23–26; *see also* D.I. 1 (Complaint) ¶ 77.) As the above image in K-fee’s contentions makes clear, there is no distinct “section” that is electrically conductive—*the entire* alleged wall region/base element is made from electrically conductive aluminum. K-fee’s proposal thus ignores the word “section” entirely, in violation of black-letter law. *See Wasica Fin. GmbH v. Cont’l Auto. Sys., Inc.*, 853 F.3d 1272, 1288 n.10 (Fed. Cir. 2017) (“It is highly disfavored to construe terms in a way that renders them void, meaningless, or superfluous.”); *SimpleAir*, 820 F.3d at 429 (“interpretations that render some portion of the claim language superfluous are disfavored”) (quoting *Power Mosfet Techs., L.L.C. v. Siemens AG*, 378 F.3d 1396, 1410 (Fed. Cir. 2004)); *Merck & Co. v. Teva Pharm. USA, Inc.*, 395 F.3d 1364, 1372 (Fed. Cir. 2005) (“A claim construction that gives meaning to all the terms of the claim is preferred over one that does not do so.”) (citations omitted). Put another way, under K-fee’s reading of the claims, “section” and the “region” are the same, rendering the term “section” superfluous.

Were it adopted, K-fee’s reading of the “section” of a region as constituting the entire region and a “section” of a base element as constituting the entire base element would undermine the public notice function of patent claims. *See PSC Computer Prods., Inc. v. Foxconn Int’l, Inc.*, 355 F.3d 1353, 1361 (Fed. Cir. 2004) (emphasizing “the important public notice function of patents—the mechanism whereby the public learns which innovations are the subjects of the claimed invention, and which are in the public domain”); *see also K-2 Corp. v. Salomon S.A.*, 191 F.3d 1356, 1364 (Fed. Cir. 1999)

1 (“Courts do not rewrite claims; instead, we give effect to the terms chosen by the
2 patentee.”).

3 **2. K-fee’s Construction Is Inconsistent with the Specification**

4 The specification refers to an “electrically conductive section” (or to electrical
5 conductivity at all) only as an exemplary “identifier.” (’177 Patent at 3:7–17, 9:14–20,
6 9:36–54.) The purpose of an “identifier” is to “individualize the respective portion
7 capsule” and thus determine whether the capsule is “suitable for the coffee machine”
8 and/or “control the production process of beverage and food by adapting” various
9 parameters. (*Id.* at 1:60–65, 5:53–61.) “The electrically conductive section, which is
10 inserted into the coffee machine, can become part of an electric circuit and causes
11 therefore a measurable change, which leads to the identification of the respective portion
12 capsule.” (*Id.* at 3:11–15.) K-fee’s apparent construction reading on a fully metallic
13 wall region/base element is also inconsistent with this purpose. With no boundary to the
14 “section” that is electrically conductive, there would be no way to distinguish between
15 proper or improper capsules or to select the processing parameters, which would defeat
16 the purpose of the claimed feature as an identifier. As such, every example of an
17 “electrically conductive section” in the specification consists of a discrete area, in the
18 same fashion as the other “identifiers” described in the specification. (*Id.* at 9:16, 9:38,
19 9:44, 10:1–4, Figs. 6, 9–11, 15.) Furthermore, the specification states that the identifier
20 “can be placed all over the portion capsule,” and is “preferably” “localized on the side
21 wall, the edge and/or the floor.” (*Id.* at 3:7–11.) The “localized” examples in the
22 specification are a narrow “ring” around the capsule wall (*id.* at 9:16, 10:1–4, Figs. 6
23 and 15), the “edge region’s back” (*id.* at 9:38, Fig. 9), or a “coat” on the “bottom” (*id.*
24 at 9:44, Figs. 10–11). This indicates that the “section” is a discrete area that is not the
25 capsule itself, as K-fee’s apparent construction suggests.

26 **C. “media chute” (’176, ’177 Patents)**

27 **K-fee’s Proposed Construction**

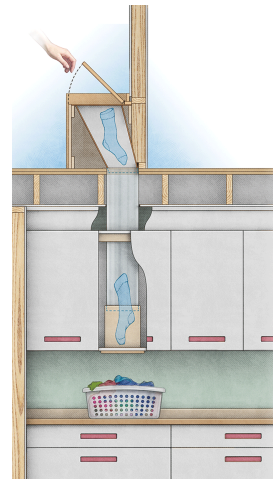
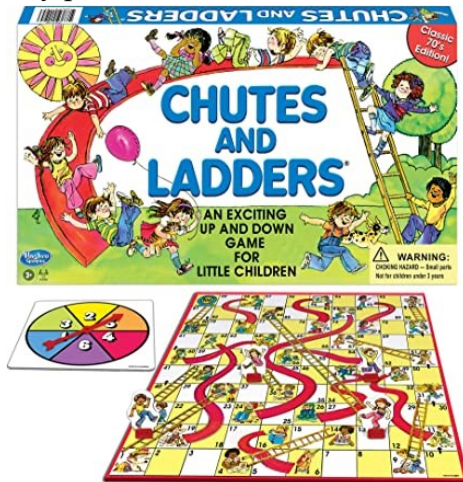
Nespresso’s Proposed Construction

“Plain and ordinary meaning without substituting synonyms for the individual words in this term/phrase”

“channel through which the portion capsule passes to a lower level”

Nespresso’s construction reflects the plain meaning of the word “chute,” specifically the chute through which the claimed beverage “medium” (i.e., the portion capsule) passes.

The plain meaning of the word “chute” is immediately familiar as a channel through which an object passes to reach a lower level (e.g., a laundry chute,² or the board game “Chutes and Ladders”).³ This understanding is consistent with contemporaneous English dictionaries. (See, e.g., Ex. 11, Merriam-Webster’s Collegiate Dictionary at 3 (“chute . . . n”: “1 a: FALL 6B b: a quick descent (as in a river): RAPID 2: an inclined plane, sloping channel, or passage down or through which things may pass : SLIDE 3: PARACHUTE”).)



² Image: How to Add a Laundry Chute, *available at* <https://www.finehomebuilding.com/2019/10/10/add-a-laundry-chute> (last visited January 3, 2022).

³ Image: HASBRO GAMING: Chutes and Ladders Board Game, *available at* <https://www.amazon.com/HASBRO-GAMING-Chutes-Ladders-Board/dp/B00V82MG2O> (last visited January 3, 2022).

1 Although there is relatively little discussion of the term “media chute” in the
 2 intrinsic record, the specification makes clear that the chute is a channel through which
 3 the portion capsule passes. The “media chute” is first described as a potential location
 4 for a mechanical identifier such as a set of “gearwheels” “in order to guarantee that
 5 incorrect portion capsule cannot be inserted into the coffee machines by *passing* the
 6 media chute.” (’177 Patent at 2:20–25 (emphasis added).) Specifically, a portion
 7 capsule with a gear-shaped circumference can be identified by a corresponding “ring
 8 gear, which is placed in the media chute,” and which “only revolves for a
 9 corresponding ring gear of the portion capsule” and thus “allows the portion capsule
 10 *to pass*.” (*Id.* at 2:49–59 (emphasis added); *see also id.* 10:46–66, Fig. 18.) As
 11 explained in the description of Figure 18 (annotated above), “[t]he portion capsule
 12 needs the rotation for *passing the media* chute’s *port* and *falling* in the intended
 13 position afterwards.” (*Id.* at 10:61–63 (emphasis added).) Even where the media chute
 14 does not contain a “gear wheel” identifier, the specification proposes that various
 15 detection means can be “placed in the media chute” as a place by which the capsule
 16 will pass when inserted. (*E.g., id.* at 9:12–13, 9:25–27, 9:29–35, 9:37–41, 9:49–54,
 17 9:61–64, 11:10–13.)

18 This mechanism is best understood in view of both prior art brewing machines
 19 and K-fee’s own commercial machines. As depicted in the below screen grabs from a
 20 K-fee promotional video for its “Twins II” machine, the plastic coffee capsules are
 21 oriented horizontally and are dropped vertically into a chute that leads to a horizontal
 22 brewing chamber:



(<https://www.youtube.com/watch?v=MWkBYuXdGEA>; *see also* Ex. 12 (U.S. Publication No. 2009/0249961) at Figs. 6–9; Ex. 13 (PCT Application No. WO2007/042414) at Figs. 9–12 (cited on the face of the Asserted Patents).) The same process is depicted in Figures 17 and 18 of the Asserted Patents, which depict the brewing chamber and the “media chute” through which the capsule passes to reach it.

In its infringement contentions, K-fee identifies as the claimed “media chute” a hemispherical cup on which the accused “portion capsule” rests for brewing. The portion capsule is placed directly in this cup by the user, and it does not move from that position until brewing is complete and it is extracted. The intrinsic record does not support K-fee’s reading of “chute” to encompass this mechanism. The portion capsule does not “pass” through the cup or “fall” anywhere “afterwards,” as discussed in the specification. *See supra*. Whatever K-fee’s rationale, K-fee is not applying the “plain and ordinary meaning” as it proposes in claim construction. The Court should accordingly adopt Nespresso’s construction.

D. “grooves are free from extending all the way into a region of the base element that is immediately adjacent to the flange” (’531 Patent)

K-fee’s Proposed Construction	Nespresso’s Proposed Construction
“Plain and ordinary meaning without substituting synonyms for the individual words in this term/phrase”	Indefinite

A claim is indefinite if it “fail[s] to inform, with reasonable certainty, those skilled in the art about the scope of the invention.” *Nautilus, Inc. v. Biosig Instruments, Inc.*,

1 572 U.S. 898, 901 (2014). In particular, a claim, “when read in light of the specification
 2 and the prosecution history, must provide objective boundaries for those of skill in the
 3 art.” *Interval Licensing LLC v. AOL, Inc.*, 766 F.3d 1364, 1370 (Fed. Cir. 2014). No
 4 such boundaries are provided in the claim phrase “grooves are free from extending all
 5 the way into a region of the base element that is immediately adjacent to the flange.”

6 First, there are no objective boundaries of the recited “region of the base element
 7 that is immediately adjacent to the flange.” Even if it is assumed that the region starts
 8 at the flange to which it is “immediately adjacent,” there is no way to tell where it ends.
 9 It could be of any size, and any shape. Indeed, the word “region” is by definition an
 10 indefinite area. (*See* Ex. 14, Meriam Webster Dictionary at 3 (“region (noun) 2a: an
 11 indefinite area of the world or universe”).)

12 Second the term “all the way” is highly subjective on its face. There is no
 13 indication in the specification for how far the grooves may or may not extend in order
 14 to be considered “all the way into the region” as recited in the claim term. For example,
 15 it is not clear whether the grooves would have to extend all the way to the far end of the
 16 region, or whether it would be sufficient for some portion of the grooves to fall entirely
 17 within the region.

18 Finally, it is unclear what it means for the grooves to be “free from extending” all
 19 the way into the region. The most common definition of the phrase “free from” means
 20 “without.” (Ex. 15, Collins Dictionary at 1 (“free from or free of: lacking; without”).)
 21 But the resulting phrase, “grooves are without extending all the way . . .” is nonsensical.
 22 K-fee’s expert suggests that the term means that the grooves “do not extend all the way
 23 to the flange.” (Ex. 8 (Singhose Decl.) ¶ 28.) But that is not the language K-fee used in
 24 its claims. Instead, K-fee’s claims recite “grooves are *free from extending* all the way
 25 into a region of the base element that is *immediately adjacent to* the flange.”

26 These issues are illustrated by applying them to the embodiment in Figure 19
 27 (annotated below) and the accompanying text. The text defines a “circumferential
 28 border 16 that is placed at the wall region . . . adjacent to the flange” which has an

enlarged diameter ('531 Patent at 12:16–22), and also refers to the “border’s region,” *id.* at 12:28. It says nothing, however, about where the region “immediately adjacent to the flange” might be. It could be the area above the border 16 (the green region), the border and the area above it (the yellow and green regions), the “border region,” or something else:

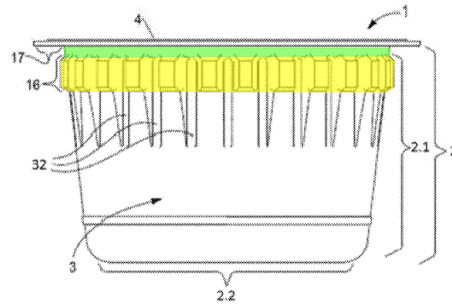


Fig. 19

Without knowing where the region “that is immediately adjacent to the flange” is, it is impossible to say whether the grooves (32 in the figure) are free from extending into that region. And even if that region were defined, one cannot determine whether the grooves extend “all the way” into it. For example, a person of ordinary skill might consider the grooves in Fig. 19 to extend all the way into green region, because the end of each groove falls entirely within that region. K-fee’s expert, on the other hand, says that these grooves satisfy the claim language because they “do not extend all the way to the flange.” (Ex. 8 (Singhose Decl.) ¶ 28.)

In short, the claim language says that the grooves must be “free from” extending an unknown distance into a region of unknown bounds. If a person of ordinary skill in the art cannot discern what the immediately adjacent region is, she cannot tell whether the grooves are “free from” extending “all the way into it.” And even if the region were defined, it is not clear what it means for a groove to be “free from” extending “all the way” into the region. That makes it impossible for a person of ordinary skill in the art to determine whether any particular grooves infringe the claims. This claim term thus fails Section 112’s requirement that the claims “particularly point[] out and distinctly

claim[] the subject matter which the applicant regards as his invention.” 35 U.S.C. § 112(b).

E. “lower section” / “upper section” (’531 Patent)

K-fee’s Proposed Construction	Nespresso’s Proposed Construction
“Plain and ordinary meaning without substituting synonyms for the individual words in this term/phrase”	Indefinite

The phrases “upper section” and “lower section” are indefinite because, like the term “region,” they fail to specify any objective boundaries to the scope of the claim discernable by a person of ordinary skill in the art. It is particularly important that a person of ordinary skill be able to determine the boundaries of these sections, because other claim elements are recited with reference to them. For example, the claims require that the upper section “comprises a circumferential border” and that “the wall of the lower section is angled, with respect to the upper section, and is tapered towards a bottom of the base element.” If a person of skill cannot determine what constitutes the upper section and the lower section, she cannot determine whether or not there is infringement.

The term “section” is used in several places in the specification, but the phrases “lower section” and “upper section” appear only in the claims. Generally, where the term “section” appears, it is accompanied by a concrete way to identify the section, such as “electrically conductive section” or “section made of a ferromagnetic material.” (*See, e.g.,* ’531 Patent at 3:7–17.) The claims fail to give any such distinctive limitation.

The claims do require that the upper section is adjacent to the flange and the lower section is between the upper section and the bottom of the base element, but this only gives the sections’ relative locations; it does not show how the “upper section” is delineated from the “lower section.” They also state that the “wall of the lower section is angled, with respect to the upper section.” (*Id.* at Claims 8, 16.) This might be sufficiently definite if the upper and lower section formed two distinct planes. This is not really illustrated in the specification, but in the below annotated Figure 19, one might

say that at least the grooves 32 in the pink “upper” section are angled with respect to the yellow “lower” section.

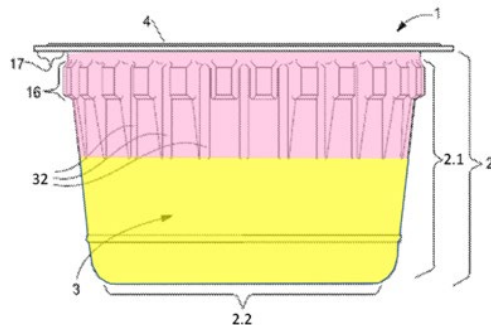


Fig. 19

'531 Patent, Fig. 19



Accused Nespresso Capsule

But that is not the interpretation of the claims that K-fee is applying here. Rather, K-fee is alleging infringement by a Nespresso capsule (above) with a base that is continuously curved, with no discontinuous angle whatsoever delineate the upper and lower section.⁴ In that context, there is no way to divine the objective boundaries of an “upper section” or “lower section” with any reasonable certainty.

As with the “grooves are free from” term, Dr. Singhose’s conclusory declaration does not save the claims from indefiniteness. Dr. Singhose’s only substantive analysis for this claim term is that “the terms ‘lower section’ / ‘upper section’ simply describe two different portions of the wall of the claimed capsule.” (Ex. 8 (Singhose Decl.) ¶ 29.) This is obviously true, but it does nothing to delineate the objective boundaries of the upper and lower section. And again, Dr. Singhose’s conclusory statements that a person of ordinary skill in the art would “understand [this] claim term[s] by its plain and

⁴ It is appropriate for a court be aware of, and to consider, the accused product to “supply the parameters and scope of the infringement analysis, including its claim construction component.” *Wilson Sporting Goods Co. v. Hillerich & Bradsby Co.*, 442 F.3d 1322, 1331 (Fed. Cir. 2006); *see also Cohesive Techs., Inc. v. Waters Corp.*, 543 F.3d 1351, 1367 (Fed. Cir. 2008) (court can consider accused device during claim construction); *Choon’s Design, LLC v. Idea Vill. Prod. Corp.*, 776 F. App’x 691, 695 n.3 (Fed. Cir. 2019) (“The district court did not err in considering the accused product in order to identify the claim terms material to infringement.”).

1 ordinary meaning” and that the term “has plain and ordinary meaning as used in
2 connection with mechanical beverage systems” (*id.* ¶¶ 27, 30) do not fix that fact.

3 ***

4 For the reasons set forth above, Nespresso respectfully requests that the Court
5 enter an order construing the claim terms above in the manner suggested.
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 Dated: January 19, 2022

Respectfully submitted,

2 By: /s/ Wayne Barsky

3
4 GIBSON, DUNN & CRUTCHER LLP
Wayne Barsky, SBN 116731
5 wbarsky@gibsondunn.com
2029 Century Park East
Suite 4000
6 Los Angeles, CA 90067-3026
Telephone: 310.552.8500
7 Facsimile: 310.551.8741

8 GIBSON, DUNN & CRUTCHER LLP
9 Y. Ernest Hsin, SBN 201668
ehsin@gibsondunn.com
10 555 Mission Street, Suite 3000
San Francisco, CA 94105-0921
Telephone: 415.393.8200
11 Facsimile: 415.393.8306

12 GIBSON, DUNN & CRUTCHER LLP
13 Christine L. Ranney, SBN 295773
cranney@gibsondunn.com
14 1801 California Street
Suite 4200
15 Denver, CO 80202-2642
Telephone: 303.298.5700
16 Facsimile: 303.298.5907

17 GIBSON, DUNN & CRUTCHER LLP
Andrew Philip Blythe, SBN 321867
18 ablythe@gibsondunn.com
3161 Michelson Drive
19 Irvine, CA 92612-4412
Telephone: 949.451.3800
20 Facsimile: 949.451.4220

21 *Attorneys for Defendants Nespresso USA*
22 *Inc. and Nestlé Holdings, Inc.*