THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD

Inventors:	Jarisch et al.
Appl. No.:	13/697,297
Conf. No.:	1065
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Title:	CAPSULE, SYSTEM AND METHOD FOR PREPARING A BEVERAGE BY CENTRIFUGATION
Art Unit:	1792
Examiner:	Chaim A. Smith
Docket No.:	3712036-01693

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

APPELLANT'S APPEAL BRIEF

Sir or Madam:

Appellant submits this Appeal Brief in support of the Notice of Appeal filed on December 6, 2016. This Appeal is taken from the Advisory Action dated September 15, 2016 and the Final Office Action dated June 14, 2016.

I. REAL PARTY IN INTEREST

The real party in interest for the above-identified patent application on appeal is Nestec S.A. as evidenced by the Assignment executed on December 14, 2010 and January 12, 2011 and recorded on February 3, 2014 at reel 032118, frame 0555 in the United States Patent and Trademark Office.

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II. SUMMARY OF CLAIMED SUBJECT MATTER

A summary of the single independent claim by reference to the specification and the figures is provided as follows:

Independent Claim 1 recites a capsule (reference numeral 7, Fig. 4) for the preparation of a beverage, the capsule comprising a container configured to house a beverage ingredient (page 5, lines 25-26), the container comprises a cup-shaped body (reference numeral 69, Fig. 4; page 5, lines 23-24) having a flange-like rim (reference numeral 73, Figs. 4, 5, and 7; page 5, lines 23-24), a lid connected to the cup-shaped body (reference numeral 60, Figs. 2 and 4; page 5, lines 24-25), and a code (reference numeral 70, Fig. 5) adapted for being identified or read by an external reader (reference numeral 62, Fig. 2), the code is arranged on a bottom of the flange-like rim, which is opposed to the lid (reference numeral 72, Fig. 4), to be read while the capsule is rotated around an axis (reference letter A, Figs. 5 and 6) of rotation traversing the capsule (page 5, lines 27-29; page 6, lines 9-11), wherein the container comprises a circumference (page 5, lines 29-32), the code comprises successive segments that extend substantially along at least an eighth of the circumference (page 6, lines 2-7), the cup-shaped body extends from a bottom end of the cup-shaped body to a top end of the cup-shaped body where the cup-shaped body terminates such that a height of the cup-shaped body is the distance from the bottom end to the top end (Fig. 4), the flange-like rim extends from the top end of the cup-shaped body (Fig. 4), and the lid has a height that is less than the height of the cup-shaped body (Fig. 4).

Although specification citations are given in accordance with 37 C.F.R. §41.37, these citations are merely examples of support in the specification for the terms used in this section of the Brief. There is no intention to suggest in any way that the terms of the claims are limited to the examples in the specification. As demonstrated by the citations, the claims are fully supported by the specification as required by law. However, it is improper under the law to read limitations from the specification into the claims. Pointing out specification support for the claim terminology in accordance with Rule 41.37(c) does not in any way limit the scope of the claims to those examples from which they find support. Nor does this exercise provide a mechanism for circumventing the law precluding reading limitations into the claims from the specification. In short, the specification citations are not to be construed as claim limitations or in any way used to limit the scope of the claims.

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III. ARGUMENT

A. LEGAL STANDARD

Obviousness under 35 U.S.C. §103

The Federal Circuit held that the legal determination of an obviousness rejection under 35 U.S.C. §103 is:

> whether the claimed invention as a whole would have been obvious to a person of ordinary skill in the art at the time the invention was made...The foundational facts for the prima facie case of obviousness are: (1) the scope and content of the prior art; (2) the difference between the prior art and the claimed invention; and (3) the level of ordinary skill in the art...Moreover, objective indicia such as commercial success and long felt need are relevant to the determination of obviousness...Thus, each obviousness determination rests on its own facts.

In re Mayne, 41 U.S.P.Q. 2d 1451, 1453 (Fed. Cir. 1997).

In making this determination, the Examiner has the initial burden of proving a *prima facie* case of obviousness. *In re Rijckaert*, 28 U.S.P.Q. 2d 1955, 1956 (Fed. Cir. 1993). This burden may only be overcome "by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings." *In re Fine*, 837 F.2d 1071, 1074 (Fed. Cir. 1988). "If the examination at the initial stage does not produce a prima facie case of unpatentability, then without more the Appellant is entitled to grant of the patent." *In re Oetiker*, 24 U.S.P.Q. 2d 1443, 1444 (Fed. Cir. 1992).

The Examiner must provide explicit reasons why the claimed invention is obvious in view of the prior art. The Supreme Court has emphasized that when formulating a rejection under 35 U.S.C. § 103(a) based upon a combination of prior art elements it remains necessary to identify the reason why a person of ordinary skill in the art would have combined the prior art elements in the manner claimed. *KSR v. Teleflex*, 550 U.S. 398 (2007).

Moreover, as the Federal Circuit explained, "the mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification." *In re Fritch*, 972 F.2d 1260, 1266 (Fed. Cir. 1992). Furthermore, "[o]ne cannot use hindsight reconstruction to pick and

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choose among isolated disclosures in the prior art" to recreate the claimed invention. *In re Fine*, 837 F.2d 1071, 1075 (Fed. Cir. 1988).

B. THE CLAIMED INVENTION AND ADVANTAGES THEREOF

As discussed in the specification, Appellant has recognized that a problem with identifying a capsule in a beverage preparation machine is that the retrieving or reading information from the capsule is not always reliable or convenient. The present claims are directed to an improved way to identify the capsule within a beverage production machine to ensure a more reliable and convenient retrieval or reading of information so as to adjust working parameters of the machine. See specification, page 2, lines 23-30.

In this regard, the present claims are directed to a capsule for the preparation of a beverage. The capsule includes a container configured to house a beverage ingredient. The container has a code adapted for being identified or read by external reading means, and the code is arranged on the container to be read while the capsule is rotated around an axis of rotation traversing the capsule. More particularly, the capsule has a circumference wherein the code is arranged on the container along an arc-shaped or circular path of the circumference. In an embodiment, the capsule has a circumference wherein the code comprises successive segments which are individually rectilinear but extend substantially along at least a part of the circumference. The code may be arranged along at least an eighth of the circumference. Such a configuration provides a reliable reading or retrieval of information as well as an effective portion for information. In order to ensure a reliable reading or retrieval of information, the code is repeated along said circumference. The repetition ensures a higher probability that at least one code is readable but also may potentially reduce the reading time. See specification, page 2, line 23-page 3, line 14.

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C. THE OBVIOUSNESS REJECTION OF CLAIM 1 OVER *YOAKIM*, *BOYD*, *AKER*, *RUCHONNET*, *HALLIDAY '333*, *HALLIDAY '074*, *HAYES*, *MAHLICH*, *EVERS*, AND *ERLANDSSON* SHOULD BE REVERSED

In the Final Office Action, the Examiner rejected Claim 1 under 35 U.S.C. §103(a) as being unpatentable over International Patent Publication No. WO 2008/148601 to Yoakim et al. ("*Yoakim*") in view of U.S. Patent Publication No. 2002/0048621 to Boyd et al. ("*Boyd*") as evidenced by U.S. Patent Publication No. 2010/0078480 to Aker ("*Aker*"), International Patent Publication No. WO 2005/0440067 to Ruchonnet ("*Ruchonnet*"), U.S. Patent No. 6,698,333 to Halliday et al. ("*Halliday '333*"), U.S. Patent No. 7,097,074 to Halliday ("*Halliday '074*"), U.S. Patent No. 7,335,387 to Hayes et al. ("*Hayes*"), U.S. Patent Publication No. 2004/0089158 to Mahlich ("*Mahlich*"), U.S. Patent Publication No. 2008/0148948 to Evers et al. ("*Evers*"), and U.S. Patent Publication No. 2007/0203587 to Erlandsson et al. ("*Erlandsson*"). See Final Office Action, page 2. The Examiner maintained this rejection in the Advisory Action. See Advisory Action.

1. The Skilled Artisan Would Not Have Combined These References To Arrive At The Code Recited in Claim 1

Appellant respectfully submits that *Yoakim*, *Boyd*, *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* fail to render obvious independent Claim 1. For example, the skilled artisan would not have combined these cited references to arrive at a capsule comprising a code arranged on a bottom of the flange-like rim, which is opposed to the lid, wherein the cup-shaped body extends from a bottom end of the cup-shaped body to a top end of the cup-shaped body where the cup-shaped body terminates such that a height of the cup-shaped body is the distance from the bottom end to the top end, the flange-like rim extends from the top end of the cup-shaped body, and the lid has a height that is less than the height of the cup-shaped body, as required by independent Claim 1.

Yoakim discloses a capsule that includes a cup-shaped body and a sealing lid sealed onto the body. See *Yoakim*, for example, bottom of page 4. However, *Yoakim* does not disclose any code provided on the capsule. Indeed, the Examiner admits that Claim 1 differs from *Yoakim* in there being a code adapted for being identified or read by an external reader. Nonetheless, in an

attempt to remedy the deficiencies of *Yoakim*, the Examiner cites *Boyd* for the alleged disclosure of providing a code on the flange-like rim to be identified or read by an external reader. See Final Office Action, page 4.

However, *Boyd* does **not** disclose or suggest a code arranged on a bottom of the flange-like rim, which is opposed to the lid, wherein the cup-shaped body extends from a bottom end of the cup-shaped body to a top end of the cup-shaped body where the cup-shaped body terminates such that a height of the cup-shaped body is the distance from the bottom end to the top end, the flange-like rim extends from the top end of the cup-shaped body, and the lid has a height that is less than the height of the cup-shaped body, as required by independent Claim 1.

Specifically, *Boyd* is directed to a brewing packet that includes a machine interpretable feature that directs operation of the coffee machine in accordance with predefined brewing directives. However, *Boyd* merely discloses a **symmetrical** disc-shaped coffee packet with the alleged flange-like rim in the **middle** of the packet. The first filter portion 12 and the second filter portion 14 collectively define a cavity of the packet and are secured to the orbicular gasket 18. The first filter portion 12 at best extends from an end of the first filter portion 12 (as in Fig. 1) to one side of the orbicular gasket 18 on which a machine interpretable feature 30 is present; the orbicular gasket 18 is in the **middle** of the packet between the first filter portion 12 and the second filter portion 14; and the first filter portion 12 and the second filter portion 14 have the **same** height. See *Boyd*, for example, paragraphs [0027]-[0029]; and FIGS. 1-2. Therefore, the first filter portion 12 is NOT the claimed cup-shaped body, the second filter portion 14 is NOT the claimed lid, and the orbicular gasket 18 is NOT the claimed flange-like rim.

The Examiner alleges that "it is not known how the rim in the form of a flange shown by Boyd would not be considered 'flange-like' since said rim is unequivocally shown as a flange in figure 2, for example." See Final Office Action, page 7. Appellant respectfully submits that whether or not the rim shown by *Boyd* is "flange-like," the rim shown by *Boyd* is **not** <u>the **claimed** rim of the claimed capsule</u> which extends from the top end of the body of the capsule as defined by independent Claim 1. Specifically, Claim 1 recites that the body extends from a bottom end of the body to a top end of the body where the body terminates such that a height of the body is the distance from the bottom end to the top end, and the lid has a height that is less than the height of the body.

Therefore, *Yoakim* and *Boyd*, even if combinable, fail to disclose or suggest a code arranged on a bottom of the flange-like rim, which is opposed to the lid, wherein the cup-shaped body extends from a bottom end of the cup-shaped body to a top end of the cup-shaped body where the cup-shaped body terminates such that a height of the cup-shaped body is the distance from the bottom end to the top end, the flange-like rim extends from the top end of the cup-shaped body, and the lid has a height that is less than the height of the cup-shaped body, as required by independent Claim 1.

The Examiner alleges that *Yoakim* meets the height limitations as claimed, and that *Boyd* was brought to teach that it was conventional and well established in the art to place a code as claimed on the rim of a capsule and not brought to teach a particular rim structure as that was taught by *Yoakim*. See Advisory Action and Interview Summary. Appellant respectfully submits that even if *Yoakim* met the height limitations as claimed, and even if it was conventional and well established in the art to place a code on the rim of a capsule, nothing in *Yoakim* or *Boyd* discloses or suggests providing a code on a **bottom** of the flange-like rim as required by independent Claim 1.

Further, the other secondary references, *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson*, even if combinable, fail to remedy the deficiencies of *Yoakim* alone or in combination with *Boyd* regarding independent Claim 1. In this regard, the Examiner relies on *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* for the alleged evidence of arranging a code capable of being identified or read by an external reader on a container, relies on *Aker* for the alleged disclosure of arranging and repeating a code on the container along an arc-shaped or circular path of a circumference of the container, and relies on *Ruchonnet* for the alleged disclosure of printing a code with an ink which is not visible by the human eye under natural light. See Final Office Action, pages 5-6.

These references do not disclose or suggest a code arranged on a bottom of the flange-like rim, which is opposed to the lid, wherein the cup-shaped body extends from a bottom end of the cup-shaped body to a top end of the cup-shaped body where the cup-shaped body terminates such that a height of the cup-shaped body is the distance from the bottom end to the top end, the flange-like rim extends from the top end of the cup-shaped body, and the lid has a height that is less than the height of the cup-shaped body, as required by independent Claim 1. Neither do these references provide any reason or motivation for the skilled artisan to modify *Yoakim* alone

or in combination with *Boyd* (even if they are combinable) to include the claimed code on a bottom of the flange-like rim of a capsule as required by independent Claim 1.

As such, the skilled artisan would not have combined *Yoakim* with *Boyd*, *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* to arrive at independent Claim 1.

For at least the reasons discussed above, independent Claim 1 is novel, nonobvious, and distinguishable from *Yoakim*, *Boyd*, *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson*. Accordingly, the obviousness rejection of Claim 1 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* should be reversed.

2. The Examiner Failed To Provide Requisite Rational Underpinning

Appellant respectfully submits that *Yoakim*, *Boyd*, *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* fail to render obvious independent Claim 1. For example, the skilled artisan had no reason or motivation to modify these cited references to arrive at a capsule comprising a code arranged on a bottom of the flange-like rim, which is opposed to the lid, wherein the cup-shaped body extends from a bottom end of the cup-shaped body to a top end of the cup-shaped body where the cup-shaped body terminates such that a height of the cup-shaped body is the distance from the bottom end to the top end, the flange-like rim extends from the top end of the cup-shaped body, and the lid has a height that is less than the height of the cup-shaped body, as required by independent Claim 1.

The Examiner attempts to remedy the deficiencies of the cited references regarding the code being on a **bottom** of the flange-like rim by alleging that the position of the code does not provide patentability. Specifically, the Examiner cites MPEP 2144.04 VI.C as the basis for this allegation. See Final Office Action, pages 4-5. However, MPEP 2144.04 VI.C actually states that "the mere fact that a worker in the art could rearrange the parts of the reference device to meet the terms of the claims on appeal is not by itself sufficient to support a finding of obviousness. The prior art must provide a motivation or reason for the worker in the art, without the benefit of appellant's specification, to make the necessary changes in the reference device." Appellant respectfully submits that no such motivation or reason has been provided here.

The Examiner merely alleges that to modify *Yoakim* and provide a code on the flange-like rim capable of being identified or read by an external reader as allegedly disclosed by *Boyd* to be read while the capsule is rotated around an axis of rotation traversing the capsule would have been an obvious matter of choice and/or design to the ordinarily skilled artisan. The Examiner has not provided any reason whatsoever that the skilled artisan would have provided the code on a **bottom** of the flange-like rim according to the teachings of the cited references. See Final Office Action, page 4.

Indeed, as submitted in the Declaration under 37 CFR 1.132 ("*Declaration*") by the named inventor Christian Jarisch previously submitted on August 15, 2016 (a copy of which is enclosed herein for the convenience of the Board), there is no reason or motivation in the record for the skilled artisan to provide the code on the **bottom** of the flange-like rim as required by independent Claim 1. In this regard, as discussed above, *Yoakim* does not even teach a code provided on the capsule; *Boyd* at most teaches a code provided on an orbicular gasket of a brewing packet, but the orbicular gasket is not even the claimed position of the flange-like rim; and the other secondary references do not remedy the deficiencies of *Yoakim* alone or in combination with *Boyd*, even if combinable. See *Declaration*, paragraph 8.

None of the cited references provide any reason or motivation for the skilled artisan to provide the code on the **bottom** of the flange-like rim not even taught by these references. Indeed, there is no teaching in the cited references regarding any effects of the code being on the bottom of the capsule rim or anything that would have prompted the skilled artisan to provide the code on the bottom of the rim of the capsule as required by independent Claim 1. As such, the skilled artisan would not have modified the cited references alone or in combination to provide the code on the bottom of the flange-like rim to arrive at independent Claim 1. *Id.*

The U.S. Supreme Court stated that "rejections on obviousness cannot be sustained with mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." *KSR v. Teleflex Inc.*, 550 U.S. 398, 418 (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)).

For at least the reasons discussed above and in the *Declaration*, independent Claim 1 is novel, nonobvious, and distinguishable from *Yoakim*, *Boyd*, *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson*. Accordingly, the obviousness rejection

of Claim 1 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* should be reversed.

3. The Skilled Artisan Would Not Have Arrived At The Code Recited in Claim 1 As An Obvious Matter Of Choice And/Or Design

Appellant respectfully submits that *Yoakim*, *Boyd*, *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* fail to render obvious independent Claim 1. For example, the skilled artisan would not have arrived at independent Claim 1 as an obvious matter of "design choice" because the specification demonstrates attendant advantages of the specifically claimed arrangement of the code on the capsule.

As noted above, the Examiner alleges that to modify *Yoakim* and provide a code on the flange-like rim capable of being identified or read by an external reader as allegedly disclosed by *Boyd* to be read while the capsule is rotated around an axis of rotation traversing the capsule would have been an obvious matter of choice and/or design to the ordinarily skilled artisan. The Examiner also alleges that "Boyd discloses code arrangements on a flange-like rim that would be readable from either side of the capsule as clearly shown in figures 2f and 2h," and that "the particular orientation required with respect to the code would be a function of the placement of the sensor in a brewing device which would be an obvious matter of choice and/or design." See Final Office Action, pages 4 and 7.

However, design choice does not apply when the claimed structure has improved functionality over the corresponding element in the cited reference. See, e.g, *In re Kuhle*, 526 F.2d 553, 555 (CCPA 1975). As detailed in the specification and also in the *Declaration*, the specifically claimed arrangement of the code on the capsule--namely, by providing the code on the bottom of the rim of the capsule which is opposed to the lid of the capsule--the bottom of the rim is sufficiently away from the liquid injection and beverage delivery areas, so that there is a lower risk for the code to become unreadable such if partly or totally hidden or soiled by beverage residues or otherwise (e.g., coffee particles); and as a result, the reading is made more reliable. See specification, for example, top of page 4; see also *Declaration*, paragraph 7. As such, the claimed arrangement has an improved functionality which renders improper the allegation of obviousness based on design choice.

Additionally, the Examiner did not provide a convincing line of reasoning why the specifically claimed arrangement of the code on the capsule would be an obvious matter of design choice. To support a conclusion that a claim is directed to obvious subject matter, i.e., that a feature is an obvious matter of design choice, an Examiner must present a 'convincing line of reasoning' as to why one of ordinary skill in the art would have found the claimed feature to have been obvious. *Ex parte Clapp*, 227 USPQ 972, 973 (BPAI 1985). When determining whether a rejection based on design choice is appropriate, the Examiner must review the specification and ascertain if the limitation in question is disclosed as serving any advantage or particular purpose, or whether it solves a stated problem. The Examiner also should explain the reasoning used to determine that the prior art would have performed equally as well as the claimed invention. These two steps help present the aforementioned "convincing line of reasoning." *Ex parte Clapp*, 227 U.S.P.Q. at 973. This analysis was not performed here, and thus any allegation of obviousness based on design choice is improper.

For at least the reasons discussed above and in the *Declaration*, the obviousness rejection of Claim 1 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* should be reversed.

D. THE OBVIOUSNESS REJECTION OF CLAIMS 2 AND 5 OVER *YOAKIM*, *BOYD*, *AKER*, *RUCHONNET*, *HALLIDAY '333*, *HALLIDAY '074*, *HAYES*, *MAHLICH*, *EVERS*, AND *ERLANDSSON* SHOULD BE REVERSED

In the Final Office Action, the Examiner rejected Claims 2 and 5 under 35 U.S.C. §103(a) as being unpatentable over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson*. See Final Office Action, page 2. The Examiner maintained this rejection in the Advisory Action. See Advisory Action.

Appellant respectfully submits that the patentability of independent Claim 1 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* as discussed in the preceding section renders Claims 2 and 5 patentable over these references because these claims depend from Claim 1.

Furthermore, Claim 2 requires that the code be arranged on the container along an arc-shaped or circular path of the circumference of the container, and Claim 5 requires that the code be repeated along the circumference of the container. The Examiner alleges that *Yoakim* in view

of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* disclose that it was well established to arrange and repeat a code on the container along an arc-shaped or circular path of a circumference of the container and specifically cites Figs. 2A, 2B, 4A, 4B, 4A (which Appellant believes is a typographic error and should be "5A"), and 5B of *Aker* (the Examiner cites '482 which Appellant believes is again a typographic error and should be "'480," i.e., *Aker*). See Final Office Action, page 5.

However, *Aker* teaches repetitive barcodes printed on the **top** surface of the capsule cover. See *Aker*, for example, Figs. 2A, 2B, 4A, 4B, 5A, and 5B. As discussed above, the skilled artisan would not have modified the cited references alone or in combination to provide the code on the **bottom** of the flange-like rim. See *Declaration*, paragraph 8. Therefore, even if it were established to arrange and repeat a code on the container along an arc-shaped or circular path of a circumference of the container as alleged by the Examiner, the proposed combination of the cited references would not have arrived at a code (repetitive or non-repetitive) on the **bottom** of the flange-like rim along an arc-shaped or circular path of a circumference of the container. As such, even if the cited references are combinable, the skilled artisan would not have combined these references to arrive at the respective elements of Claims 2 and 5 in combination with the novel and non-obvious elements of the corresponding independent Claim 1.

Accordingly, the obviousness rejection of Claims 2 and 5 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* should be reversed.

E. THE OBVIOUSNESS REJECTION OF CLAIM 19 OVER *YOAKIM*, *BOYD*, *AKER*, *RUCHONNET*, *HALLIDAY '333*, *HALLIDAY '074*, *HAYES*, *MAHLICH*, *EVERS*, AND *ERLANDSSON* SHOULD BE REVERSED

In the Final Office Action, the Examiner rejected Claim 19 under 35 U.S.C. §103(a) as being unpatentable over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson*. See Final Office Action, page 2. The Examiner maintained this rejection in the Advisory Action. See Advisory Action.

Appellant respectfully submits that the patentability of independent Claim 1 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*,

Mahlich, *Evers*, and *Erlandsson* as discussed in the preceding section renders Claim 19 patentable over these references because these claims depend from Claim 1.

Furthermore, Claim 19 requires a peripheral edge that is an outermost circular line of the capsule, wherein the code is positioned within 10 mm of the peripheral edge. The Examiner alleges that *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* disclose that it was well established to arrange and repeat a code on the container along an arc-shaped or circular path of a circumference of the container and specifically cites Figs. 2A, 2B, 4A, 4B, 4A (which Appellant believes is a typographic error and should be "5A"), and 5B of *Aker* (the Examiner cites '482 which Appellant believes is again a typographic error and should be "'480," i.e., *Aker*). The Examiner further alleges that regarding Claim 19 which requires that the code is positioned within 10 mm of the peripheral edge, "once it was known to place the code on a peripheral edge of a capsule it is not seen that patentability would be predicted on the particular distance the code would be placed from said peripheral edge. Where the only difference between the prior art and the claims would be a recitation of a relative dimension, in this case a distance, and a capsule having the claim[ed] relative distance would not perform differently than the prior art capsule the claimed capsule would not be seen as patentably distinct from the prior art capsule." See Final Office Action, page 5.

However, this allegation is merely a conclusory statement. As noted above, the U.S. Supreme Court stated that "rejections on obviousness cannot be sustained with mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." *KSR v. Teleflex Inc.*, 550 U.S. 398, 418 (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)).

Here, as discussed above, the skilled artisan would not have combined the cited references to arrive at a code on the bottom of the flange-like rim along an arc-shaped or circular path of a circumference of the container. Therefore, the difference between the cited references and the claims is NOT only a recitation of the distance of the code from the peripheral edge. Further, the Patent Office merely provides a conclusory statement by failing to provide any reason whatsoever that the claimed capsule having the claim distance would not perform differently than the capsule of the cited references. Thus, the Patent Office has failed to provide the requisite rational underpinning to support the obviousness rejection.

Appellant respectfully submit that even if the cited references are combinable, the skilled artisan would not have combined these references to arrive at the respective elements of Claim 19 in combination with the novel and non-obvious elements of the corresponding independent Claim 1.

Accordingly, the obviousness rejection of Claim 19 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* should be reversed.

F. THE OBVIOUSNESS REJECTION OF CLAIM 6 OVER *YOAKIM*, *BOYD*, *AKER*, *RUCHONNET*, *HALLIDAY '333*, *HALLIDAY '074*, *HAYES*, *MAHLICH*, *EVERS*, AND *ERLANDSSON* SHOULD BE REVERSED

In the Final Office Action, the Examiner rejected Claim 6 under 35 U.S.C. §103(a) as being unpatentable over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson*. See Final Office Action, page 2. The Examiner maintained this rejection in the Advisory Action. See Advisory Action.

Appellant respectfully submits that the patentability of independent Claim 1 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* as discussed in the preceding section renders Claim 6 patentable over these references because this claim depends from Claim 1.

Furthermore, Claim 6 requires that the code be a bit code formed by a series of discrete polygonal or dot surfaces printed on and/or embossed in the container. The Examiner cites Fig. 2h of *Boyd* for the alleged disclosure of dot surfaces. See Final Office Action, page 5. However, *Boyd* actually discloses in Fig. 2h one or more "**holes**" instead of **dot surfaces printed on and/or embossed in the container**. See *Boyd*, for example, paragraph [0029]. Therefore, even if the cited references are combinable, the skilled artisan would not have combined these references to arrive at the elements of Claim 6 in combination with the novel and non-obvious elements of the corresponding independent Claim 1.

Accordingly, the obviousness rejection of Claim 6 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* should be reversed.

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G. THE OBVIOUSNESS REJECTION OF CLAIM 7 OVER *YOAKIM*, *BOYD*, *AKER*, *RUCHONNET*, *HALLIDAY '333*, *HALLIDAY '074*, *HAYES*, *MAHLICH*, *EVERS*, AND *ERLANDSSON* SHOULD BE REVERSED

In the Final Office Action, the Examiner rejected Claim 7 under 35 U.S.C. §103(a) as being unpatentable over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson*. See Final Office Action, page 2. The Examiner maintained this rejection in the Advisory Action. See Advisory Action.

Appellant respectfully submits that the patentability of independent Claim 1 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* as discussed in the preceding section renders Claim 7 patentable over these references because this claim depends from Claim 1.

Furthermore, Claim 7 requires that the code be printed by an ink which is not visible by a human eye under natural light. The Examiner relies on *Ruchonnet* for the alleged disclosure of printing the code with an ink which is not visible by the human eye under natural light. Nevertheless, the Examiner alleges that "once it was known to arrange a code on the flange-like rim of the capsule it is not seen that patentability would be predicted by the visibility or lack thereof of the code by the human eye under natural light absent strong and compelling evidence to the contrary. The substitution of one known machine readable coding ink for another known machine readable coding ink would have been obvious." See Final Office Action, pages 5-6.

However, this allegation is merely a conclusory statement. As noted above, the U.S. Supreme Court stated that "rejections on obviousness cannot be sustained with mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." *KSR v. Teleflex Inc.*, 550 U.S. 398, 418 (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)). Here, the Patent Office merely provides a conclusory statement by failing to provide any reason whatsoever that the skilled artisan would have found it obvious to substitute one known machine readable coding ink for another known machine readable coding ink. Thus, the Patent Office has failed to provide the requisite rational underpinning to support the obviousness rejection.

Moreover, as discussed above, the skilled artisan would not have modified the cited references alone or in combination to provide the code on the **bottom** of the flange-like rim. See *Declaration*, paragraph 8. Therefore, even if *Ruchonnet* is combinable with *Yoakim* in view of

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Boyd as evidenced by the other cited references, the skilled artisan would not have combined the cited references to arrive at a code printed by an ink invisible by the human eye under natural light on the **bottom** of the flange-like rim of the capsule. As such, even if the cited references are combinable, the skilled artisan would not have combined these references to arrive at the elements of Claim 7 in combination with the novel and non-obvious elements of the corresponding independent Claim 1.

Accordingly, the obviousness rejection of Claim 7 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* should be reversed.

H. THE OBVIOUSNESS REJECTION OF CLAIMS 8-9 OVER *YOAKIM*, *BOYD*, *AKER*, *RUCHONNET*, *HALLIDAY '333*, *HALLIDAY '074*, *HAYES*, *MAHLICH*, *EVERS*, AND *ERLANDSSON* SHOULD BE REVERSED

In the Final Office Action, the Examiner rejected Claims 8-9 under 35 U.S.C. §103(a) as being unpatentable over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson*. See Final Office Action, page 2. The Examiner maintained this rejection in the Advisory Action. See Advisory Action.

Appellant respectfully submits that the patentability of independent Claim 1 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* as discussed in the preceding section renders Claims 8-9 patentable over these references because this claim depends from Claim 1.

Furthermore, Claim 8 requires that the code be printed or embossed by a pattern which possesses surfaces having different reflective and/or absorbing properties to light, and Claim 9 requires that the pattern possess a first surface having inclined mirroring or absorbing properties to light and a second surface having flat mirroring or flat reflective properties to light. The Examiner alleges that *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* discloses that "the code (30) can be printed or embossed by a pattern (geometric shape) which possesses surfaces having different reflective and/or absorbing properties to light (color), wherein the pattern possesses a first surface having inclined (raised) mirroring or flat reflective properties to light (code 32 can be

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geometric shape that may be raised or lowered and may incorporate a color)" by citing *Boyd*. See Final Office Action, page 6.

However, the Examiner fails to provide any reason whatsoever that the skilled artisan would have combined *Boyd* with *Yoakim* alone or in combination with the other cited references to arrive at Claims 8 and 9 and therefore, fails to provide the requisite rational underpinning to support the obviousness rejection. See *KSR v. Teleflex Inc.*, 550 U.S. 398, 418 (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)).

Moreover, as discussed above, the skilled artisan would not have modified the cited references alone or in combination to provide the code on the **bottom** of the flange-like rim. See *Declaration*, paragraph 8. Therefore, even if *Boyd* is combinable with *Yoakim* and the other cited references, the skilled artisan would not have combined the cited references to arrive at a code printed or embossed by a pattern which possesses surfaces having different reflective and/or absorbing properties to light (Claim 8) or a pattern which possesses a first surface having inclined mirroring or absorbing properties to light and a second surface having flat mirroring or flat reflective properties to light (Claim 9) on the **bottom** of the flange-like rim of the capsule. As such, even if the cited references are combinable, the skilled artisan would not have combined these references to arrive at the elements of Claims 8 and 9 in combination with the novel and non-obvious elements of the corresponding independent Claim 1.

Accordingly, the obviousness rejection of Claims 8-9 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* should be reversed.

I. THE OBVIOUSNESS REJECTION OF CLAIM 10 OVER *YOAKIM*, *BOYD*, *AKER*, *RUCHONNET*, *HALLIDAY '333*, *HALLIDAY '074*, *HAYES*, *MAHLICH*, *EVERS*, AND *ERLANDSSON* SHOULD BE REVERSED

In the Final Office Action, the Examiner rejected Claim 10 under 35 U.S.C. §103(a) as being unpatentable over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson*. See Final Office Action, page 2. The Examiner maintained this rejection in the Advisory Action. See Advisory Action.

Appellant respectfully submits that the patentability of independent Claim 10 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*,

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Mahlich, Evers, and *Erlandsson* as discussed in the preceding section renders Claim 6 patentable over these references because this claim depends from Claim 1.

Furthermore, Claim 10 requires that the code be mechanically embossed or engraved on the container by a laser. The Examiner alleges that *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* discloses that "the code would be mechanically embossed on the container" by citing the disclosure that "grooves may be incorporated to create a texture" in *Boyd*. See Final Office Action, page 6.

However, the Examiner again fails to provide any reason whatsoever that the skilled artisan would have combined *Boyd* with *Yoakim* alone or in combination with the other cited references to arrive at Claim 10 and therefore, fails to provide the requisite rational underpinning to support the obviousness rejection. See *KSR v. Teleflex Inc.*, 550 U.S. 398, 418 (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)).

Moreover, as discussed above, the skilled artisan would not have modified the cited references alone or in combination to provide the code on the **bottom** of the flange-like rim. See *Declaration*, paragraph 8. Therefore, even if *Boyd* is combinable with *Yoakim* and the other cited references, the skilled artisan would not have combined the cited references to arrive at a code mechanically embossed or engraved on the **bottom** of the flange-like rim of the capsule. As such, even if the cited references are combinable, the skilled artisan would not have combined these references to arrive at the elements of Claim 10 in combination with the novel and non-obvious elements of the corresponding independent Claim 1.

Accordingly, the obviousness rejection of Claim 10 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* should be reversed.

IV. CONCLUSION

Appellant respectfully submits that the Examiner failed to establish obviousness under 35 U.S.C. §103 for the pending claims. Accordingly, Appellant respectfully submits that the obviousness rejection is erroneous in law and in fact and should, therefore, be reversed by this Board.

The Director is authorized to charge any fee for the Appeal Brief that may be due and any additional fee that may be required or to credit any overpayment to Deposit Account No. 02-1818. If such a withdrawal is made, please indicate the Attorney Docket No. 3712036-01693 on the account statement.

Respectfully submitted,

K&L GATES LLP

BY: /Robert M. Barrett/
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Dated: January 20, 2017

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CLAIMS APPENDIX

PENDING CLAIMS ON APPEAL OF U.S. PATENT APPLICATION SERIAL NO. 13/697,297

Claim 1: A capsule for the preparation of a beverage, the capsule comprising a container configured to house a beverage ingredient, the container comprises a cup-shaped body having a flange-like rim, a lid connected to the cup-shaped body, and a code adapted for being identified or read by an external reader, the code is arranged on a bottom of the flange-like rim, which is opposed to the lid, to be read while the capsule is rotated around an axis of rotation traversing the capsule,

wherein the container comprises a circumference, the code comprises successive segments that extend substantially along at least an eighth of the circumference, the cup-shaped body extends from a bottom end of the cup-shaped body to a top end of the cup-shaped body where the cup-shaped body terminates such that a height of the cup-shaped body is the distance from the bottom end to the top end, the flange-like rim extends from the top end of the cup-shaped body, and the lid has a height that is less than the height of the cup-shaped body.

Claim 2: The capsule of Claim 1, wherein the code is arranged on the container along an arc-shaped or circular path of the circumference of the container.

Claim 5: The capsule of Claim 1, wherein the code is repeated along the circumference of the container.

Claim 6: The capsule of Claim 1, wherein the code is a bit code formed by a series of discrete polygonal or dot surfaces printed on and/or embossed in the container.

Claim 7: The capsule of Claim 1, wherein the code is printed by an ink which is not visible by a human eye under natural light.

Claim 8: The capsule of Claim 1, wherein the code is printed or embossed by a pattern which possesses surfaces having different reflective and/or absorbing properties to light.

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Claim 9: The capsule of Claim 8, wherein the pattern possesses a first surface having inclined mirroring or absorbing properties to light and a second surface having flat mirroring or flat reflective properties to light.

Claim 10: The capsule of Claim 1, wherein the code is mechanically embossed or engraved on the container by a laser.

Claim 19: The capsule of Claim 1, comprising a peripheral edge that is an outermost circular line of the capsule, wherein the code is positioned within 10 mm of the peripheral edge.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicants: Jarisch et al.
Appl. No.: 13/697,297
Conf. No.: 1065
Filed: November 9, 2012
Title: CAPSULE, SYSTEM AND METHOD FOR PREPARING A BEVERAGE BY CENTRIFUGATION
Art Unit: 1792
Examiner: Long, Luana Zhang
Docket No.: 3712036-01693

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

DECLARATION UNDER 37 C.F.R. §1.132

Sir or Madam:

The undersigned hereby states as follows:

1. My experience, qualifications, and current employment are as follows:

MS Microtechnical Engineering

R&D Project Manager , Systems Expert at

Nestlé System Technology Centre Orbe

2. I am a named inventor of the above-identified patent application and am therefore familiar with the inventions disclosed therein.

3. I reviewed the Office Action dated June 14, 2016 pending against the above-identified patent application. In addition to considering the pending Office Action, I reviewed the references cited therein as well as the pending claims. I believe that the obviousness rejections are based on a misunderstanding of these references and the pending claims. The basis for my opinion is set forth below.

4. Independent Claim 15 recites a capsule for the preparation of a beverage, the capsule comprising a container configured to house a beverage ingredient, the container comprises a cup-shaped body having a flange-like rim, a lid connected to the cup-shaped body, and a code adapted for being identified or read by an external reader, the code is arranged on a bottom of the flange-like rim, which is opposed to the lid, to be read while the capsule is rotated around an axis of rotation traversing the capsule, wherein the container comprises a circumference, the code comprises successive segments that extend substantially along at least an eighth of the circumference, the cup-shaped body extends from a bottom end of the cup-shaped body to a top end of the cup-shaped body where the cup-shaped body terminates such that a height of the cup-shaped body is the distance from the bottom end to the top end, the flange-like rim extends from the top end of the cup-shaped body, and the lid has a height that is less than the height of the cup-shaped body.

5. For at least the reasons set forth below, I respectfully submit that the cited references are deficient with respect to the present claims. Specifically, the cited references alone or in combination fail to disclose or suggest <u>the code is arranged on a bottom of the flange-like rim, which is opposed to the lid, the body extends from a bottom end of the body to a top end of the body where the body terminates such that a height of the body is the distance from the bottom end to the top end, the flange-like rim extends from the top end of the body, and the lid has a height that is less than the height of the body</u> as required by the present claims. Further, the skilled artisan would not have combined the cited references to arrive at the present claims.

6. The Patent Office alleges that to modify *Yoakim* and provide a code on the flange-like rim capable of being identified or read by an external reader as disclosed by *Boyd* to be read while the capsule is rotated around an axis of rotation traversing the capsule would have been obvious matter of choice and/or design to the ordinarily skilled artisan. See Office Action, page 4.

7. I respectfully submit that providing the code on the bottom of the rim of the capsule as required by the present claims is not merely design choice. In this regard, as detailed in the specification, by providing the code on the bottom of the rim of the capsule which is opposed to

the lid of the capsule, the bottom of the rim is sufficiently away from the liquid injection and beverage delivery areas, so that there is a lower risk for the code to become unreadable such if partly or totally hidden or soiled by beverage residues or otherwise (e.g., coffee particles); and as a result, the reading is made more reliable. See specification, for example, top of page 4. Therefore, there are attendant advantages of the specifically claimed arrangement of the code on the capsule.

8. However, there is no teaching in the cited references regarding these effects of the code being on the bottom of the capsule rim or anything that would have prompted the skilled artisan to provide the code on the bottom of the rim of the capsule as required by the present claims. Indeed, *Yoakim* does not even teach a code provided on the capsule; *Boyd* at most teaches a code provided on an orbicular gasket of a brewing packet, but the orbicular gasket is not even the claimed flange-like rim; and the other secondary references do not remedy the deficiencies of *Yoakim* alone or in combination with *Boyd* even if combinable. None of the cited references provide any reason or motivation for the skilled artisan to provide the code on the bottom of the capsule rim to arrive at the present claims.

9. Therefore, the skilled artisan would not have modified the cited references to arrive at the present claims.

10. I further declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001, Title 18, United States Code, and that willful false statements may jeopardize the validity of this patent and any patent issuing therefrom.

Date: 15.08.2016

Christian Jarisch

Electronic Acknowledgement Receipt

EFS ID:	28119766
Application Number:	13697297
International Application Number:	
Confirmation Number:	1065
Title of Invention:	CAPSULE, SYSTEM AND METHOD FOR PREPARING A BEVERAGE BY CENTRIFUGATION
First Named Inventor/Applicant Name:	Christian Jarisch
Customer Number:	29157
Filer:	Robert M. Barrett/Elias Santiago
Filer Authorized By:	Robert M. Barrett
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If a new application is being filed and the application includes the necessary components for a filing date (see 37 CFR 1.53(b)-(d) and MPEP 506), a Filing Receipt (37 CFR 1.54) will be issued in due course and the date shown on this Acknowledgement Receipt will establish the filing date of the application.

National Stage of an International Application under 35 U.S.C. 371
If a timely submission to enter the national stage of an international application is compliant with the conditions of 35 U.S.C. 371 and other applicable requirements a Form PCT/DO/EO/903 indicating acceptance of the application as a national stage submission under 35 U.S.C. 371 will be issued in addition to the Filing Receipt, in due course.

New International Application Filed with the USPTO as a Receiving Office
If a new international application is being filed and the international application includes the necessary components for an international filing date (see PCT Article 11 and MPEP 1810), a Notification of the International Application Number and of the International Filing Date (Form PCT/RO/105) will be issued in due course, subject to prescriptions concerning national security, and the date shown on this Acknowledgement Receipt will establish the international filing date of the application.

THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD

Inventors:	Jarisch et al.
Appl. No.:	13/697,297
Conf. No.:	1065
Filed:	November 9, 2012
Title:	CAPSULE, SYSTEM AND METHOD FOR PREPARING A BEVERAGE BY CENTRIFUGATION
Art Unit:	1792
Examiner:	Chaim A. Smith
Docket No.:	3712036-01693

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

APPELLANT'S APPEAL BRIEF

Sir or Madam:

Appellant submits this Appeal Brief in support of the Notice of Appeal filed on December 6, 2016. This Appeal is taken from the Advisory Action dated September 15, 2016 and the Final Office Action dated June 14, 2016.

I. REAL PARTY IN INTEREST

The real party in interest for the above-identified patent application on appeal is Nestec S.A. as evidenced by the Assignment executed on December 14, 2010 and January 12, 2011 and recorded on February 3, 2014 at reel 032118, frame 0555 in the United States Patent and Trademark Office.

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II. SUMMARY OF CLAIMED SUBJECT MATTER

A summary of the single independent claim by reference to the specification and the figures is provided as follows:

Independent Claim 1 recites a capsule (reference numeral 7, Fig. 4) for the preparation of a beverage, the capsule comprising a container configured to house a beverage ingredient (page 5, lines 25-26), the container comprises a cup-shaped body (reference numeral 69, Fig. 4; page 5, lines 23-24) having a flange-like rim (reference numeral 73, Figs. 4, 5, and 7; page 5, lines 23-24), a lid connected to the cup-shaped body (reference numeral 60, Figs. 2 and 4; page 5, lines 24-25), and a code (reference numeral 70, Fig. 5) adapted for being identified or read by an external reader (reference numeral 62, Fig. 2), the code is arranged on a bottom of the flange-like rim, which is opposed to the lid (reference numeral 72, Fig. 4), to be read while the capsule is rotated around an axis (reference letter A, Figs. 5 and 6) of rotation traversing the capsule (page 5, lines 27-29; page 6, lines 9-11), wherein the container comprises a circumference (page 5, lines 29-32), the code comprises successive segments that extend substantially along at least an eighth of the circumference (page 6, lines 2-7), the cup-shaped body extends from a bottom end of the cup-shaped body to a top end of the cup-shaped body where the cup-shaped body terminates such that a height of the cup-shaped body is the distance from the bottom end to the top end (Fig. 4), the flange-like rim extends from the top end of the cup-shaped body (Fig. 4), and the lid has a height that is less than the height of the cup-shaped body (Fig. 4).

Although specification citations are given in accordance with 37 C.F.R. §41.37, these citations are merely examples of support in the specification for the terms used in this section of the Brief. There is no intention to suggest in any way that the terms of the claims are limited to the examples in the specification. As demonstrated by the citations, the claims are fully supported by the specification as required by law. However, it is improper under the law to read limitations from the specification into the claims. Pointing out specification support for the claim terminology in accordance with Rule 41.37(c) does not in any way limit the scope of the claims to those examples from which they find support. Nor does this exercise provide a mechanism for circumventing the law precluding reading limitations into the claims from the specification. In short, the specification citations are not to be construed as claim limitations or in any way used to limit the scope of the claims.

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III. ARGUMENT

A. LEGAL STANDARD

Obviousness under 35 U.S.C. §103

The Federal Circuit held that the legal determination of an obviousness rejection under 35 U.S.C. §103 is:

> whether the claimed invention as a whole would have been obvious to a person of ordinary skill in the art at the time the invention was made…The foundational facts for the prima facie case of obviousness are: (1) the scope and content of the prior art; (2) the difference between the prior art and the claimed invention; and (3) the level of ordinary skill in the art…Moreover, objective indicia such as commercial success and long felt need are relevant to the determination of obviousness…Thus, each obviousness determination rests on its own facts.

In re Mayne, 41 U.S.P.Q. 2d 1451, 1453 (Fed. Cir. 1997).

In making this determination, the Examiner has the initial burden of proving a *prima facie* case of obviousness. *In re Rijckaert*, 28 U.S.P.Q. 2d 1955, 1956 (Fed. Cir. 1993). This burden may only be overcome "by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings." *In re Fine*, 837 F.2d 1071, 1074 (Fed. Cir. 1988). "If the examination at the initial stage does not produce a prima facie case of unpatentability, then without more the Appellant is entitled to grant of the patent." *In re Oetiker*, 24 U.S.P.Q. 2d 1443, 1444 (Fed. Cir. 1992).

The Examiner must provide explicit reasons why the claimed invention is obvious in view of the prior art. The Supreme Court has emphasized that when formulating a rejection under 35 U.S.C. § 103(a) based upon a combination of prior art elements it remains necessary to identify the reason why a person of ordinary skill in the art would have combined the prior art elements in the manner claimed. *KSR v. Teleflex*, 550 U.S. 398 (2007).

Moreover, as the Federal Circuit explained, "the mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification." *In re Fritch*, 972 F.2d 1260, 1266 (Fed. Cir. 1992). Furthermore, "[o]ne cannot use hindsight reconstruction to pick and

choose among isolated disclosures in the prior art" to recreate the claimed invention. *In re Fine*, 837 F.2d 1071, 1075 (Fed. Cir. 1988).

B. THE CLAIMED INVENTION AND ADVANTAGES THEREOF

As discussed in the specification, Appellant has recognized that a problem with identifying a capsule in a beverage preparation machine is that the retrieving or reading information from the capsule is not always reliable or convenient. The present claims are directed to an improved way to identify the capsule within a beverage production machine to ensure a more reliable and convenient retrieval or reading of information so as to adjust working parameters of the machine. See specification, page 2, lines 23-30.

In this regard, the present claims are directed to a capsule for the preparation of a beverage. The capsule includes a container configured to house a beverage ingredient. The container has a code adapted for being identified or read by external reading means, and the code is arranged on the container to be read while the capsule is rotated around an axis of rotation traversing the capsule. More particularly, the capsule has a circumference wherein the code is arranged on the container along an arc-shaped or circular path of the circumference. In an embodiment, the capsule has a circumference wherein the code comprises successive segments which are individually rectilinear but extend substantially along at least a part of the circumference. The code may be arranged along at least an eighth of the circumference. Such a configuration provides a reliable reading or retrieval of information as well as an effective portion for information. In order to ensure a reliable reading or retrieval of information, the code is repeated along said circumference. The repetition ensures a higher probability that at least one code is readable but also may potentially reduce the reading time. See specification, page 2, line 23-page 3, line 14.

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C. THE OBVIOUSNESS REJECTION OF CLAIM 1 OVER *YOAKIM*, *BOYD*, *AKER*, *RUCHONNET*, *HALLIDAY '333*, *HALLIDAY '074*, *HAYES*, *MAHLICH*, *EVERS*, AND *ERLANDSSON* SHOULD BE REVERSED

In the Final Office Action, the Examiner rejected Claim 1 under 35 U.S.C. §103(a) as being unpatentable over International Patent Publication No. WO 2008/148601 to Yoakim et al. ("*Yoakim*") in view of U.S. Patent Publication No. 2002/0048621 to Boyd et al. ("*Boyd*") as evidenced by U.S. Patent Publication No. 2010/0078480 to Aker ("*Aker*"), International Patent Publication No. WO 2005/0440067 to Ruchonnet ("*Ruchonnet*"), U.S. Patent No. 6,698,333 to Halliday et al. ("*Halliday '333*"), U.S. Patent No. 7,097,074 to Halliday ("*Halliday '074*"), U.S. Patent No. 7,335,387 to Hayes et al. ("*Hayes*"), U.S. Patent Publication No. 2004/0089158 to Mahlich ("*Mahlich*"), U.S. Patent Publication No. 2008/0148948 to Evers et al. ("*Evers*"), and U.S. Patent Publication No. 2007/0203587 to Erlandsson et al. ("*Erlandsson*"). See Final Office Action, page 2. The Examiner maintained this rejection in the Advisory Action. See Advisory Action.

1. The Skilled Artisan Would Not Have Combined These References To Arrive At The Code Recited in Claim 1

Appellant respectfully submits that *Yoakim*, *Boyd*, *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* fail to render obvious independent Claim 1. For example, the skilled artisan would not have combined these cited references to arrive at a capsule comprising a code arranged on a bottom of the flange-like rim, which is opposed to the lid, wherein the cup-shaped body extends from a bottom end of the cup-shaped body to a top end of the cup-shaped body where the cup-shaped body terminates such that a height of the cup-shaped body is the distance from the bottom end to the top end, the flange-like rim extends from the top end of the cup-shaped body, and the lid has a height that is less than the height of the cup-shaped body, as required by independent Claim 1.

Yoakim discloses a capsule that includes a cup-shaped body and a sealing lid sealed onto the body. See *Yoakim*, for example, bottom of page 4. However, *Yoakim* does not disclose any code provided on the capsule. Indeed, the Examiner admits that Claim 1 differs from *Yoakim* in there being a code adapted for being identified or read by an external reader. Nonetheless, in an

attempt to remedy the deficiencies of *Yoakim*, the Examiner cites *Boyd* for the alleged disclosure of providing a code on the flange-like rim to be identified or read by an external reader. See Final Office Action, page 4.

However, *Boyd* does **not** disclose or suggest a code arranged on a bottom of the flange-like rim, which is opposed to the lid, wherein the cup-shaped body extends from a bottom end of the cup-shaped body to a top end of the cup-shaped body where the cup-shaped body terminates such that a height of the cup-shaped body is the distance from the bottom end to the top end, the flange-like rim extends from the top end of the cup-shaped body, and the lid has a height that is less than the height of the cup-shaped body, as required by independent Claim 1.

Specifically, *Boyd* is directed to a brewing packet that includes a machine interpretable feature that directs operation of the coffee machine in accordance with predefined brewing directives. However, *Boyd* merely discloses a **symmetrical** disc-shaped coffee packet with the alleged flange-like rim in the **middle** of the packet. The first filter portion 12 and the second filter portion 14 collectively define a cavity of the packet and are secured to the orbicular gasket 18. The first filter portion 12 at best extends from an end of the first filter portion 12 (as in Fig. 1) to one side of the orbicular gasket 18 on which a machine interpretable feature 30 is present; the orbicular gasket 18 is in the **middle** of the packet between the first filter portion 12 and the second filter portion 14; and the first filter portion 12 and the second filter portion 14 have the **same** height. See *Boyd*, for example, paragraphs [0027]-[0029]; and FIGS. 1-2. Therefore, the first filter portion 12 is NOT the claimed cup-shaped body, the second filter portion 14 is NOT the claimed lid, and the orbicular gasket 18 is NOT the claimed flange-like rim.

The Examiner alleges that "it is not known how the rim in the form of a flange shown by Boyd would not be considered 'flange-like' since said rim is unequivocally shown as a flange in figure 2, for example." See Final Office Action, page 7. Appellant respectfully submits that whether or not the rim shown by *Boyd* is "flange-like," the rim shown by *Boyd* is **not** <u>the **claimed** rim of the claimed capsule</u> which extends from the top end of the body of the capsule as defined by independent Claim 1. Specifically, Claim 1 recites that the body extends from a bottom end of the body to a top end of the body where the body terminates such that a height of the body is the distance from the bottom end to the top end, and the lid has a height that is less than the height of the body.

Therefore, *Yoakim* and *Boyd*, even if combinable, fail to disclose or suggest a code arranged on a bottom of the flange-like rim, which is opposed to the lid, wherein the cup-shaped body extends from a bottom end of the cup-shaped body to a top end of the cup-shaped body where the cup-shaped body terminates such that a height of the cup-shaped body is the distance from the bottom end to the top end, the flange-like rim extends from the top end of the cup-shaped body, and the lid has a height that is less than the height of the cup-shaped body, as required by independent Claim 1.

The Examiner alleges that *Yoakim* meets the height limitations as claimed, and that *Boyd* was brought to teach that it was conventional and well established in the art to place a code as claimed on the rim of a capsule and not brought to teach a particular rim structure as that was taught by *Yoakim*. See Advisory Action and Interview Summary. Appellant respectfully submits that even if *Yoakim* met the height limitations as claimed, and even if it was conventional and well established in the art to place a code on the rim of a capsule, nothing in *Yoakim* or *Boyd* discloses or suggests providing a code on a **bottom** of the flange-like rim as required by independent Claim 1.

Further, the other secondary references, *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson*, even if combinable, fail to remedy the deficiencies of *Yoakim* alone or in combination with *Boyd* regarding independent Claim 1. In this regard, the Examiner relies on *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* for the alleged evidence of arranging a code capable of being identified or read by an external reader on a container, relies on *Aker* for the alleged disclosure of arranging and repeating a code on the container along an arc-shaped or circular path of a circumference of the container, and relies on *Ruchonnet* for the alleged disclosure of printing a code with an ink which is not visible by the human eye under natural light. See Final Office Action, pages 5-6.

These references do not disclose or suggest a code arranged on a bottom of the flange-like rim, which is opposed to the lid, wherein the cup-shaped body extends from a bottom end of the cup-shaped body to a top end of the cup-shaped body where the cup-shaped body terminates such that a height of the cup-shaped body is the distance from the bottom end to the top end, the flange-like rim extends from the top end of the cup-shaped body, and the lid has a height that is less than the height of the cup-shaped body, as required by independent Claim 1. Neither do these references provide any reason or motivation for the skilled artisan to modify *Yoakim* alone

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or in combination with *Boyd* (even if they are combinable) to include the claimed code on a bottom of the flange-like rim of a capsule as required by independent Claim 1.

As such, the skilled artisan would not have combined *Yoakim* with *Boyd*, *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* to arrive at independent Claim 1.

For at least the reasons discussed above, independent Claim 1 is novel, nonobvious, and distinguishable from *Yoakim*, *Boyd*, *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson*. Accordingly, the obviousness rejection of Claim 1 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* should be reversed.

2. The Examiner Failed To Provide Requisite Rational Underpinning

Appellant respectfully submits that *Yoakim*, *Boyd*, *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* fail to render obvious independent Claim 1. For example, the skilled artisan had no reason or motivation to modify these cited references to arrive at a capsule comprising a code arranged on a bottom of the flange-like rim, which is opposed to the lid, wherein the cup-shaped body extends from a bottom end of the cup-shaped body to a top end of the cup-shaped body where the cup-shaped body terminates such that a height of the cup-shaped body is the distance from the bottom end to the top end, the flange-like rim extends from the top end of the cup-shaped body, and the lid has a height that is less than the height of the cup-shaped body, as required by independent Claim 1.

The Examiner attempts to remedy the deficiencies of the cited references regarding the code being on a **bottom** of the flange-like rim by alleging that the position of the code does not provide patentability. Specifically, the Examiner cites MPEP 2144.04 VI.C as the basis for this allegation. See Final Office Action, pages 4-5. However, MPEP 2144.04 VI.C actually states that "the mere fact that a worker in the art could rearrange the parts of the reference device to meet the terms of the claims on appeal is not by itself sufficient to support a finding of obviousness. The prior art must provide a motivation or reason for the worker in the art, without the benefit of appellant's specification, to make the necessary changes in the reference device." Appellant respectfully submits that no such motivation or reason has been provided here.

The Examiner merely alleges that to modify *Yoakim* and provide a code on the flange-like rim capable of being identified or read by an external reader as allegedly disclosed by *Boyd* to be read while the capsule is rotated around an axis of rotation traversing the capsule would have been an obvious matter of choice and/or design to the ordinarily skilled artisan. The Examiner has not provided any reason whatsoever that the skilled artisan would have provided the code on a **bottom** of the flange-like rim according to the teachings of the cited references. See Final Office Action, page 4.

Indeed, as submitted in the Declaration under 37 CFR 1.132 ("*Declaration*") by the named inventor Christian Jarisch previously submitted on August 15, 2016 (a copy of which is enclosed herein for the convenience of the Board), there is no reason or motivation in the record for the skilled artisan to provide the code on the **bottom** of the flange-like rim as required by independent Claim 1. In this regard, as discussed above, *Yoakim* does not even teach a code provided on the capsule; *Boyd* at most teaches a code provided on an orbicular gasket of a brewing packet, but the orbicular gasket is not even the claimed position of the flange-like rim; and the other secondary references do not remedy the deficiencies of *Yoakim* alone or in combination with *Boyd*, even if combinable. See *Declaration*, paragraph 8.

None of the cited references provide any reason or motivation for the skilled artisan to provide the code on the **bottom** of the flange-like rim not even taught by these references. Indeed, there is no teaching in the cited references regarding any effects of the code being on the bottom of the capsule rim or anything that would have prompted the skilled artisan to provide the code on the bottom of the rim of the capsule as required by independent Claim 1. As such, the skilled artisan would not have modified the cited references alone or in combination to provide the code on the bottom of the flange-like rim to arrive at independent Claim 1. *Id.*

The U.S. Supreme Court stated that "rejections on obviousness cannot be sustained with mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." *KSR v. Teleflex Inc.*, 550 U.S. 398, 418 (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)).

For at least the reasons discussed above and in the *Declaration*, independent Claim 1 is novel, nonobvious, and distinguishable from *Yoakim*, *Boyd*, *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson*. Accordingly, the obviousness rejection

of Claim 1 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* should be reversed.

3. The Skilled Artisan Would Not Have Arrived At The Code Recited in Claim 1 As An Obvious Matter Of Choice And/Or Design

Appellant respectfully submits that *Yoakim*, *Boyd*, *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* fail to render obvious independent Claim 1. For example, the skilled artisan would not have arrived at independent Claim 1 as an obvious matter of "design choice" because the specification demonstrates attendant advantages of the specifically claimed arrangement of the code on the capsule.

As noted above, the Examiner alleges that to modify *Yoakim* and provide a code on the flange-like rim capable of being identified or read by an external reader as allegedly disclosed by *Boyd* to be read while the capsule is rotated around an axis of rotation traversing the capsule would have been an obvious matter of choice and/or design to the ordinarily skilled artisan. The Examiner also alleges that "Boyd discloses code arrangements on a flange-like rim that would be readable from either side of the capsule as clearly shown in figures 2f and 2h," and that "the particular orientation required with respect to the code would be a function of the placement of the sensor in a brewing device which would be an obvious matter of choice and/or design." See Final Office Action, pages 4 and 7.

However, design choice does not apply when the claimed structure has improved functionality over the corresponding element in the cited reference. See, e.g, *In re Kuhle*, 526 F.2d 553, 555 (CCPA 1975). As detailed in the specification and also in the *Declaration*, the specifically claimed arrangement of the code on the capsule--namely, by providing the code on the bottom of the rim of the capsule which is opposed to the lid of the capsule--the bottom of the rim is sufficiently away from the liquid injection and beverage delivery areas, so that there is a lower risk for the code to become unreadable such if partly or totally hidden or soiled by beverage residues or otherwise (e.g., coffee particles); and as a result, the reading is made more reliable. See specification, for example, top of page 4; see also *Declaration*, paragraph 7. As such, the claimed arrangement has an improved functionality which renders improper the allegation of obviousness based on design choice.

Additionally, the Examiner did not provide a convincing line of reasoning why the specifically claimed arrangement of the code on the capsule would be an obvious matter of design choice. To support a conclusion that a claim is directed to obvious subject matter, i.e., that a feature is an obvious matter of design choice, an Examiner must present a 'convincing line of reasoning' as to why one of ordinary skill in the art would have found the claimed feature to have been obvious. *Ex parte Clapp*, 227 USPQ 972, 973 (BPAI 1985). When determining whether a rejection based on design choice is appropriate, the Examiner must review the specification and ascertain if the limitation in question is disclosed as serving any advantage or particular purpose, or whether it solves a stated problem. The Examiner also should explain the reasoning used to determine that the prior art would have performed equally as well as the claimed invention. These two steps help present the aforementioned "convincing line of reasoning." *Ex parte Clapp*, 227 U.S.P.Q. at 973. This analysis was not performed here, and thus any allegation of obviousness based on design choice is improper.

For at least the reasons discussed above and in the *Declaration*, the obviousness rejection of Claim 1 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* should be reversed.

D. THE OBVIOUSNESS REJECTION OF CLAIMS 2 AND 5 OVER *YOAKIM*, *BOYD*, *AKER*, *RUCHONNET*, *HALLIDAY '333*, *HALLIDAY '074*, *HAYES*, *MAHLICH*, *EVERS*, AND *ERLANDSSON* SHOULD BE REVERSED

In the Final Office Action, the Examiner rejected Claims 2 and 5 under 35 U.S.C. §103(a) as being unpatentable over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson*. See Final Office Action, page 2. The Examiner maintained this rejection in the Advisory Action. See Advisory Action.

Appellant respectfully submits that the patentability of independent Claim 1 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* as discussed in the preceding section renders Claims 2 and 5 patentable over these references because these claims depend from Claim 1.

Furthermore, Claim 2 requires that the code be arranged on the container along an arc-shaped or circular path of the circumference of the container, and Claim 5 requires that the code be repeated along the circumference of the container. The Examiner alleges that *Yoakim* in view

of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* disclose that it was well established to arrange and repeat a code on the container along an arc-shaped or circular path of a circumference of the container and specifically cites Figs. 2A, 2B, 4A, 4B, 4A (which Appellant believes is a typographic error and should be "5A"), and 5B of *Aker* (the Examiner cites '482 which Appellant believes is again a typographic error and should be "'480," i.e., *Aker*). See Final Office Action, page 5.

However, *Aker* teaches repetitive barcodes printed on the **top** surface of the capsule cover. See *Aker*, for example, Figs. 2A, 2B, 4A, 4B, 5A, and 5B. As discussed above, the skilled artisan would not have modified the cited references alone or in combination to provide the code on the **bottom** of the flange-like rim. See *Declaration*, paragraph 8. Therefore, even if it were established to arrange and repeat a code on the container along an arc-shaped or circular path of a circumference of the container as alleged by the Examiner, the proposed combination of the cited references would not have arrived at a code (repetitive or non-repetitive) on the **bottom** of the flange-like rim along an arc-shaped or circular path of a circumference of the container. As such, even if the cited references are combinable, the skilled artisan would not have combined these references to arrive at the respective elements of Claims 2 and 5 in combination with the novel and non-obvious elements of the corresponding independent Claim 1.

Accordingly, the obviousness rejection of Claims 2 and 5 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* should be reversed.

E. THE OBVIOUSNESS REJECTION OF CLAIM 19 OVER *YOAKIM*, *BOYD*, *AKER*, *RUCHONNET*, *HALLIDAY '333*, *HALLIDAY '074*, *HAYES*, *MAHLICH*, *EVERS*, AND *ERLANDSSON* SHOULD BE REVERSED

In the Final Office Action, the Examiner rejected Claim 19 under 35 U.S.C. §103(a) as being unpatentable over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson*. See Final Office Action, page 2. The Examiner maintained this rejection in the Advisory Action. See Advisory Action.

Appellant respectfully submits that the patentability of independent Claim 1 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*,

Mahlich, *Evers*, and *Erlandsson* as discussed in the preceding section renders Claim 19 patentable over these references because these claims depend from Claim 1.

Furthermore, Claim 19 requires a peripheral edge that is an outermost circular line of the capsule, wherein the code is positioned within 10 mm of the peripheral edge. The Examiner alleges that *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* disclose that it was well established to arrange and repeat a code on the container along an arc-shaped or circular path of a circumference of the container and specifically cites Figs. 2A, 2B, 4A, 4B, 4A (which Appellant believes is a typographic error and should be "5A"), and 5B of *Aker* (the Examiner cites '482 which Appellant believes is again a typographic error and should be "'480," i.e., *Aker*). The Examiner further alleges that regarding Claim 19 which requires that the code is positioned within 10 mm of the peripheral edge, "once it was known to place the code on a peripheral edge of a capsule it is not seen that patentability would be predicted on the particular distance the code would be placed from said peripheral edge. Where the only difference between the prior art and the claims would be a recitation of a relative dimension, in this case a distance, and a capsule having the claim[ed] relative distance would not perform differently than the prior art capsule the claimed capsule would not be seen as patentably distinct from the prior art capsule." See Final Office Action, page 5.

However, this allegation is merely a conclusory statement. As noted above, the U.S. Supreme Court stated that "rejections on obviousness cannot be sustained with mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." *KSR v. Teleflex Inc.*, 550 U.S. 398, 418 (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)).

Here, as discussed above, the skilled artisan would not have combined the cited references to arrive at a code on the bottom of the flange-like rim along an arc-shaped or circular path of a circumference of the container. Therefore, the difference between the cited references and the claims is NOT only a recitation of the distance of the code from the peripheral edge. Further, the Patent Office merely provides a conclusory statement by failing to provide any reason whatsoever that the claimed capsule having the claim distance would not perform differently than the capsule of the cited references. Thus, the Patent Office has failed to provide the requisite rational underpinning to support the obviousness rejection.

Appellant respectfully submit that even if the cited references are combinable, the skilled artisan would not have combined these references to arrive at the respective elements of Claim 19 in combination with the novel and non-obvious elements of the corresponding independent Claim 1.

Accordingly, the obviousness rejection of Claim 19 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* should be reversed.

F. THE OBVIOUSNESS REJECTION OF CLAIM 6 OVER *YOAKIM*, *BOYD*, *AKER*, *RUCHONNET*, *HALLIDAY '333*, *HALLIDAY '074*, *HAYES*, *MAHLICH*, *EVERS*, AND *ERLANDSSON* SHOULD BE REVERSED

In the Final Office Action, the Examiner rejected Claim 6 under 35 U.S.C. §103(a) as being unpatentable over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson*. See Final Office Action, page 2. The Examiner maintained this rejection in the Advisory Action. See Advisory Action.

Appellant respectfully submits that the patentability of independent Claim 1 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* as discussed in the preceding section renders Claim 6 patentable over these references because this claim depends from Claim 1.

Furthermore, Claim 6 requires that the code be a bit code formed by a series of discrete polygonal or dot surfaces printed on and/or embossed in the container. The Examiner cites Fig. 2h of *Boyd* for the alleged disclosure of dot surfaces. See Final Office Action, page 5. However, *Boyd* actually discloses in Fig. 2h one or more "**holes**" instead of **dot surfaces printed on and/or embossed in the container**. See *Boyd*, for example, paragraph [0029]. Therefore, even if the cited references are combinable, the skilled artisan would not have combined these references to arrive at the elements of Claim 6 in combination with the novel and non-obvious elements of the corresponding independent Claim 1.

Accordingly, the obviousness rejection of Claim 6 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* should be reversed.

G. THE OBVIOUSNESS REJECTION OF CLAIM 7 OVER *YOAKIM*, *BOYD*, *AKER*, *RUCHONNET*, *HALLIDAY '333*, *HALLIDAY '074*, *HAYES*, *MAHLICH*, *EVERS*, AND *ERLANDSSON* SHOULD BE REVERSED

In the Final Office Action, the Examiner rejected Claim 7 under 35 U.S.C. §103(a) as being unpatentable over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson*. See Final Office Action, page 2. The Examiner maintained this rejection in the Advisory Action. See Advisory Action.

Appellant respectfully submits that the patentability of independent Claim 1 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* as discussed in the preceding section renders Claim 7 patentable over these references because this claim depends from Claim 1.

Furthermore, Claim 7 requires that the code be printed by an ink which is not visible by a human eye under natural light. The Examiner relies on *Ruchonnet* for the alleged disclosure of printing the code with an ink which is not visible by the human eye under natural light. Nevertheless, the Examiner alleges that "once it was known to arrange a code on the flange-like rim of the capsule it is not seen that patentability would be predicted by the visibility or lack thereof of the code by the human eye under natural light absent strong and compelling evidence to the contrary. The substitution of one known machine readable coding ink for another known machine readable coding ink would have been obvious." See Final Office Action, pages 5-6.

However, this allegation is merely a conclusory statement. As noted above, the U.S. Supreme Court stated that "rejections on obviousness cannot be sustained with mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." *KSR v. Teleflex Inc.*, 550 U.S. 398, 418 (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)). Here, the Patent Office merely provides a conclusory statement by failing to provide any reason whatsoever that the skilled artisan would have found it obvious to substitute one known machine readable coding ink for another known machine readable coding ink. Thus, the Patent Office has failed to provide the requisite rational underpinning to support the obviousness rejection.

Moreover, as discussed above, the skilled artisan would not have modified the cited references alone or in combination to provide the code on the **bottom** of the flange-like rim. See *Declaration*, paragraph 8. Therefore, even if *Ruchonnet* is combinable with *Yoakim* in view of

Boyd as evidenced by the other cited references, the skilled artisan would not have combined the cited references to arrive at a code printed by an ink invisible by the human eye under natural light on the **bottom** of the flange-like rim of the capsule. As such, even if the cited references are combinable, the skilled artisan would not have combined these references to arrive at the elements of Claim 7 in combination with the novel and non-obvious elements of the corresponding independent Claim 1.

Accordingly, the obviousness rejection of Claim 7 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* should be reversed.

H. THE OBVIOUSNESS REJECTION OF CLAIMS 8-9 OVER *YOAKIM*, *BOYD*, *AKER*, *RUCHONNET*, *HALLIDAY '333*, *HALLIDAY '074*, *HAYES*, *MAHLICH*, *EVERS*, AND *ERLANDSSON* SHOULD BE REVERSED

In the Final Office Action, the Examiner rejected Claims 8-9 under 35 U.S.C. §103(a) as being unpatentable over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson*. See Final Office Action, page 2. The Examiner maintained this rejection in the Advisory Action. See Advisory Action.

Appellant respectfully submits that the patentability of independent Claim 1 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* as discussed in the preceding section renders Claims 8-9 patentable over these references because this claim depends from Claim 1.

Furthermore, Claim 8 requires that the code be printed or embossed by a pattern which possesses surfaces having different reflective and/or absorbing properties to light, and Claim 9 requires that the pattern possess a first surface having inclined mirroring or absorbing properties to light and a second surface having flat mirroring or flat reflective properties to light. The Examiner alleges that *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* discloses that "the code (30) can be printed or embossed by a pattern (geometric shape) which possesses surfaces having different reflective and/or absorbing properties to light (color), wherein the pattern possesses a first surface having inclined (raised) mirroring or flat reflective properties to light (code 32 can be

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geometric shape that may be raised or lowered and may incorporate a color)" by citing *Boyd*. See Final Office Action, page 6.

However, the Examiner fails to provide any reason whatsoever that the skilled artisan would have combined *Boyd* with *Yoakim* alone or in combination with the other cited references to arrive at Claims 8 and 9 and therefore, fails to provide the requisite rational underpinning to support the obviousness rejection. See *KSR v. Teleflex Inc.*, 550 U.S. 398, 418 (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)).

Moreover, as discussed above, the skilled artisan would not have modified the cited references alone or in combination to provide the code on the **bottom** of the flange-like rim. See *Declaration*, paragraph 8. Therefore, even if *Boyd* is combinable with *Yoakim* and the other cited references, the skilled artisan would not have combined the cited references to arrive at a code printed or embossed by a pattern which possesses surfaces having different reflective and/or absorbing properties to light (Claim 8) or a pattern which possesses a first surface having inclined mirroring or absorbing properties to light and a second surface having flat mirroring or flat reflective properties to light (Claim 9) on the **bottom** of the flange-like rim of the capsule. As such, even if the cited references are combinable, the skilled artisan would not have combined these references to arrive at the elements of Claims 8 and 9 in combination with the novel and non-obvious elements of the corresponding independent Claim 1.

Accordingly, the obviousness rejection of Claims 8-9 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* should be reversed.

I. THE OBVIOUSNESS REJECTION OF CLAIM 10 OVER *YOAKIM*, *BOYD*, *AKER*, *RUCHONNET*, *HALLIDAY '333*, *HALLIDAY '074*, *HAYES*, *MAHLICH*, *EVERS*, AND *ERLANDSSON* SHOULD BE REVERSED

In the Final Office Action, the Examiner rejected Claim 10 under 35 U.S.C. §103(a) as being unpatentable over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson*. See Final Office Action, page 2. The Examiner maintained this rejection in the Advisory Action. See Advisory Action.

Appellant respectfully submits that the patentability of independent Claim 10 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*,

Mahlich, *Evers*, and *Erlandsson* as discussed in the preceding section renders Claim 6 patentable over these references because this claim depends from Claim 1.

Furthermore, Claim 10 requires that the code be mechanically embossed or engraved on the container by a laser. The Examiner alleges that *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* discloses that "the code would be mechanically embossed on the container" by citing the disclosure that "grooves may be incorporated to create a texture" in *Boyd*. See Final Office Action, page 6.

However, the Examiner again fails to provide any reason whatsoever that the skilled artisan would have combined *Boyd* with *Yoakim* alone or in combination with the other cited references to arrive at Claim 10 and therefore, fails to provide the requisite rational underpinning to support the obviousness rejection. See *KSR v. Teleflex Inc.*, 550 U.S. 398, 418 (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)).

Moreover, as discussed above, the skilled artisan would not have modified the cited references alone or in combination to provide the code on the **bottom** of the flange-like rim. See *Declaration*, paragraph 8. Therefore, even if *Boyd* is combinable with *Yoakim* and the other cited references, the skilled artisan would not have combined the cited references to arrive at a code mechanically embossed or engraved on the **bottom** of the flange-like rim of the capsule. As such, even if the cited references are combinable, the skilled artisan would not have combined these references to arrive at the elements of Claim 10 in combination with the novel and non-obvious elements of the corresponding independent Claim 1.

Accordingly, the obviousness rejection of Claim 10 over *Yoakim* in view of *Boyd* as evidenced by *Aker*, *Ruchonnet*, *Halliday '333*, *Halliday '074*, *Hayes*, *Mahlich*, *Evers*, and *Erlandsson* should be reversed.

IV. CONCLUSION

Appellant respectfully submits that the Examiner failed to establish obviousness under 35 U.S.C. §103 for the pending claims. Accordingly, Appellant respectfully submits that the obviousness rejection is erroneous in law and in fact and should, therefore, be reversed by this Board.

The Director is authorized to charge any fee for the Appeal Brief that may be due and any additional fee that may be required or to credit any overpayment to Deposit Account No. 02-1818. If such a withdrawal is made, please indicate the Attorney Docket No. 3712036-01693 on the account statement.

Respectfully submitted,

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Dated: January 19, 2017

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NESPRESSO USA, INC. v. K-FEE SYSTEM GMBH
IPR2024-00254, U.S. PATENT 11,465,829

CLAIMS APPENDIX

PENDING CLAIMS ON APPEAL OF U.S. PATENT APPLICATION SERIAL NO. 13/697,297

Claim 1: A capsule for the preparation of a beverage, the capsule comprising a container configured to house a beverage ingredient, the container comprises a cup-shaped body having a flange-like rim, a lid connected to the cup-shaped body, and a code adapted for being identified or read by an external reader, the code is arranged on a bottom of the flange-like rim, which is opposed to the lid, to be read while the capsule is rotated around an axis of rotation traversing the capsule,

wherein the container comprises a circumference, the code comprises successive segments that extend substantially along at least an eighth of the circumference, the cup-shaped body extends from a bottom end of the cup-shaped body to a top end of the cup-shaped body where the cup-shaped body terminates such that a height of the cup-shaped body is the distance from the bottom end to the top end, the flange-like rim extends from the top end of the cup-shaped body, and the lid has a height that is less than the height of the cup-shaped body.

Claim 2: The capsule of Claim 1, wherein the code is arranged on the container along an arc-shaped or circular path of the circumference of the container.

Claim 5: The capsule of Claim 1, wherein the code is repeated along the circumference of the container.

Claim 6: The capsule of Claim 1, wherein the code is a bit code formed by a series of discrete polygonal or dot surfaces printed on and/or embossed in the container.

Claim 7: The capsule of Claim 1, wherein the code is printed by an ink which is not visible by a human eye under natural light.

Claim 8: The capsule of Claim 1, wherein the code is printed or embossed by a pattern which possesses surfaces having different reflective and/or absorbing properties to light.

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Claim 9: The capsule of Claim 8, wherein the pattern possesses a first surface having inclined mirroring or absorbing properties to light and a second surface having flat mirroring or flat reflective properties to light.

Claim 10: The capsule of Claim 1, wherein the code is mechanically embossed or engraved on the container by a laser.

Claim 19: The capsule of Claim 1, comprising a peripheral edge that is an outermost circular line of the capsule, wherein the code is positioned within 10 mm of the peripheral edge.

Electronic Acknowledgement Receipt

EFS ID:	28106129
Application Number:	13697297
International Application Number:	
Confirmation Number:	1065
Title of Invention:	CAPSULE, SYSTEM AND METHOD FOR PREPARING A BEVERAGE BY CENTRIFUGATION
First Named Inventor/Applicant Name:	Christian Jarisch
Customer Number:	29157
Filer:	Robert M. Barrett/Elias Santiago
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Document Number	Document Description	File Name	File Size(Bytes)/ Message Digest	Multi Part /.zip	Pages (if appl.)
1	Appeal Brief Filed	01693.pdf	207466 c2fd1bd01655504c700c8d7eca6f2bae40b5134b	no	22

Warnings:

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IPR2024-00254, U.S. PATENT 11,465,829

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If a new application is being filed and the application includes the necessary components for a filing date (see 37 CFR 1.53(b)-(d) and MPEP 506), a Filing Receipt (37 CFR 1.54) will be issued in due course and the date shown on this Acknowledgement Receipt will establish the filing date of the application.

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If a new international application is being filed and the international application includes the necessary components for an international filing date (see PCT Article 11 and MPEP 1810), a Notification of the International Application Number and of the International Filing Date (Form PCT/RO/105) will be issued in due course, subject to prescriptions concerning national security, and the date shown on this Acknowledgement Receipt will establish the international filing date of the application.