

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NESPRESSO USA, INC.
Petitioner,

v.

K-FEE SYSTEM GMBH,
Patent Owner

IPR2024-00254 (Patent 11,465,829 B2)
IPR2024-00257 (Patent 11,548,722 B2)
IPR2024-00299 (Patent 11,554,910 B2)
IPR2024-00304 (Patent 11,465,830 B2)

Record of Oral Hearing
Held: March 20, 2025

Before GRACE KARAFFA OBERMANN, JON B. TORNQUIST,
JEFFREY W. ABRAHAM and AVELYN M. ROSS, *Administrative Patent
Judges.*

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IPR2024-00257 (Patent 11,548,722 B2)
IPR2024-00299 (Patent 11,554,910 B2)
IPR2024-00304 (Patent 11,465,830 B2)

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P R O C E E D I N G S

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JUDGE ABRAHAM:

Good morning, everyone. We are here for the consolidated hearing on four IPRs: IPR2024-00254 regarding U.S. Patent Number 11,465,829, IPR2024-00257 regarding U.S. Patent Number 11,548,722, IPR2024-00299 regarding U.S. Patent Number 11,554,910, and IPR2024-00304 regarding U.S. Patent Number 11,465,830.

I am Judge Abraham joined in the hearing room today by Judge Obermann and Judge Tornquist. And we have Judge Ross joining us remotely.

Just for clarity purposes this is not an expanded panel. This is just the four judges that are paneled across the four different cases. So we're all here today because we have a consolidation.

Let's begin by taking appearances from counsel starting with Petitioner.

MR. MCCRAW: Good morning, Your Honors. Clayton McCraw, Mayer Brown on behalf of Nespresso USA.

With me today is my colleague, Erick Palmer. I'll let him introduce himself.

MR. PALMER: Erick Palmer.

MR. MCCRAW: Okay. And also our associate, Shantelle Lafayette and Ryan Regan.

JUDGE ABRAHAM: Okay. Welcome. And for Patent Owner?

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1 MR. CARSTEN: Good morning, Your Honor. Doug Carsten,
2 McDermott Will & Emery, on behalf of Patent Owner K-fee. Along with
3 me is my colleague, Ian Brooks and Kavya Rallabhandi. And then in the
4 gallery we have a number of folks attending including some corporate
5 representatives as well as prosecution counsel for these patents.

6 JUDGE ABRAHAM: Okay. Great.

7 Well welcome, everyone. It's nice to see everybody here. So just
8 according to our hearing order, each side will have 75 minutes total to
9 present your arguments. Petitioner will go first. You can reserve up to half
10 your time for rebuttal, if you like.

11 And then Patent Owner, same. You will go second, and you can
12 reserve up to half of your time for surrebuttal, if you'd like.

13 We do have a clock so if you let me know how much time you
14 have, I'll put that up and, you know, even if you reserve some time, if you
15 want to use it in your opening that's fine. You can, you know, it's your time
16 to use how you see fit. Okay.

17 A few other things, when you're using your demonstratives, please
18 refer to your slide numbers, so that when we go back through the record it
19 helps us with purposes of clarity; it's always helpful.

20 We do have access to the entire record on our screens here, so if
21 you want to refer to a paper number, or to an exhibit, you can do that, too.
22 And, you know, we can pull it up just as quickly. So if that helps you, feel
23 free to take advantage of that.

24 There are members of the public here. I've also been informed that

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1 there's a public line open so the hearing is available to be seen, you know,
2 virtually. I don't think there's any confidential information, but if there is, if
3 you feel like you need to discuss it, just let us know and we can take care of
4 it. But otherwise, just be aware that it's open to the public.

5 So with those preliminaries out of the way, any questions from the
6 Petitioner?

7 MR. MCCRAW: No, Your Honor.

8 JUDGE ABRAHAM: Okay. Great. So I'll invite the Petitioner,
9 up to the podium, and let me know if you'd like to reserve time for rebuttal.

10 MR. MCCRAW: Good morning, Your Honors and thank you.
11 Out of 75 minutes today, I'd like to reserve 35 minutes for rebuttal.

12 May it please the Court, I'm Clayton McCraw on behalf of
13 Petitioner Nespresso USA. I'd also like to note that given the number of
14 patents and proceedings here, my colleague, Mr. Palmer, will also handle
15 certain sections of the Argument, particularly for a few of the limitations
16 relating to the '910 Patent so we may split that up as the questions go.

17 But I'd like to start, Your Honors, with slide 15. Just by addressing
18 the grounds, Your Honor. So to set the stage, as you could see, we have four
19 proceedings as you've announced, four patents at issue, two of these patents
20 relate to a beverage system including a machine, and a capsule; that's the
21 '829 Patent and the '722 Patent. And the other two relate solely to the
22 capsule; that's the '910 Patent and the '830 Patent.

23 And our Petitions, Your Honor, is laid out precisely why all of
24 these patents claim nothing more than known coffee technology that was

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1 combined to achieve predictable results.

2 If we go to slide 4, please. So specifically, this is an excerpt of the
3 challenged patents with common specifications. These patents relate to
4 systems that read an optical code on a capsule and then determine whether or
5 not that capsule is suitable for the machine and make a decision on whether
6 or not to operate the machine. That's all really there is to it.

7 If we can go to slide 8, please. I wanted to summarize for Your
8 Honors, just how these combinations are made in the Petitions. This is an
9 exemplary challenged claim I believe -- and, again, this is slide 8 -- and this
10 is Claim 1 from the '829 Patent -- you can see we have a beverage system,
11 the portioned capsule, the capsule structure, all taught by Yoakim. The
12 general machine features, like, a sensor, an insertion shaft, the mandrel, a
13 seal, the pump, all taught by Yoakim.

14 And then a couple particular limitations, the location of the
15 identifier on the bottom of the rim that's taught by Jarisch, and the machine
16 operation which is to not operate unless it determines that the capsule's
17 suitable; that's taught by Rossi.

18 If we could go to slide 9, please. We also have Castellani, which
19 you may recall in the record. And that's simply, Your Honors, deals with the
20 basic technology of a waste container and holding arms that move a used
21 capsule to a dropping box so that a user doesn't have to actually touch the
22 hot, wet capsule.

23 Slide 10, please. This is an example claim from the '830 and just
24 introducing Rapparini. And so Rapparini is a reference that teaches the

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1 long-known technology of just applying grooves and ribs to a thin-walled
2 structure like a capsule in order to increase structural stability. And so for
3 some of the limitations in the claims that deal with ribs or indentations,
4 we've used Rapparini.

5 Could we go to slide 7, please. Now some of this may look
6 familiar to some of Your Honors, because we've been here before and we've
7 had some of these proceedings in the past.

8 And so Your Honors, particularly on the motivations to combine
9 here, have already been presented with a lot of the arguments that K-fee has
10 made but presented with the same combinations that we've applied here.
11 And in the '430 and '923 Patent IPRs, Your Honors found all the claims
12 unpatentable over these same references and combinations.

13 So that is where we are with the motivations, and if I could move
14 onto the next slide, please. You can see also several of the limitations have
15 already been previously presented such as free of the filter and pump
16 control. Items like grooves and ribs and a ledge; these have been discussed.
17 That's slide 5.

18 And if we could go to slide 6, please. Now these are some of the
19 newer limitations that K-fee has added like challenging whether there's hot
20 water. And so we will also address some of these new limitations as well.

21 So just to summarize the introduction, Your Honors' correctly
22 concluded in the '430 and '923 Patents that those claims are unpatentable
23 over the same combinations as we've applied here. And the same analysis
24 applies today. K-fee has not applied any new evidence that would change

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1 the outcome. They've attempted to complicate really, really complicate a
2 very simple combination of coffee -- predictable coffee technology.

3 So what I'd like to do, Your Honors, is start by just addressing K-
4 fee's challenges to the motivations to combine, and then along with Mr.
5 Palmer, go through some of the limitations. Of course, that's my plan. If
6 Your Honors have any particular questions or particular directions you'd like
7 us to go, please feel free to direct us particularly since some of this has been
8 evaluated before.

9 JUDGE TORNQUIST: Counsel, could I ask a quick question?

10 MR. MCCRAW: Certainly.

11 JUDGE TORNQUIST: As you had mentioned, some of this was
12 evaluated before, or at least looked at. I think those cases have been
13 appealed?

14 MR. MCCRAW: They are --

15 JUDGE TORNQUIST: Any chance that we're going to get a
16 readout on those appeals before this final decision is due?

17 MR. MCCRAW: No, Your Honor.

18 JUDGE TORNQUIST: Okay. So the timeline is not close? Okay.

19 MR. MCCRAW: That's correct. So one quick point I would like
20 to address before diving into the motivations is an argument that K-fee has
21 made in every paper.

22 And if we could go to slide 107, please. K-fee has argued that
23 Petitioner needed to put forth specific motivations to combine individual
24 features within the Yoakim reference.

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1 And Your Honors, this is wrong on the law and on the facts based
2 on Yoakim's clear disclosure for at least four reasons. And the first, Your
3 Honor, you see on slide 107 here, we have the GE Electric v. Raytheon case.
4 And under this federal circuit authority, you don't have to show motivations
5 to combine individual elements within a single reference. You don't need to
6 re-do the work that a reference already does. And that's what K-fee's asking
7 us to do here is make particular element-by-element motivations that are
8 simply not required. Our expert evaluated the art as a whole for what the
9 reference taught and explained why the limitations in the claim are obvious.

10 If we could go to slide 108, please. And this is particularly
11 relevant in predictable art. So we have mechanical arts with predictable
12 solutions. And so there's a level of creativity and understanding of a
13 person's field in the art; they're not an automaton. There's no leap of
14 inventiveness required to move around the Yoakim reference for what it
15 teaches.

16 Moving to slide 113. Factually, the Yoakim reference is very
17 clear, and Your Honors got this right at the Institution Decision, that you
18 have common capsules used across common machines. And I think the
19 clearer statement of this, Your Honor, is in Paragraph 20 in the bottom left
20 of this slide 113 that says, the device of the invention conveniently prepares
21 the liquid food from any of the capsules disclosed herein.

22 Yoakim is clear. Any of the capsules are meant to be used with the
23 device; and they're talking about the device collectively, Your Honors. So
24 that's one point.

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1 Another point, Your Honors, that K-fee has tried to make, is that
2 the identification means; the concept of using an optical code to identify the
3 capsule, is just limited to Figure 61 and nothing else.

4 If we could go to slide 114, please. That's just the opposite of what
5 Yoakim actually says. In the introduction, for the whole purpose of the
6 invention in Paragraph 10, Yoakim explains that the whole purpose of the
7 invention is to be able to better and more independently control the capsules
8 that it's reading.

9 In the summary of the invention in Paragraph 25, it says the device
10 is useful for preparing different capsules by comprising an identification
11 means for identifying the different capsules and controlling the operation.

12 And in 521, Your Honor, where you are talking about the different
13 figures with the identification means, it describes it as the system of the
14 invention.

15 So Your Honors, this is common among all of the devices. This is
16 not just Figure 61, like, K-fee tries to make it out.

17 And the last point I want to make about this alleged combination
18 deals with the flow restriction which K-fee has argued is just limited to
19 Figure 35 and cannot be applied anywhere else which Yoakim actually does
20 not say anywhere.

21 Could we please go to slide 119. Yoakim says the opposite. So
22 this Paragraph, 506 and 507, are talking about the version of the invention
23 that's reading multiple capsules. It's using the identifier and it's reading
24 multiple capsules. And they say a flow restriction can be formed by a

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1 spring-biased valve situated at, and acting on the rim of the capsule. That is
2 exactly what you see depicted in Figure 5, and you have Yoakim telling you
3 to use that with the multiple capsule embodiment.

4 And it even references earlier in the document. In Paragraph 507,
5 it says such restriction can be obtained by a restriction valve such as
6 described above. They're referencing back up to that.

7 So Yoakim is clear. They tell you exactly what, how to combine
8 these features. There's no leap of inventiveness.

9 Could we go to slide 117, please. And so I think it's also important
10 to look at what the Patent talks about when it relates to the flow restriction
11 means, which is really just a seal pressing on the outer rim of the capsule.
12 There's nothing about it that would be incompatible with any other aspect of
13 the device.

14 In 369, Yoakim describes this as an important aspect of the
15 invention. So the idea that this would just be cabined to one figure, it's just,
16 it's not logical. And it says that, you know, the flow restriction comprises a
17 valve means which opens or enlarges the liquid passage.

18 And so that, that's how that works, and it can work in whether
19 there's an identifier there or not. That's not an improper combination here.

20 Could we go to slide 118. Now one thing that I'd like to point out,
21 is even though the case law under GE v. Raytheon is clear that we do not
22 need to put forth any particular motivations for any particular independent
23 limitations, we, in fact, in the Petition did identify for this limitation that
24 would have been obvious to utilize a seal to take advantage of controlling

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1 the pressure of the liquid during brewing.

2 So we do have a motivation that we've provided for that. We
3 didn't even need that but we have that. So this is covered from every angle,
4 Your Honors. So there is no leap of inventiveness here. There's no
5 improper combination. Yoakim is very clear all of the capsules can be
6 combined, and the embodiments all work together.

7 So unless there's any questions about that, I would move onto the
8 motivation of why one would combine Yoakim with Jarisch.

9 Could we please go to slide 18. And Your Honors may recall this
10 from the prior proceeding. So what we have here is all of the various
11 capsule and machine features of the Yoakim reference, Jarisch tells us that
12 we want to take that identifier, that optical reader that's right in the center of
13 where all of the brewing occurs and move it out of the way so you don't have
14 any kind of, you know, residue or coffee grinds, or liquid impeding that
15 optical sensor.

16 And they tell you how to do it in a very clear way. Could we go to
17 slide 19, please.

18 And this is what the Petition laid out, Your Honor. You have
19 Yoakim on the left here, Figure 61, and on the right you have Jarisch, or
20 Jarisch 929 depending upon the IPR; they have the same -- a similar
21 disclosure. And so Jarisch is clear. You take a straight chamber, you run
22 the optical reader through it through a translucent chamber, you read the
23 code on the bottom of the flange and it comes right back down. And that is
24 the combination that we've made and there's a clear motivation as to why

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1 you would do that.

2 And could we go to slide 20.

3 JUDGE TORNQUIST: Counsel, we had this in the previous case.
4 But I think what the evidentiary record might be a little different, in now we
5 have another patent application in this family, and it's later and saying, hey,
6 this is problematic.

7 MR. MCCRAW: Yes. I'm happy to talk about that, Your Honor.

8 JUDGE TORNQUIST: What do we do with that? Because I think
9 that is something different than our previous cases.

10 MR. MCCRAW: So I think there's a couple issues with that
11 argument, Your Honor. The first of all, and we actually have a new case
12 that came out from the federal circuit in, I believe, it was January 2025,
13 called In re Entresto, that is clear post-filing date evidence of enablement
14 cannot be used to demonstrate lack of enablement.

15 So just legally, the point they're making is wrong. But I actually
16 don't have a problem with Exhibit 2021. I actually think it's helpful. And it
17 shows you that the Jarisch reference was, in fact, enabled.

18 Could you please go to slide 54. Well before I get to that, of
19 course, we know the law also that the prior does not, in fact, have to be self-
20 enabling for the obviousness inquiry, as long as the person skilled in the art
21 could combine the limitations with a reasonable expectation of success.

22 But let's go to slide 55, please. So this is the paragraph from
23 Exhibit 2021, the new patent you're referring to, that K-fee argues, and they
24 argue that this discloses that the original Jarisch patent was not enabled. But

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1 that isn't what it says, Your Honors. It says the support, which when they
2 support they're talking about the actual code where it sits, comprises a
3 section on which at least one sequence of symbols is represented so that each
4 symbol is sequentially readable. They're telling you it's readable. They say
5 such invention enables, they actually use the word enables, to make a large
6 volume of coded information available. And they say another advantage of
7 the Jarisch Patent is to be able to read the code support by rotating the
8 capsule.

9 So they say that it is readable. All that they're doing -- could we
10 please go to slide 56. And I would just to like make the point that just as a
11 matter of law, the U.S. Patent Office granted claims from these patents that
12 dealt with being able to read the capsule, and they determined that the patent
13 was enabled.

14 But let's go onto slide 57 -- 58. So what's going on in Exhibit
15 2021? The later patent for Jarisch -- they're just saying they're trying to
16 further improve the existing readability. And they say that, basically, it's a
17 commercial issue. That the reader that they have is not strong enough to
18 reliably read it over and over and over again. And so they say that yes, you
19 would be able to use a stronger sensing device, but commercially, that would
20 be difficult because that would make it expensive.

21 So what they do here, Your Honor, and you can see this on the
22 right, they provide an improved code support for enhancing the optical
23 signal. And what I love about this is it tells everyone that they didn't
24 abandon the actual invention. They didn't -- they kept the code on the

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1 bottom of the flange. They kept the reader at the base of the chamber, and
2 they kept the chamber being translucent to read it. They kept the entire
3 combination that we've set out with Yoakim and Jarisch.

4 All they did, Your Honors, is put a lacquer on the base of the
5 capsule and scratch the absorbing portion so they're a little rougher to sort of
6 increase the reflectivity and the clarity between whether it is on or off in
7 those signals.

8 But what they did not do, Your Honor, is abandon the overall
9 invention that we've laid out. And all they did was make it better. This is --
10 there's nothing about this that indicates that it's not, you know, enabled.

11 The other thing I think that's important, could we go to slide 66.
12 When I deposed their expert who had, you know, he has this discussion in
13 his expert report saying that this reference is not enabled. And I said, do you
14 understand a patent to be enabled -- and it was one of his patents I was
15 asking about -- but he said I don't understand the term enabled? And that
16 makes sense to me that he doesn't understand it because if you read his
17 report, he doesn't do any Wands analysis, he doesn't do any analysis that
18 comes to a legitimate conclusion that the reference is not enabled. He just
19 sort of comes to a conclusory position that the reference is not enabled based
20 on what it says. But it's a misreading of the reference. And I'll go back to
21 the first point which is post-filing evidence cannot be used to demonstrate
22 lack of enablement.

23 So for all of those reasons, Your Honor, I think this is very clear
24 there is no enablement issue.

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1 JUDGE TORNQUIST: Okay. And I understand what you folks
2 say on enablement, because they did. But there's also reasonable
3 expectation of success and motivation to combine.

4 MR. MCCRAW: Sure.

5 JUDGE TORNQUIST: And you relied on Jarisch, not this next
6 patent --

7 MR. MCCRAW: Correct.

8 JUDGE TORNQUIST: And this next patent says, hey, what's in
9 Jarisch is problematic.

10 MR. MCCRAW: I don't know that they would say it's
11 problematic. I think they say that it -- that if you really wanted to get it at
12 production levels, you would need to increase the sensors', you know,
13 strength in order to read it better.

14 So they come up with a solution to help read it better. But I think
15 what's important is that they kept the solution. It's not like they later
16 determined that the solution didn't work, or that there was no expectation of
17 success, they kept the solution. They kept the code under the flange, and the
18 location of the reader. They kept it all the same, Your Honor.

19 JUDGE TORNQUIST: Okay. One other concern about vibrations
20 and that sort of thing.

21 MR. MCCRAW: I think vibrations are discussed but I don't think
22 there's ever been a real issue with vibration. And I think if you look at the
23 Jarisch Patent itself, Jarisch is very clear -- let me try to get a slide for you.
24 Could we go to slide 37, please.

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1 Jarisch tells you that you would read the capsule by putting it into
2 the chamber and the device includes a capsule holding means for holding the
3 capsule and driving it in rotation. And this came up last time, Your Honor.
4 And it is clear that Jarisch -- Jarisch is not suggesting you have some kind of
5 gap or loose capsule. It doesn't make logical sense. What makes sense is to
6 lock down the capsule and spin it. And that's what they tell you that you're
7 doing.

8 Are there any other questions about the Jarisch enablement or the
9 combination, Your Honor?

10 JUDGE TORNQUIST: No.

11 MR. MCCRAW: Let's see. Well I want to make sure we have
12 time for limitations as well. Would Your Honors like to hear me talk a little
13 bit about the Rossi motivation or Castellani motivation, or would you rather
14 hear Mr. Palmer talk about some of the limitations? I want to make sure we
15 use the time in a way that's effective for you.

16 JUDGE ABRAHAM: Whatever you think is best.

17 MR. MCCRAW: Okay. Well let me quickly just go through Rossi
18 and a couple of the other references on the motivation side. If we could just
19 go to slide 70, please.

20 So and these are also limitations Your Honors saw in the prior
21 proceeding. A pump control to push water into the capsule only upon a
22 determination that the identifier agrees with the stored reference or
23 determines that it's suitable for use.

24 And just like last time, we utilized Yoakim for the reference that it

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1 is relying on a pump, and the disclosure of Rossi for how that pump
2 operates. And if we could just go to slide 74.

3 K-fee does the same thing as before where it tries to attack these
4 references in isolation. It argues, you know, that Rossi doesn't have a pump,
5 but well, 477 is very clear that Yoakim is controlling the pump based on the
6 identification means.

7 If we go to slide 75, please. In Paragraph 522, Yoakim is very
8 clear that they're controlling the pump to activate the pump. One of K-fee's
9 arguments is somehow to control the pump for volume only means turning it
10 off. They're very clear they're activating the pump.

11 Could we go to slide 80, please. So I just want to walk through the
12 process of Rossi because it's a three-step process. And you have the first
13 thing it does is you have an identifying element. They call it a load element.
14 But you have this identification element on the capsule which they call a
15 load element. And that's the first thing the machine checks for. And the
16 pump, the activation, nothing's going to operate if that identification element
17 does not check out.

18 Then you have a validation element which is a second step to
19 determine if the capsule is safe for the machine. And then, finally, if both of
20 those check out, and only after that, they will activate the pump.

21 And so Your Honor, it's a safety mechanism. It's a quality
22 mechanism. And there's clear motivations. Could we go to 83, please.
23 Eighty-four?

24 One of the arguments that K-fee has made is that if for some

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1 reason Yoakim doesn't benefit from increased machine safety, but I just --
2 it's very clear here from the cited paragraphs on slide 84, and this is from
3 Yoakim 506, 428, 188, that you have hot water, high pressure; whether that
4 pressure comes from a pump or from the rotational speed of the capsule.
5 You have high pressure in the system. There's certainly a reason that you
6 would want that safety.

7 And I want to address one other point. If we could go to slide 97.
8 So K-fee argues that for some reason there's no pump control before or after
9 reading the identifier because of an optional pre-wetting step, but we don't
10 talk about pre-wetting in the Petition. The Petition is not part of our
11 mapping.

12 If we could go to 98, please. Yoakim is very clear. Pre-wetting is
13 an optional step in the system. They say it might be advantageous to allow
14 some water to flow in the capsule but by no means is that required. So
15 there's nothing preventing, you know, there's nothing forcing this bodily
16 incorporation that K-fee wants here. All you have to do is use Rossi's
17 teaching to not turn on the pump of Yoakim until after the identification
18 means determines that the capsule is suitable for use.

19 And I'd like to quickly go to Castellani and that would be slide
20 122 -- 123. So Castellani teaches the basic and well-known technology
21 that's been around for decades of using arms to move a capsule that you've
22 brewed in the system to a wastebasket so a user doesn't have to touch it, that
23 the capsule -- it's hot, it's wet, it could be dangerous, it could be just
24 unpleasant. And so in Paragraph 10 of Castellani, they're very clear this is a

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1 simple, safe system to just dispose of the capsule after you've brewed.

2 If we could go to 124, please. So this is expressly meant to be
3 used with Nespresso coffee machines. So we're talking about the same type
4 of system as Yoakim and Jarisch. Can we move to 125.

5 And you can see, structurally, these are compatible. These are
6 both systems that have a jaw-like structure that the capsule sits upward. It's
7 pierced from above. So structurally, it makes a lot of sense; not that you
8 need that bodily incorporation, but it's just generally a person of skill in the
9 art looks at this and sees this to be compatible.

10 Now the arguments K-fee has made about this, Your Honor --
11 could we go to 126. K-fee's argued somehow that because of these arms, it
12 would, (1) impede the reading of the code, and (2) impede rotation.

13 But if you see here, this is from their Patent Owner response,
14 they're focusing on figures that show the capsule being lifted and in use.
15 And that's really not the right inquiry here. Could we go to slide 127, please.

16 So this is what K-fee's focusing on. Well of course, the arms are
17 picking up the rim of the capsule at that point. But if we go to slide 128,
18 what you actually see, Your Honor, is the holding arms, which are in blue,
19 and they show them behind the capsule, they're dotted lines, and they come
20 up underneath the rim, they sit below it, the rim is in red. There's a very
21 clear amount of space between the two. And then after it brews, it lifts up.

22 JUDGE ABRAHAM: Sorry -- back up a little bit.

23 MR. MCCRAW: Certainly.

24 JUDGE ABRAHAM: I'm having a little trouble understanding

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1 this figure.

2 MR. MCCRAW: Sure.

3 JUDGE ABRAHAM: Are you saying there's -- you've got the two
4 arms, it's going to be on -- one's going to be behind the green capsule and
5 one's going to be in front of the green capsule, right?

6 MR. MCCRAW: Correct. It's a U-shape; that's right.

7 JUDGE ABRAHAM: And you said there's space between the arm
8 and the rim?

9 MR. MCCRAW: Correct, Your Honor. On both sides, if you
10 look, you can see the rim of the capsule which we've colored in red, and you
11 can see where the blue is, where the arms are, and there's a white delta
12 between them. There are just --

13 (Simultaneous speaking)

14 JUDGE ABRAHAM: That small space in between --

15 MR. MCCRAW: Yes.

16 JUDGE ABRAHAM: -- the dotted lines and the blue line --

17 MR. MCCRAW: And that's the difference between those arms
18 whether they're touching the rim or not touching the rim.

19 JUDGE ABRAHAM: Okay.

20 MR. MCCRAW: And so as it relates to reading the code, first of
21 all, let's recall that this is a U-shaped arm. So the arm doesn't go completely
22 around the rim of the capsule. They're -- on the side of the open U, there's
23 going to be nothing touching the capsule. That's going to be in the image.
24 That'll be what we're looking at here on the right, in that crosshatch space.

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1 Perfect amount of space for a reader underneath the rim if you needed it.
2 The arms don't impede it. They also don't impede rotation because they sit
3 below.

4 And if we could go to slide 130, let's see, if you could go to slide
5 129. So our expert, Michael Jobin, explained that from reading this, you can
6 tell that it is below the rim of the capsule, and it basically drops into a lower
7 resting position, and then comes up and grabs the capsule at the right time.

8 Could we go to slide 133. And this is more testimony from
9 Michael Jobin on the same issue explaining that you can see that the arms
10 are held below it.

11 And 134? I think this is also important to understand because
12 regardless if there's a dispute about whether there's some little millimeter of
13 space, it's common sense to a person of ordinary skill in the art, you'd want
14 to have a little bit of clearance so it could spin freely, and it's easy to do.
15 This is a predictable art.

16 So and there's no bodily incorporation required. So none of the
17 arguments K-fee has made about Castellani apply. And so unless there's any
18 questions, I'd move on to the Rapparini reference?

19 JUDGE ABRAHAM: Is there any discussion in Castellani about
20 whether it's -- operates by rotation or just water pressure or anything?

21 MR. MCCRAW: It is silent on whether the capsule rotates. But I
22 don't think that would impact that here, Your Honor, just because really the
23 purpose of the invention is to apply lifting arms to a single-serve capsule
24 system. I think it's agnostic as to whether that capsule's rotating or not.

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1 If we could go to slide 135, please. So for Rapparini, really this
2 just deals with the basic context, and it's been known for decades of grooves
3 on the side of any kind of thin-walled structure including a capsule will
4 make that structure stronger. 136, please.

5 So here is an example of grooves on the capsule in the Rapparini
6 invention. And you can see that it's intended in Paragraph 19 to apply to
7 automatic espresso machines.

8 And in 67. So this, you have, this is analogous art. This is directly
9 meant to be used with machines like Yoakim and Jarisch.

10 Can we go to 137, please. And you can see just as a matter of
11 principle, that the capsules are shaped similarly, applying grooves from
12 Rapparini to these capsules is just logical if you were trying to increase the
13 structural stability. And Rapparini gives you that express motivation.

14 138, please. They tell you that by applying these grooves, it
15 guarantees the stability of the structure, makes them easier to handle, if
16 they're to be employed in automatic machines for domestic use. That's what
17 the Yoakim and Jarisch system is.

18 And that improves, as you can see in Paragraph 9, the stability and
19 rigidity of the system. And you have Jobin in his Paragraph 234 here
20 explaining the same thing.

21 Could we go to slide 139. Yes, so and this is just -- this is in the
22 Petition, this background. This is not just Rapparini. This is well, well-
23 known to people skilled in the art that you could apply grooves to a thin-
24 walled structure to increase its structural stability.

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1 Now what K-fee has tried to argue here, Your Honor, is that
2 because some of the embodiments in Rapparini are permeable, meaning that
3 they're, you know, liquid can go through them, that somehow that makes
4 them just incompatible with use in Yoakim and Jarisch.

5 But that isn't what we've mapped. We haven't said you would take
6 the exact capsule. We haven't said you take the capsule material. All we're
7 saying is taking what a person skilled in the art would know from this, which
8 is grooves on the structure increase the stability.

9 So if we go to slide 141, please. You can see Rapparini is clear.
10 Several kinds of materials can be used. And so they don't limit it to just, you
11 know, permeable materials. And, in fact, even if it's other types of plastics,
12 Yoakim is clear its capsules can be plastics, aluminum, cellulose-based,
13 biodegradable materials.

14 So Yoakim doesn't cabin its material either, so there's nothing
15 incompatible here, Your Honor.

16 And could we go to 142, please. We also have the testimony of
17 our expert, Michael Jobin, explaining that his reading of Rapparini is that it
18 is not in any way limited to permeable capsules. In fact, it talks about -- and
19 the Patent talks about impermeable capsules.

20 The last thing I'll say on this, unless Your Honors have any
21 questions, is that they tried to draw a distinction between thermoforming and
22 deep drawing which is the method in which you would put the grooves onto
23 the capsules.

24 In our Petition, both of Michael Jobin and evidence, explains that

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1 those manufacturing processes are not difficult, they're not different, they're
2 understood to a person skilled in the art. They're effectively the same, which
3 is you take a flat sheet of material and you stamp it into the shape of
4 whatever you want. It may have grooves on it.

5 Thermoforming, if it's plastic, you heat the plastic so that it will be
6 malleable. And with aluminum, it's deep drawing and you just stamp it. But
7 they're effectively the same method of manufacturing.

8 So Your Honors, that's everything I have on the motivations. Are
9 there particular limitations Your Honors would like to hear about with my
10 remaining time?

11 JUDGE ABRAHAM: While you're here, can you address this
12 slide 148? They're talking about the grooves and the rim.

13 MR. MCCRAW: Sure. Sure. So what you have here, they've
14 argued that the groove goes into the rim and therefore, that wouldn't leave
15 space for, you know, reading the code.

16 Well, first of all, you know, this is not necessarily drawn to scale.
17 A person skilled in the art would know how to, you know, have a rim of a
18 certain size in order to make room for that code. But as you can see here,
19 clearly with four, that groove stops. It stops right there before it hits the rim.

20 So the combination of just seeing that it does not go into the rim as
21 well as the fact that the person skilled in the art is going to know how to
22 make the different diameters for that. It's just simply not an issue. This
23 really would be improper bodily incorporation if you were forcing this type
24 of very specific combination.

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1 JUDGE ABRAHAM: Okay.

2 MR. MCCRAW: With my remaining time, I'm going to pass the
3 baton to my colleague, Mr. Palmer, to talk about a few of the limitations.

4 MR. PALMER: Thank you. Thank you, Your Honors, and may it
5 please the Board, in the remaining time, I may leap over into the rebuttal
6 some, but my plan is to touch on ledge from the '830 Patent, follow that with
7 the grooves on the Rapparini, and then go into the sidewall identifier. But if
8 you guys have other plans or other questions for any of the other limitations,
9 just let me know.

10 Can we pull up slide 230. So slide 230 shows the ledge
11 limitations. We're talking about Claim Limitation 1.g in Claim 9 of the '830
12 Patent. The plain language of the Claim 1.g, or Claim Limitation 1.g, shows
13 that the ledge has three requirements: (1) it's formed up at the inside of the
14 surface of the wall, (2) it projects towards the central longitudinal axis, and
15 (3) it's spaced below the open end of the base.

16 The Yoakim reference discloses a capsule hat that has this ledge
17 that meets these requirements.

18 If we could go to slide 232. And we're looking at Figure 28 of
19 Yoakim. So this reference we made sure we don't color any of the figures so
20 that you can actually see the features. But we have colored the individual
21 claim limitations and how the limitations map to the disclosure in Figure 28.

22 But if you take a look at the capsule. You've got the bottom end.
23 You've got the open end near the top. The rim, 104, is at the open end of the
24 capsule, and that comes from Limitation 1.h.

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1 The inside wall of the capsule is 107. It faces the beverage
2 material, that's 122. And so where is the ledge? The ledge is the flat portion
3 of what's identified as 120. If you take a look at Yoakim, Yoakim refers to
4 this as the seat portion. The seat portion provides the ledge that the lid can
5 sit on to close the capsule.

6 So if you take a look at this figure, you can see that the ledge is on
7 the inside surface of the wall. You can see that the ledge is below the open
8 end of the base element. And you can see that it projects towards the central
9 longitudinal axis which is 8.a.

10 Now they've argued on the other side that the -- it actually projects
11 away from. Not really sure how you get there. The way I think about this
12 is, if you're standing on the ledge and you jump off the ledge, which
13 direction are you jumping towards? You're jumping towards the central
14 longitudinal axis AA. And that's actually consistent with the intrinsic
15 evidence in the Patent.

16 If we can go to slide 232. On the right you see the Figures 10,
17 Figure 16A from the Patent. The only description of the ledge in the
18 intrinsic evidence of the Patent is in these illustrations; it's not described in
19 any manner.

20 And if you take a look at the ledges that are in Figures 10 and
21 Figure 16A, they're configured the same to be in the same direction as the
22 ledge that's in Figure 28 of Yoakim.

23 Yes, we can also see that if we turn to slide 233. This is the
24 intrinsic evidence again, or it's actually another figure, Figure 8, just to get

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1 this into the record. Do you have 233? You can pull 233 up. Yes. Sorry.

2 So just for the record, what we're looking at here is slide 233, and
3 it has the comparison of the Figure 28 in Yoakim with the prior art.

4 If there aren't any questions about that, I'd like to move onto the
5 vertical grooves in Rapparini. So if we could turn to slide 178. So now
6 we're moving onto the '910 Patent. There's one of these references, the next,
7 it's the next Claim Limitation, the sidewall identifier that will also apply to
8 13, but for now everything else applies to the '910 Patent.

9 So we're looking at Claim Limitation 1.f and 1.g. So you got a
10 vertically oriented groove spaced the distance between the flange and the
11 closed bottom.

12 The parties agree -- and if we go to the next slide, slide 179 -- the
13 parties agree that the plurality of vertically oriented grooves and ribs in
14 Rapparini have the radius topped -- radius top and radius bottom. So the
15 only dispute is whether the Rapparini grooves are grooves that extend -- or
16 sorry, grooves that are spaced the distance between the flange and the closed
17 bottom.

18 So if we can go to slide 180. So this is what Your Honor asked
19 about earlier. So you've got the groove there as 4, the flange is 3. The
20 groove is clearly positioned between the flange and the closed bottom region
21 which is 5 there in the figure; that's Figure 6bis of Rapparini Exhibit 1008.
22 And as the Petition and our expert explains, those grooves are spaced a
23 distance between the flange and the closed bottom.

24 The Patent Owner contends otherwise. They believe that it's not

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1 spaced a distance between the flange and the closed bottom because the
2 grooves run up to the flange. And they suggest that the claims require some
3 amount of space between the flange and the vertically-oriented grooves.
4 That's not the case. And it's not supported by the Claim Limitation or the
5 specification.

6 If you -- so Patent Owner's argument's actually based on Figure 19
7 of -- can we pull up Patent Owner slide 148. So they base this argument that
8 there must be a space between the grooves -- sorry, between the vertical
9 groove and the flange based on Figure 19 of their '910 Patent.

10 That's not actually the case. If you take a look at what the '910
11 Patent -- sorry, the -- yes, the '910 Patent discloses, the description of Figure
12 19 goes from Column 11, Line 8 through Column 12, Line 23. And here's
13 the operative language of Exhibit 1001, the '910 Patent. If you take a look at
14 Column 12, Lines 2 through 9.

15 According to the invention, provision is made for the grooves 32,
16 so you see the grooves 32 in the Figure, to be extended vertically across the
17 wall region. That is, they run straight from the flange to the bottom region.
18 There is no requirement in that description that there is space between the
19 vertical groove and the flange. So we respectfully disagree with Patent
20 Owner and their expert on that point.

21 JUDGE ABRAHAM: The claim in the '910 Patent, so l.f says
22 they're spaced a distance between the flange and the closed bottom. So
23 you're saying that you're understanding is that there does not need to be a
24 space between the flange and the groove?

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1 MR. PALMER: That is correct. So if you take a look at the claim
2 language, it's the plurality of vertical grooves are spaced a distance between
3 the flange and the bottom of the rim.

4 So what you're looking at, is you're looking at the plurality of
5 vertical grooves; they have to be spaced somehow, and they just need to be
6 spaced between the flange and the bottom of the capsule.

7 JUDGE ABRAHAM: So you're saying -- you're understanding of
8 that to me, they have to be located somewhere between the flange and the
9 closed bottom essentially?

10 MR. PALMER: Correct.

11 JUDGE ABRAHAM: And your basis for that is this language in
12 column 12?

13 MR. PALMER: Correct.

14 JUDGE ABRAHAM: Is that -- did you offer this claim
15 construction in the Petition? It's my understanding was that it was just --
16 you offered -- you went with plain and ordinary meaning in the Petition
17 for --

18 MR. PALMER: Yes. So that, yes. It's plain and ordinary
19 meaning based on this specification; how a person of ordinary skill in the art
20 would understand the specification.

21 JUDGE ABRAHAM: Okay.

22 MR. PALMER: So moving on, if we could take a look at -- the
23 next dispute on this is Limitation 1.g, the plurality of vertically-oriented
24 grooves cover 20 percent to 80 percent of the wall between the flange and

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1 the closed bottom.

2 So on this one, if we can take a look at slide 185. And can we go
3 to the next slide? Yes. So here you got Figure 6bis of Rapparini. You've
4 got the grooves that are variable in length and they cover some portion of the
5 body of the wall.

6 Based on this disclosure of Rapparini, Dr. Jobin explained that it
7 was known to employ grooves in the sidewall of the beverage capsules to
8 improve both their strength and the rigidity that can be found in Petition 23
9 to 24, citing Exhibit 1008, Paragraphs 9 through 11, and Exhibit 1003,
10 Paragraph 12, that's the Jobin declaration.

11 Paragraph 9, what paragraph 9 of Rapparini discloses is it discloses
12 that the length and the coverage of the vertical grooves can vary and be
13 optimized based on what you want for strength and rigidity. So it discloses
14 that this 20 to 40 percent coverage, or the amount of coverage in the length
15 of the grooves is a result-effective variable, and we all know under the Fed.
16 Circuit case law that result-effective variables, are not patentable unless you
17 show criticality of the claimed range. And we don't have any evidence from
18 the other side. They basically say it's a failure of evidence on our end.

19 We have expert testimony who tells you that based on his reading
20 and a person of ordinary skill in the art would read that that coverage, even
21 though it may not be drawn to scale, it certainly in addition to -- well, the --
22 sorry, I'm getting ahead of myself -- that figure plus the express teaching of
23 Rapparini, that those grooves -- the length of those grooves can be variable,
24 provides ranges that overlap with the 20 and 80 percent range. And

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1 therefore, it's not our burden at that point to show the obviousness. It's their
2 burden to show the criticality of that range, and they can't do that here
3 because they've put no evidence in the record to do that.

4 They've argued that there's a narrower range. So the 40 to 60
5 percent, but we know that's not critical because the broader range is 20 to 80
6 percent. So there's nothing critical with that narrower range.

7 JUDGE TORNQUIST: Let me ask you a question. You had a
8 discussion with Judge Abraham about the space, the distance part, and the
9 claim construction.

10 MR. PALMER: Yes.

11 JUDGE TORNQUIST: If we disagree with you, what's the effect
12 for your Petition?

13 MR. PALMER: It's no effect. You can still rule in our favor
14 because if you're just going to move it a little bit, that -- that's -- the
15 difference is between the prior art and what's disclosed or what's claimed. It
16 is very minimal there.

17 JUDGE TORNQUIST: Okay. And that's set forth in the
18 Petitions?

19 MR. PALMER: Yes.

20 JUDGE TORNQUIST: Okay.

21 MR. PALMER: And I've gone about six minutes over my time.
22 So if you guys don't have any other questions, I'll just reserve the remainder
23 of the time.

24 JUDGE ABRAHAM: All right. Thank you very much. I have

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1 you for about 30 minutes for your rebuttal. While you're getting set up,
2 Counsel, would you like to reserve time for rebuttal?

3 MR. CARSTEN: Thank you, Your Honors, yes. I think we'll take
4 55 minutes up front, and 20 on rebuttal.

5 Mr. Easton, could I trouble you to switch over to the Elmo please.

6 MR. CARSTEN: Good morning and may it please the Court. It's
7 good to see two of you again, and it's lovely to meet you Judge Abraham and
8 Judge Ross. Thank you for joining our little party which has been going on
9 for some time as Mr. McCraw noted.

10 So we're here for four IPRs today. In terms of the order of what I
11 intend to do, I'm going to handle a couple of the motivations to combine
12 right up front. And then I'm going to turn it over to my colleague, Mr.
13 Brooks, who's going to address some of the limitations; probably the three
14 that you heard about and perhaps one more.

15 If time remaining, I may get up and pop up one of the other
16 limitations, but if we don't get there, we don't get there.

17 So but, of course, we serve here at your pleasure. So if you have
18 questions, you have things that you'd like to know, to help you write the
19 opinion, we're happy to provide that so, feel free to interrupt at any point.

20 I think where I'd like to start is similar to where my learned friend
21 started, and that was at the overview of the challenged patents. And he said,
22 he pointed to the specification -- and I'm using references to the '910, all the
23 specs are the same. The declarations are very similar. The claim language
24 may vary from time to time, and it'd be relevant to certain arguments, but

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1 generally speaking, in broad-brush, the motivation to combine especially the
2 motivation to combine the embodiments out of Yoakim and the motivation
3 to combine Jarisch or Jarisch '929, are dispositive.

4 And so if the panel finds that either of those failed, then our work
5 is done, essentially, and we need not go any further. And that's irrespective
6 of what the claim language -- what the particular claim language is.

7 So with respect to the overview of the challenged patents, the first
8 thing on the slide, this is theirs, so this is an Nespresso slide 4, the object of
9 the present invention is therefore to provide a portion capsule which is
10 only -- only is suitable for a specific coffee machine. And that's absolutely
11 absent from the Petition. It's absent from Mr. Jobin's declaration. It's absent
12 from the attorney argument that followed. They just pick and choose at
13 random and mix and match in order to suit what serves their pleasure.

14 And I think we can kind of see that, and I'd like to also to put a
15 slide that my learned friend put up; this is slide 5. And he said, you know,
16 well some of these things have been previously considered or previously
17 presented, excuse me. Yes, they were, but I think Judge Tornquist, you had
18 mentioned, for example, the Jarisch 3 reference was new evidence and
19 different.

20 I would submit more broadly, though, in the last round of IPRs, the
21 Board did not put any weight or very, very limited weight on our expert, Mr.
22 Howle. And that is different. Now we have chosen a different expert and
23 perhaps in response to Your Honor's Decision, we disagree with that and
24 that's on appeal, but we do have a very fulsome and qualified expert in Mr.

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1 Glucksman who has gone through and analyzed all of this material, and that
2 is entitled to the afforded weight.

3 So even though these issues were previously presented, if you're
4 thinking about a scale, they were sort of previously presented with a big chip
5 on the side of Nespresso in that our expert's testimony was given very, very
6 little weight if any weight at all. So this is a different situation we're dealing
7 with.

8 JUDGE ABRAHAM: While we're on the topic -- I apologize --

9 MR. CARSTEN: Yes.

10 JUDGE ABRAHAM: -- for the interruption. There's a little bit of
11 a discrepancy in the level of ordinary skill in the art. Can you address how
12 different they are, and if that makes a difference to what we're talking about
13 here? Do we need to address that at all?

14 MR. CARSTEN: Sure. I'm happy to take that off the table.
15 Obviously, we hired a new expert. And in so doing, we said to him, hey,
16 you've been around for 50 years doing this, what's your idea or
17 understanding of what the level of ordinary skill in the art would be? He
18 said, this is what I think. And so, of course, we're going to put that forward.
19 We're not going to make the man swear to a standard he doesn't believe in.

20 Having said that though, Mr. Glucksman qualifies under either
21 standard, in spades. And I don't believe, obviously, I think theirs is a little
22 more narrow in that it requires five years of design experience specifically
23 with beverage systems, and so forth. It has some academic requirements
24 which are inconsistent with what, you know, Mr. Glucksman found in his

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1 career, but I think at the end of the day whichever you decide to apply here,
2 the results are going to be the same.

3 JUDGE ABRAHAM: Okay. Thank you.

4 MR. CARSTEN: So previously presented, yes, but previously
5 presented in a little bit of a skewed fashion. And so I think that there is
6 some new evidence that needs to be grappled with and considered. And I --
7 there's one exception to that.

8 And I do think, for example, the determination or the assessment
9 of groove that's laterally offset. That is the same as what has previously
10 been passed on, and there was a Decision, that's on appeal. But there was
11 also a non-institution decision premised on that same idea.

12 We do have one claim here that has the groove laterally offset,
13 which is presented in the same way. So I would submit that that claim ought
14 to be passed on as well.

15 Now I'd like to switch over to Nespresso's slide, I think this is slide
16 10. This is one of the slides that Mr. McCraw presented to sort of show how
17 things were mapped. And I think it's kind of telling.

18 First of all, one thing that kind of sticks out to me is, you know,
19 most of the art that's at issue here, is Nespresso art. It's Nes-tech (phonetic)
20 or one of the Nestle entities. And if this were so obvious, why did they need
21 to cite to four different items in order to cobble together an argument that
22 this claim is somehow obvious. I think that alone sort of speaks to the
23 notion that there really isn't anything obvious here.

24 But secondarily, if you do go through this and take a look and see,

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1 there's a lot of gray on the slide. And the gray says, oh, it's taught by
2 Yoakim. Well yes. But the first element here, that's referring Figures 6 and
3 7. And that's one embodiment of Yoakim. The remainder is Figures 28 to
4 31. That's a second distinct embodiment we have here.

5 And if you go down here, it says taught by Rapparini. Yes, but in
6 order to get to Rapparini, they take a little pit stop at Figure 23 in Yoakim,
7 leave that and spot that because that's sort of on the way. But the next
8 thing -- well this guy, that's Figure 6 and 7, so that's, again, number one. But
9 the next gray spot, now we're into Figure 61, 62. And so now we're into --
10 sorry, Figure 3, that's the third, we're into Number 4. And then when you
11 continue down here, you're looking at for this gray box, part of it is Figure 7,
12 and part of it is Figure 35.

13 JUDGE OBERMANN: Excuse me. This cite of the case, General
14 Electric v. Raytheon Tech., a Federal Circuit case that scolded the Board for
15 the approach that you seem to be advocating for here that requires the
16 motivation to combine each element of the claim even thus presented
17 together in a reference, what's your answer to that?

18 MR. CARSTEN: Your Honor, we are absolutely not going
19 element by element here. They're the ones that are picking and choosing
20 four elements among these embodiments. And their expert has provided no
21 information whatsoever about why or how a person of skill in the art would
22 consider those disparate embodiments to be in any way combinable. This is
23 In re Stepan. This is -- and that case stands exactly for the proposition
24 where you're taking disparate embodiments within a reference and trying to

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1 cobble them together in some way, you have to have from the perspective of
2 a POSA, the rationale as to why they would do it.

3 Mr. Jobin was absolutely silent about that. There is no discussion
4 anywhere in the Petition or in Mr. Jobin's declaration -- first or second -- that
5 says, here's why a person of skill in the art would think that these five
6 different embodiments are combinable.

7 And, in fact, we have evidence here from Mr. Glucksman going
8 through the specification saying look at all the differences and how
9 Yoakim's five embodiments are working and operational, and we don't --
10 there's no reason why a person skilled in the art would think to combine
11 these things. I'm sorry, is there --

12 JUDGE OBERMANN: I just wondered if you know, in the
13 General Electric case, was the Patent challenger combining elements from
14 different embodiments?

15 MR. CARSTEN: I believe it was. Absolutely. I think there was a
16 single element that was, I think, at issue in General Electric is my
17 understanding. I will go and confirm that while my friend, Mr. Brooks,
18 speaks, but I want to get you an answer to that directly. I believe that's the
19 case.

20 JUDGE OBERMAN: So you think it was a single embodiment in
21 General Electric?

22 MR. CARSTEN: Oh, no, no, no. I'm sorry. I misread the
23 question. It was a single element that was being taken from one
24 embodiment -- with one embodiment to another, I believe. And so that's

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1 why it was an element by element.

2 Here they're taking a mash up and they are the ones, the Petitioner
3 there, is taking, you know, aspects of this one and combining it with this one
4 in order to meet with hindsight, the claim.

5 JUDGE OBERMANN: Then your view is that Stepan, is the case
6 that controls?

7 MR. CARSTEN: Absolutely. Stepan is the case that controls.
8 And there's no exception to Stepan. Even Boston Scientific, which, I think,
9 stands for the proposition that -- or cited for the proposition that two
10 embodiments that are adjacent to each other in a disclosure, had been
11 combined. That's a broadly stated, the proposition in Boston Scientific, and
12 that's the rationale that the Board applied in the Institution Decision here for
13 allowing the Petition to be instituted in the first instance and say well look if
14 Boston Scientific -- Boston Scientific was after a full trial. And while the
15 particular paragraph doesn't identify that there was expert testimony about
16 the compatibility of those two, there was detailed expert testimony about the
17 Wolf reference which was at issue in the case, elicited during trial.

18 So what we have here, we have an expert who sort of says hey, I'm
19 going to just willy-nilly pick out of these five embodiments and combine
20 them, but it doesn't give -- doesn't even acknowledge that it's five
21 embodiments in the first instance -- and then never goes ahead and provides
22 any rationale for it.

23 From the very jump Your Honors, this case probably won't go
24 away because of that fundamental failure of proof. All they've done since is

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1 point to attorney argument.

2 JUDGE ABRAHAM: Let me ask you a question about your
3 annotations here. You pointed to parts of the claim, when you say it
4 corresponds to different figures in the Yoakim reference, how did you arrive
5 at that? Is it based on the paragraphs that they cite in the Petition and those
6 paragraphs talk about certain figures?

7 MR. CARSTEN: It's based on exactly the figures that are
8 identified in the Petition when they map out the claim.

9 JUDGE ABRAHAM: They also rely on certain paragraphs in the
10 reference as well?

11 MR. CARSTEN: Yes. Yes, sir, they do. Absolutely. And I've
12 got a full list of the paragraphs that are cited there as well, but you can look
13 at that, too. Absolutely correct.

14 But what I'm saying is, those paragraphs typically go ahead and
15 talk about or describe particular figures. And the figures that they are
16 pointing to in each one of these, represent and reflect different embodiments.
17 And that's the fundamental problem.

18 There is nothing from Jobin, their expert, from anyone who had --
19 who qualifies to say what a person of ordinary skill in the art would
20 understand here in order to assess this and say, yes, here's the rationale why
21 a person would think this can easily be combined or would predictably be
22 combined with this embodiment.

23 Unlike the way they tried to do, at least, for Jarisch in combination
24 with Yoakim. But the Stepan case stands clearly for the proposition that if

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1 you're going to pick and choose amongst embodiments in a reference, then
2 you need to have someone, someone with a propellor hat who qualifies as a
3 person of ordinary skill in the art to be able to say, here's why I think there's
4 a motivation to combine these things. And it's just a failure of proof from
5 the jump on this instance.

6 And it makes sense that -- well it doesn't necessarily make sense
7 that it's a failure from the jump in this instance, it's understandable as to how
8 it happened. And how it happened, if you look at our slide 11. I think I'm
9 going to switch back to the computer control of this recent -- is that okay?
10 Thank you, sir. I appreciate it.

11 MR. EATON: No problem.

12 MR. CARSTEN: Ms. Rallabhandi, could you put up 11 for us,
13 please? It makes sense how it happened and that is Yoakim is sort of like a
14 filing cabinet from a bunch of CIPs. And so progressively, Nes-tech or
15 Nespresso or whatever Nestle entity we want to talk about, was going ahead
16 and doing a bunch of development. And they were filing CIP after CIP after
17 CIP, and all pertaining to different embodiments.

18 And then the filing cabinet ends up as Exhibit 1004, Yoakim,
19 which has all the figures; Figures 1 through 65 in it. But they weren't
20 prosecuted together in the first instance. They weren't developed and said
21 here you go. Here's my unified thing. Instead, they're set forth separately.
22 And, you know, I think that -- may we go to slide -- I'm sorry, getting old is
23 awful. Slide 21, please, Ms. Rallabhandi.

24 There's a clear link in the specification between the capsule in

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1 Figure 28 to the Figure 35, for example, And a clear link between, you
2 know, the capsule in Figure 23 and the embodiments -- the laboratory model
3 at Figure 8, and et cetera.

4 And what they do, even though there's those blue lines, which is
5 the link -- and remember, we're talking about capsules are directed to
6 specific systems. Here, these sort of red paths that go all over the place,
7 that's the way they mapped this. They tried to take Figure 28 and tie it to
8 Figure 61. And remember, Figure 61 is the only system in Yoakim that
9 actually has an identifier at all.

10 I heard when, in connection with the argument about Rapparini,
11 and I'm getting a little ahead of myself, you know, them pointing out to
12 Figure 23 and saying, well look at this. Well Figure 23, that has the tooth
13 structure. And that tooth structure has to fit into a holder that has those
14 ridges on it as well. That -- and this is not me saying this, this is Mr.
15 Glucksman saying this. That is going to cause havoc on the optics. If you're
16 trying to shoot to the bottom of a rim, you're not just dealing with flat
17 surfaces now.

18 So back to the Yoakim. Mr. Glucksman talks at length about why
19 a person of skill in the art would not combine these various embodiments.
20 And his testimony is absolutely un rebutted.

21 Nestle had the opportunity and took advantage of the opportunity
22 to provide a supplemental declaration along with their reply. That doesn't
23 touch any of this. They had the chance to fill the gap. We would have been
24 objecting saying no, no, no, it's too late, it's too late, it's too late. And you

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1 probably heard this a time or two I would imagine. But it's -- we don't even
2 have that argument to make now because it's simply a null set. They didn't
3 provide anything. All they have is attorney argument.

4 I'd like to shift if I could over to -- unless there are questions about
5 this which, of course, we're here for questions.

6 JUDGE ABRAHAM: One follow-up question.

7 MR. CARSTEN: Yes, sir.

8 JUDGE ABRAHAM: Some of the patents have claims that refer
9 to just a portioned capsule. Does this argument apply to those claims as
10 well, or are these arguments mainly directed towards the patents that talk
11 about a brewing device with a capsule?

12 MR. CARSTEN: You know, if -- good question. I think if the
13 claims really were just directed to a portioned capsule, I might agree with
14 you that the argument only applies to the system claimed.

15 But these portioned capsule claims are a little different. Each one
16 of the independent claims says as an affirmative limitation configured to
17 operate in a specific system. And so I can pull up a claim, if you'd like, but,
18 obviously -- could we go the '910 Patent?

19 In two instances there's a reference to a beverage system -- a
20 specific beverage system. And so my sense of it, and my argument is, since
21 the entire -- and we saw from the first slide, right? Since the entire invention
22 is really focused on compatibility of a capsule with a specific system and the
23 claims actually talk about a specific system -- any claim is fine.

24 In my view, Your Honor, I think that those limitations make it

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1 clear that the argument applies there as well, because it's not just a portioned
2 capsule in the abstract, it's a portioned capsule that's configured to be used in
3 a particular system. And that's what Yoakim teaches. It teaches the five
4 different embodiments with these capsules for this, these capsules for this,
5 these capsules for this, and then that's what are the challenged patent, the
6 '910 Patent, for example, and the '829 Patent talk about it as well.

7 Well go back to, jump into the next argument that I would like to
8 address, and this is the combination of Yoakim -- the various embodiments
9 of Yoakim -- in connection with either Jarisch or Jarisch '929.

10 And Judge Tornquist, you had a question for my learned friend
11 earlier about Jarisch 3 and what impact it has. I think you're absolutely right
12 that it really is telling. And even if you want to say -- if you don't want to go
13 so far as us and say, oh, that evidence really does demonstrate that Jarisch or
14 Jarisch '929 are not enabled? I think you're dead on.

15 And this is exactly the way that Mr. Glucksman addressed it. He
16 talked about the challenges that a person of skill in the art would see when
17 actually doing what's talked about in Jarisch or Jarisch '929. I'm going to lob
18 off a litany of paragraphs that the Glucksman Declaration -- for the '910
19 now -- at Paragraphs 110 through 113, he talks about the challenges. At
20 Paragraph 119, he talks about the vibration issue. There was a question from
21 Judge Tornquist about vibrations. At Paragraphs 129 through 135, he talks
22 about the challenges in terms of optics and how you would go about trying
23 to solve those problems.

24 Remember now, there is zero evidence from Mr. Jobin about how

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1 a person of skill in the art would actually implement these changes. He
2 doesn't offer up any assessment of -- there's no design there. There's no
3 here's how you would do it. It's simply, I see this element here. I see this
4 element there. And that's what I'm going to do, challenges be damned. And
5 that's not the way that the way the KSR works. That's not the way that
6 obviousness works.

7 There's questions about whether or not this is a predictable art. I
8 think that while I don't think the word unpredictable is ever used in Mr.
9 Glucksman's declaration, I think that if you go ahead and actually assess
10 those paragraphs that I just rattled off along with a host of others, everyone
11 recognizes that this is an incredibly challenging field because you're dealing
12 with pumps and liquids and solutions, and vibrations, and spinning, so
13 centrifugation, et cetera. I mean, this is not a trivial mechanical system that
14 you can just easy-peasy it's done.

15 And so to have that complete absence of disclosure about how a
16 person of skill in the art would actually do what he says they would do, is
17 incredibly telling.

18 And then, you know, I mean, going further here, I think, if we look
19 at -- well I'm getting way ahead of myself here because maybe I'm proving
20 too much, actually or arguing too much I suppose, you might think that. The
21 Institution Decision really did premise the moving forward with the
22 combination on two things, or one paragraph essentially from Jarisch and
23 that was, you know, Paragraph 17, right?

24 And Paragraph 17 essentially says there are two reasons why, one,

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1 you know, less prone to damage and they talk about this thing called a
2 pyramidal plate, and then there's the ingredients projection. Now nobody
3 said what the ingredients projection is. Presumably, to use the technical
4 term, it's schmutz -- it's just dirt, or grounds, or whatever it might be. But
5 their expert hasn't said what it is. He doesn't -- there's no opinion out there
6 saying this is what ingredients projection means.

7 But on the less prone to damage by the pyramidal plate, it took
8 some digging. We had to find what the pyramidal plate was. And it's our
9 expert in the Patent Owner Response, in his declaration who actually
10 presented this. This is from Exhibit 2032, and it's simply just a plate. A
11 plate that has some little sort of semi-flattened pyramids that stick out of it.
12 And this is from Nespresso's original line of capsules. It's not rotating. It's a
13 high-pressure system, and essentially with this article with Exhibit 2032 says
14 is, that when the capsule is under sufficient pressure and expands enough, it
15 touches the plate and pow, it opens up. That's exactly the opposite of
16 everything that's taught in Yoakim.

17 So why on earth would a person of skill in the art -- and this is
18 handled in Mr. Glucksman's declaration -- a person of ordinary skill in the
19 art would not be motivated by a sentence that refers to a pyramidal plate
20 where there is no such pyramidal plate in Yoakim whatsoever. And the
21 pyramidal plate works oppositely of anything that's taught in Yoakim, which
22 is piercing the capsule before there's pressure going in at all essentially.

23 JUDGE ABRAHAM: So there may not be a pyramidal plate. I'm
24 not saying there is or there's not.

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1 MR. CARSTEN: Understood.

2 JUDGE ABRAHAM: My understanding is that Mr. Jobin did say
3 that there is some potential for damage to the capsule that could interfere
4 with reading it. So I get that it's not the specific damage that Jarisch is
5 talking about, but isn't the expert still talking about damage that could
6 occur?

7 MR. CARSTEN: He is talking about damage that could occur.
8 And the issue though is that Yoakim actually has already solved the
9 problem. And now we're into a situation where, and this is recognized in the
10 case law In re Schweikert, where there is no problem to be solved because
11 Yoakim works and works well. It reads it already.

12 And so what's the issue? It reads it in a stationary manner. And so
13 there is no issue in terms of damaging during rotation or anything else. It's
14 read before any rotation occurs.

15 And so In re Schweikert stands for that proposition that where
16 you're simply adding unwanted cost and unwanted complexity to a system?
17 That's not a motivation to combine. And so there's no evidence whatsoever
18 that the system in Figure 61 of Yoakim suffered from any problems in terms
19 of damaging the code that would prevent it from being read.

20 And so while I understand and I agree with you that that's one
21 thing that Mr. Jobin did say, it doesn't get him where it wants to be. And
22 that's because this is all hindsight driven. They see the target, they know the
23 target, they know that they've patented profusely in the area, and they're,
24 like, okay, we're going to mind what we've got to take this competitor's

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1 patent away. And we're going to cobble together and if we have to use four
2 references or we have to use four references including five different
3 disparate embodiments, we're going to do it.

4 And that's where we are here. And I think that the fact that Mr.
5 Jobin did not come back after that Institution Decision and say, Your
6 Honors, I read your Institution Decision. I see the rationale for why you
7 think -- and remember that was on the record as it existed. He never came
8 back and said you guys were absolutely right. And here's why a person of
9 skill in the art would have understood exactly what you're saying. Now,
10 again, we would have had an argument, oh, too little too late, but that's not
11 the argument we're dealing with. All we have is attorney argument; very
12 competent attorneys absolutely. But it's just attorney argument.

13 I have some details about, for example, the rationale as to why the
14 ingredient projections -- this is all handled in Mr. Glucksman's declaration,
15 but as to why the ingredient projections wouldn't be an issue with respect to
16 Figure 61, I don't know if you want to hear that.

17 In addition, there's this red herring that's thrown out there, will
18 Panesar -- this reference Panesar talked about a problem. Candidly, I think
19 Panesar is irrelevant because Yoakim's Figure 61 already implements
20 Panesar in that the optical reader is inboard, if you'll have it, of where the
21 piercing occurs, so you wouldn't expect any schmutz or residues, et cetera to
22 even interfere with the reading as well as the reader -- the reading happens
23 well before anything even occurs in Figure 61. So there's that.

24 But I would encourage, Judge Tornquist, just to sort of finish off

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1 where we began on this assessment, pay close attention to that paragraph
2 from Jarisch 3. I mean, it's not saying, oh, this is trivial. I mean, it is
3 specifically difficult, right? Not suitable. I'm at our slide 57. Right?

4 I mean that paragraph over there on the right, it does talk about
5 things, the vibrations, wearing, unbalanced mass distribution; none of that at
6 all was even considered as far as we can tell by Mr. Jobin in saying here's
7 the outcome of taking these two things and putting it together.

8 JUDGE ABRAHAM: Sorry. What do we do about the fact that
9 Patent Owner's already admitted that this document is after the -- I mean, it's
10 post-dated?

11 MR. CARSTEN: I tend to -- I agree that if we were using this
12 solely for enablement, maybe it's too late, although oftentimes, you do prove
13 up lack of enablement by efforts that were done subsequent, after the fact.
14 But -- so I think a garden-variety blanket rule is not the appropriate thing.

15 But having said that, these are instances or experiences that a
16 person of skill in the art as of the priority date, looking at the reference and
17 trying it would've seen and understood. And these are not a surprise. I
18 mean, I think that -- the fact that Mr. Jobin doesn't even address them in
19 saying here's how you would implement this solution that is made obvious
20 by these various references demonstrates that, you know -- makes it even
21 worse that he hasn't even considered these things. You know, our expert,
22 Mr. Glucksman, went through at length and considered each one of these.

23 And so, I think the evidence is relevant to reasonable expectation
24 of success and what you would learn if you went ahead and performed what

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1 Mr. Jobin is nebulously saying a person of skill in the art would do.

2 JUDGE ABRAHAM: So what evidence do we have that the
3 information that's provided in this document is what a person of ordinary
4 skill in the art would've known at the time of the invention? Is that coming
5 from your expert?

6 MR. CARSTEN: Well, he is, he is taking this document at face
7 value and, remember, this is the same group. This is Jarisch, who did the --
8 Jarisch and Jarisch 929, and this is the same group, Jarisch, at the same
9 facility a couple years later. So we have to take them at their word
10 essentially.

11 JUDGE ABRAHAM: Right. But it's not unheard of to say you've
12 discovered something and you say it's the best and greatest thing, and then
13 10 years later say, well, we realize now that that was a difficult way to do it
14 and we've come up with something better.

15 MR. CARSTEN: Very true.

16 JUDGE ABRAHAM: It doesn't mean that the first one wasn't
17 good when it -- when they came up with it or it wasn't enabled or however
18 you want to describe it. So my question is more of timing, right. So if we
19 take this information as of the day it was published, are we supposed to take
20 it at face value that that's what a person of ordinary skill in the art would
21 have understood it to be at the time of the invention?

22 MR. CARSTEN: Yeah. Well, I think -- I think, yes, is the answer
23 to that.

24 JUDGE ABRAHAM: And what's the basis for saying yes?

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1 MR. CARSTEN: Well, certainly, I would encourage you to look
2 at the paragraphs I cited of Mr. Glucksman's declaration. He goes through
3 and talks about that. But even without citing Jarisch 3, which is new to the
4 party, Mr. Howle, the expert that was not credited last time, talks
5 specifically about so many of these things. He, alone -- he, himself -- now,
6 that's obviously not evidence record here.

7 JUDGE ABRAHAM: Right, right, right.

8 MR. CARSTEN: But what -- but this is something that we've
9 been talking about even before we found Jarisch 3 and saw this disclosure.
10 And so these are -- like, the difficulty of the optics, that's something that
11 was recognized and has been recognized for a long time. The question of
12 vibrations and jitter causing issues with the optics, the holding of the
13 capsule. And you know, I didn't take the bait in terms of the gap, but there
14 is a gap in Jarisch that really does undermine the entire secure fit that is the
15 basis of Yoakim. But all of these things, and my -- Ms. Rallabhandi, who is
16 three steps ahead of me at slide 49, which shows the gap. And remember,
17 you know, Yoakim is -- this thing seats in and grabs on tight, and Jarisch is
18 just completely different. And that gives rise to the possibility for wobble.
19 Now, if he says, a person with skill in the art would see that and they fix it,
20 or he says there's not a gap at all, I don't know.

21 But this is just one little example of dozens of issues. So our
22 expert went ahead, looked at your institution decision, identified those two
23 issues that you said this is the reason why a person is going back to it and
24 said, no, I disagree, with respect, and then went on and listed five other

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1 reasons in detail. And Mr. Jobin didn't even touch it.

2 JUDGE TOURNQUIST: So I have a question.

3 MR. CARSTEN: Yes.

4 JUDGE TOURNQUIST: At least in the '910 Patent, the claim is
5 to a portion capsule.

6 MR. CARSTEN: It is.

7 JUDGE TOURNQUIST: Your argument with Jarisch 3 is no
8 reasonable expectation of success. You have multiple arguments, but one of
9 them is that. But reasonable expectation of success is to form the claimed
10 invention.

11 MR. CARSTEN: Right.

12 JUDGE TOURNQUIST: There's no need to read -- it's just --
13 there's no doubt you can add an identifier under the flange, correct?

14 MR. CARSTEN: Well, would it be possible for one to do it? And
15 I'm trying not to -- I'm trying to be careful in my words here because I don't
16 want to say I've conceded that it's obvious, right. I don't think it is obvious
17 at all, in fact.

18 But with that caveat, yes, a person could throw a code under the
19 flange.

20 JUDGE TOURNQUIST: Okay. So the --

21 MR. CARSTEN: Jarisch has that one sentence that says you can
22 do it on the bottom, right?

23 JUDGE TOURNQUIST: So it seems like what we're just steeling
24 down to is more -- now we're motivation to combine, because you're not

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1 going to put it under the flange unless you have a device that can read it.

2 MR. CARSTEN: Exactly. And the claims say that. The claims
3 say this is a portion capsule, but it's not just a portion capsule in the -- you
4 know, in the wild. This is a portion capsule which is configured to be read
5 by a particular beverage system. And that's why, in my view, as I responded
6 to Judge Abraham's question earlier, you know, this is not just a portion
7 capsule. It's a portion capsule that's designed to be used by a specific
8 system. And there would be absolutely no motivation to put it on the
9 underside of the flange unless you had in mind a system that was capable of
10 routinely and reproducibly reading that identifier.

11 JUDGE TOURNQUIST: So we have to write decisions for these.
12 Is it fair to say, for the portion capsule claims, we can focus on motivation to
13 combine and not at all on the reasonable expectation of success for putting
14 the identifier under the flange?

15 MR. CARSTEN: I'm going to give you a glib answer, Judge, and
16 I apologize. If you're going to find our way, you can write whatever you
17 want. But having said that, I think that's a good way of thinking about it.
18 So you've got -- because really, it's the reasonable expectation of success
19 when it comes time to the whole system that provides the motivation to
20 combine them if that makes sense. So sort of thinking about it through that
21 structure.

22 JUDGE TOURNQUIST: Okay.

23 MR. CARSTEN: I do have some things to say about Rapparini,
24 just really briefly. This is motivation to combine Rapparini. You know, on

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1 that port -- on that point, excuse me, you know, my learned friends stood up
2 and said there's nothing in Rapparini that limits it to -- you know, to
3 permeable or filters. Well, I mean, if you actually look at the field of the
4 invention, number one, you know, in particular, the present invention relates
5 to the field of filtering and permeable containers. It goes on for substances,
6 et cetera. The summary of the invention, paragraph eight. The present
7 invention relates to filtering and permeable containers for substances
8 suitable for the presentation of beverages.

9 You know, this is about this. Now, sure, there is that other
10 sentence -- or that paragraph that talks about other materials, but those
11 materials, according to Mr. Glucksman, would be understood to be
12 permeable materials. Now, there was some testimony about figure 10 from
13 Mr. Jobin in this, and he said, well, that's not a permeable material. That --
14 it says hermetically sealed. Well, that's a cup in which the permeable thing
15 with the grooves in it sits. That's not, itself, the thing that is grooved.

16 And so I think -- you know, I like to think that's just a mistake,
17 that they would point to that and say that means that Rapparini taught
18 putting grooves on things that were not permeable, but be that as it may.

19 And it makes sense that Rapparini really is about permeable stuff.
20 This is something that dropped into a mocha pod or dropped into one of the
21 handles that a barista would do in terms of an espresso machine to get rid of
22 the -- to contain the detritus from brewing coffee. This has nothing to do
23 with rotation or centrifugation. And that's what Mr. Glucksman goes
24 through and says. If it's permeable like this -- you know, it's a little floppy

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1 bag. And the reason for stiffening this is to allow you to put stuff in it
2 during manufacturing without flopping all over the place.

3 And so that's not what is going on here at all. And the slide that
4 my friend put up, this is Nespresso slide 139 with the three images, they're
5 not relying on those at all. Those are not part of the grounds. That's
6 irrelevant. The ground they proffered was figure 23 leading to Rapparini,
7 and that fails.

8 JUDGE ABRAHAM: So the argument is that -- is the argument
9 that because it's -- Rapparini's talking about permeable containers that a
10 person of ordinary skill in the art wouldn't even look to the reference?

11 MR. CARSTEN: Exactly right.

12 JUDGE ABRAHAM: Because you're not really disputing that the
13 grooves give it more structure. It's you wouldn't go there in the first place?

14 MR. CARSTEN: Exactly right.

15 JUDGE ABRAHAM: It would just be based on the permeable
16 nature of the --

17 MR. CARSTEN: Well, think about it. So, you know, if you took
18 this bag and put the ribs to stiffen it, we don't dispute that that would stiffen
19 that permeable thing, and then dropped it into something that spins it, then it
20 twists. And so you wouldn't get the brewing that's necessary in order to
21 actually make it function in a rotational system. So there's absolutely no
22 reason that a person would look to Rapparini for that solution.

23 JUDGE ABRAHAM: Well, it sounds like -- my understanding is
24 that they're arguing that they're looking to Rapparini for the improved

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1 structure, not for the entire bag. They're not going to take the permeable
2 material. They want something with more -- a rigid structure. And so
3 why -- your argument is you wouldn't take this bag and put it in a
4 centrifugal machine, fair, but that's not what they're arguing. They're
5 saying you take the ridges or the grooves and apply it to the aluminum
6 capsule.

7 MR. CARSTEN: And that's why I'm saying that does not -- that's
8 not what is at issue here. That's the problem with their motivation to
9 combine. The whole purpose of it is separate from -- of the grooves in
10 Rapparini is different from any rationale for why they would, you know, put
11 a groove onto the aluminum capsule. The grooves in --

12 JUDGE ABRAHAM: But they're arguing -- sorry, go ahead.

13 MR. CARSTEN: No. There are -- for example, there is a cup that
14 is shown or a container or a cylinder that's shown in Rapparini, but it is
15 designed for the grooved permeable membrane to be sent in and sealed that
16 way. There's -- if you're looking for stability, that's the stability point,
17 make it metal. And that's what Rapparini teaches. Rapparini teaches you
18 don't -- for metal, you have just the cylinder in figure 10. You don't need
19 the grooves. It's for the floppy stuff that you need it, and that's at issue with
20 everything you just said.

21 Remember, my learned friend got up here and said, this applies to
22 metal, this applies to metal. Why was that so important to him? It was
23 important to him because Rapparini, on its own, doesn't get him where he
24 needs to be. There's no rationale to take something as stiff as a floppy bag

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1 and apply it to a capsule that's made of aluminum and already is fine.

2 I'm going to switch it over to my learned friend who I'm sure I did
3 not give nearly enough time for, but we'll take that as it comes. Thank you
4 for your indulgence and your patience. Mr. Brooks.

5 MR. BROOKS: Thank you, Mr. Carsten.

6 Good morning, Your Honors. My name is Ian Brooks. I'd like to
7 start with testimony, and there was a question about whether or not
8 Castellani is a centrifugal system, and I'll submit to Your Honors it is not.
9 And Mr. Glucksman, in paragraph 73 of the 722, Patent Declaration, says so.
10 But I think it's apparent just by looking at the differences between the
11 Yoakim system and the Castellani system as illustrated here on slide 74 of
12 Patent Owner's demonstratives.

13 In the Yoakim system, you can see there there is -- an area of
14 separation allows that brewing chamber to rotate, and the way that that
15 system operates is water is input through the top of the capsule and it also
16 exits through the top of the capsule. And that exiting through the top of the
17 capsule at the ends is done as a result of that rotation function.

18 Castellani operates differently in that the capsule is punctured at
19 the top and the bottom and the water flows through the capsule from the top
20 to the bottom, and that's explained in paragraph 50 of Castellani.

21 Now -- and so, as we explained, these two systems are not similar
22 in their nature of how they would operate in the first place. So that's reason
23 one why you would not combine the teachings of Castellani with Yoakim.
24 But I think there are other compelling reasons.

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1 And if we go to slide 75, the way that these holding arms
2 operate the annular portion in Castellani, it's taught that -- in a way that it
3 would block any identifier on the underside of the rim of the capsule. In
4 particular, you're not just talking about a fork, but you have this -- within the
5 fork, an annular portion, so a rim, that encompasses the capsule. And that
6 encompassing point is made in paragraph 43 of Castellani. And so this ring
7 essentially wraps around the area of the capsule where the underside would
8 be blocked.

9 Now, the figures are not drawn to scale, and so there may be an
10 area in Castellani that potentially that annular ring or annular portion is not
11 covering, and we address that on slide 76. I think the only area where that
12 would be is on the right side, potentially above where that number seven
13 annotation is. And the problem there is, of course, every time a capsule is
14 ejected, it's going to fall in the direction of where that sensor would be in the
15 first place. And if you've got a hole in the bottom of the capsule, you have a
16 hole in the top of the capsule, Petitioner has explained many times that
17 there's this concern about soiling and residue, and you are effectively going
18 to have capsule material on that sensor when it was placed in that one
19 available position where you might potentially be able to provide an
20 identifier -- a sensor for reading an identifier.

21 And so that is a reason why a person of ordinary skill in the art
22 would not look to Castellani's teachings of this fork and annular portion in
23 order to exit a capsule from a centrifugal brewing system.

24 If we go to slide 77, as we've explained, there is an area here that

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1 is being encompassed by -- an area of the capsule that is encompassed by the
2 annular portion and that fork element when it is closed. And I think the
3 annotation that Petitioner provided where they have this red area omits an
4 aspect of the capsule, which I just below, where there is -- what you see here
5 is this dashed line that effectively goes across, and in this cross section, it is
6 touching a portion of that capsule when the system is closed. And I think
7 that this becomes more evident by the fact that there's no suggestion in
8 Castellani to support Mr. Jobin's motion that the fork element drops out of
9 the way.

10 And if we go to slide 78, what you see here in figures 8 and 9 of
11 Castellani and the fork element in its rest position. And so when that
12 brewing head is closed, you see it sits in the same position as when -- it sits
13 when it is opened. And the idea here is that this fork and annular portion
14 encompasses that capsule so that when we get to fully open position, slide
15 78 -- slide 79, please. It can be lifted up and then the capsule slides out into
16 the wastebin.

17 And so because there is that element of the fork, the annular
18 portion touching the capsule during the brewing and it doesn't move out of
19 the way, you're going to have friction if you were to try to use these
20 teachings and apply them to a system like Yoakim or Jarisch where there is
21 rotation.

22 JUDGE TOURNQUIST: So you're saying that you're disagreeing
23 with Petitioner that when this device is closed there's not a gap between the
24 fork and the rim?

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1 MR. BROOKS: Absolutely, I disagree with that.

2 JUDGE TOURNQUIST: Okay.

3 MR. BROOKS: And I think that there's additional support in the
4 fact -- you know, not only showing this rest position here, but also
5 Castellani's explanation that this fork element abuts that bottom supporting
6 element number five. And so, effectively, it's going down and it's stopped
7 at that rest position and it is within a place where it would be touching the
8 capsule rim.

9 If there's no other questions on Castellani, I'd like to talk about
10 vertically oriented grooves, spaced a distance between the flange, and that
11 would be K-fee slide number 147.

12 Now, we've applied the plain and ordinary meaning in our
13 interpretation of the claim, and I submit that I wholeheartedly disagree with
14 Nespresso's position that under the plain and ordinary meaning, spaced a
15 distance between the flange and the closed bottom effectively just means
16 between with no spacing at all. I think there has to be some amount of
17 space, and so I'd like to focus on that language, spaced a distance between.
18 And if we go to 148, as was pointed out by Nespresso and conceded, what
19 you see here are grooves 32, and they are spaced a distance from the flange
20 and spaced a distance from the closed bottom. In this particular
21 embodiment, the Patent explains that these grooves have about 50 percent
22 coverage of the side wall in implementation.

23 And another point, if I could, Mr. Easton, have the Elmo up. Now,
24 I just point to this because --

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1 JUDGE ABRAHAM: Can you just identify it for the record what
2 that is?

3 MR. BROOKS: Yes. I've put up here Petitioner's slide 189.

4 Again, getting to the point of claim interpretation, Nespresso says
5 it's applying plain and ordinary meaning, but the Petition also explains that
6 they're relying on the interpretations that K-fee has provided in its -- this
7 report action. And when looking at the accused product -- I'll just flip it
8 over so that it aligns with what you've seen in figure 19. But it's difficult to
9 see here, but there is, in fact, a gap between the end of that groove and where
10 the flange is.

11 And so our interpretation in our infringement contentions, as well
12 as in this proceeding, is that there must be grooves spaced a distance
13 between the flange and the closed bottom, and that means that there is some
14 spacing between the flange and the closed bottom.

15 Mr. Easton, if I could go back to the slides. Thank you.

16 MR. EASTON: You're welcome.

17 MR. BROOKS: And so if we go to 149, K-fee slide 149, I have
18 here the evidence that Petitioner puts in his petition, figure 6 of Rapparini. I
19 don't think your eyes are deceiving you. I think that those ribs go to the
20 flange. And I disagree that the statement in paragraph 11 that there are short
21 ribs extending only along the side region of the container indicate that
22 there's any space or distance between the flange of that container of
23 Rapparini and the top of the rib.

24 And if we go to slide 150, we have Mr. Glucksman, in his

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1 declaration, paragraph 182, explaining that under Rapparini's process, there
2 is not a practical way to thermoform the capsule and have the ribs that's
3 taught by Rapparini that would not have them go to the flange. And you can
4 see that illustrated in figure 4 of Rapparini, where there is this die that
5 illustrates ribs all the way to the top, and it is stamped -- or it is used to
6 stamp a flat sheet that generates a container, and in the figure there, you can
7 see that those ribs go all the way up to the flange surface.

8 JUDGE TOURNQUIST: Okay. So I asked Petitioner if they
9 could prevail on that claim construction and they said yes, that it's in the
10 Petition. Do you agree with that?

11 MR. BROOKS: I do not agree. I --

12 JUDGE TOURNQUIST: Why not?

13 MR. BROOKS: Well, first of all, as I said, the plain and ordinary
14 meaning requires that there be some spacing. And then second, under the
15 interpretation that's in Petition, which is, I believe -- follows K-fee's
16 infringement contentions to not be spacing there, there is no teaching in
17 Rapparini that would support that there would be any spacing from the
18 flange.

19 And so whether the rib goes into the flange or goes to the flange,
20 K-fee is going to prevail, because there is not, at least on the flange side,
21 spaced a distance between -- spaced from that flange.

22 JUDGE TOURNQUIST: So they didn't make an argument that
23 you would space it a distance away from the flange?

24 MR. BROOKS: No, I don't think so. What they have pointed to

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1 repeatedly is the representations in Rapparini that these ribs can have
2 variable length. But I think that that, one, is about one rib next to the other.
3 So this rib will have a different length than the rib next to it. And that's
4 what's illustrated in figures 6 and 10 of Rapparini. But in all instances, there
5 is -- these ribs extend from the flange. And if we go to slide 150, we have --
6 sorry, 151. We have Mr. Jobin confirming this in his deposition, Exhibit
7 2025, page 117, 16 to 19. He says that it creates longitudinal stiffening ribs
8 that extend from the flange toward the region of the capsule. And he says
9 that's figures 1 through 5 that are forming his understanding of Rapparini.

10 And so it's in all instances within Rapparini, you're starting from
11 something at the flange that then takes some length from that point and
12 comes to a bottom area.

13 If I can go to slide 152. The Petition and Mr. Jobin rely on this
14 figure 6 with this green annotation to suggest that there's also disclosure of
15 20 to 80 percent coverage, or 40 to 60 percent coverage. Now, I think that
16 based on what I've already shown, you don't even have to address these
17 points, because they haven't demonstrated in the Petition or here that there is
18 any spacing between the flange and the closed bottom. But if you were to
19 look to these elements as well, first, I would submit that their reliance on this
20 patent drawing is insufficient, as there are no precise proportions. Rapparini
21 doesn't explain or tell you what size they need to be, the amount of
22 coverage, et cetera. And so pointing to this figure is inadequate.

23 And then if I go to slide 153.

24 JUDGE OBERMANN: Do you have any -- I'm sorry.

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1 MR. BROOKS: Yes.

2 JUDGE OBERMANN: Going back to that figure, do you dispute
3 that it would've been a result effective variable to vary the proportions?

4 MR. BROOKS: Based on the teachings of Rapparini, I think that
5 you're always going to start from the flange, and then there may be some
6 length coming down. And -- but Rapparini doesn't tell you what amount of
7 length that would be. I think it would have to be appropriate enough to
8 provide stability. But, in any case, whether the coverage is 90 percent or
9 something else, you're always going to extend from the flange region based
10 on the teachings of Rapparini.

11 JUDGE OBERMANN: Okay. But an ordinarily skilled artisan
12 would've been able to tell, you know, what to do in order to make it stable.

13 MR. BROOKS: I think there -- I don't know that there is anything
14 in the record that says at what point ribs provide stability.

15 JUDGE OBERMANN: But an ordinary artisan would've been
16 able to figure it out?

17 MR. BROOKS: I don't know that that's in the record. But there
18 are references in the record that provide different embodiments of ribs or
19 stiffening elements, but the amount of coverage or how much is necessary to
20 attempt that result I don't think is clearly laid out.

21 JUDGE OBERMANN: Okay, thank you.

22 MR. BROOKS: I did want to talk about -- I see them in the
23 rebuttal talks so I did want to talk about the identifier on the outside surface
24 of the wall. If we could go to 132. Go back a few slides. Okay. So yeah, in

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1 the '910 Patents and the 722 Patent we have claim limitations that are
2 described, further providing on the outside surface of the wall the identifier.
3 And if I go to slide 134, Petitioner relies on Jarisch 929 to claim that this
4 was in the prior art. However, I think a complete reading of Jarisch 929 as a
5 whole, a person of ordinary skill would understand that it's teaching placing
6 that support element on a specific area of the capsule, and that is what is
7 referred to as the circumference in that reference. And so I'll explain that on
8 the next slide, 135.

9 It's undisputed that the circumference is where the support is
10 located, and Jarisch 929, at paragraph 50, describes that there is this axis A
11 that helps to define that notion of the circumference, and that's illustrated in
12 figure 4. It's essentially the central longitudinal axis going through that --
13 the middle of the capsule. And it explains in paragraph 50 that this
14 circumference can be on the lid, for example of the membrane, or on the
15 body part, such as the flange-like rim. Those are the two examples that are
16 specific in Jarisch 929. No other examples are stated.

17 And it further explains that it is positioned such that the sequence
18 of symbols is spread along that circumference or part of the circumference
19 or on the bottom side of the rim. That's paragraph 19 of Jarisch 929.

20 And so if we go to slide 136, paragraph 64 is what Petitioner relies
21 upon, and I submit that what paragraph 64 is talking about is the method of
22 placing the support on the capsule, not where it would be. As I explain, the
23 where is the circumference. Sixty-four is the how or the method, and it's
24 that it can be placed directly on the body of the capsule. It could also,

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1 alternatively, be disposed on the bottom side of the rim.

2 And so in the case of directly on, you have an example like
3 embossing where it is using the material of the capsule to place that support.
4 And in the alternative, it can be disposed on, paint or lacquer, essentially
5 added to the material. That's consistent with the last sentence here in
6 paragraph 64, and then it goes on the middle sentence there to explain that
7 the preferred place for this support is not far from the peripheral edge, no
8 more than 8 millimeters. And so we're talking about a specific area of that
9 capsule, which is the circumference, and we understand circumference to be
10 the outer area. And if you take that -- those teachings together and all of the
11 examples in Jarisch 929, which is shown on 137, you see that in each
12 instance, what's described is placing that support either underneath the rim
13 on the outside or on the membrane, but also on the outside area. There is no
14 teaching, there is no suggestion of anywhere else on that capsule in Jarisch
15 929 for that support to go.

16 And in fact, if you go to 138, figure 5, which Petitioner relies
17 upon, shows us that there's one way to read a support anywhere other than
18 the rim in this environment. What you have there is a green wall of the cell,
19 and you're seeing the arrows, which are reflecting where the light from the
20 sensor is going to go -- be directed. And it's all on that rim side. There's no
21 way for that light to be directed on the cup area of the capsule.

22 Now, Petitioner makes a cursory mention of there'd be a benefit
23 for alternative location to read the code in order to increase the changes of
24 the code being read, but Jarisch -- if we turn to slide 139, Jarisch 929 already

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1 provides a solution to ensure readability, and that's to repeat the sequence
2 along the circumference. So the area that he's already told you about, in
3 order to have a more reliable reading, repeat the sequence over that same
4 area. There's no suggestion to place that support anywhere else.

5 I'd like to talk about pump, and specifically the '910 Patent's
6 requirement that we use coded information to activate the pump, and I'd like
7 to ask Mr. Easton again if I could have the Elmo. And what I have here is
8 Petitioner's slide 101. And what I think is important here is -- and I'm
9 focusing on '910, because I think it is different from pump limitations that
10 the Board has been in the past. And what is required specifically here is that
11 the identifier encodes information that is used by that specific coffee
12 machine to activate a pump of the specific coffee machine. And so that
13 requires that that encoded information is used for activation of the pump, not
14 simply that it is used by the machine, for example.

15 And I think by the highlighting of the red and green in this slide,
16 there's an implicit admission of Petitioner that the only teaching for
17 activating a pump, if there is any, for what it is relying upon comes from
18 Yoakim. And of course, if that's the only place where they're seeking to
19 demonstrate activation of a pump, it seems that the other references, Rossi
20 and Jarisch 929, would not have adequate teachings for a coded information
21 used for that purpose.

22 But I'm going to quickly walk through that now with reference to
23 102, Petitioner's slide 102. They point to three passages in Jarisch -- excuse
24 me, in Yoakim that they say demonstrates encoded information used to

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1 activate the pump. But what you have here, starting with paragraph 477 in
2 Yoakim, is it's describing an identification means that's associated with the
3 control means. And so that's your ID, and it's associated with control. You
4 effectively have a box here. And then it further goes on to say that that
5 control means can control the pump supplying the liquid.

6 But what it doesn't tell you in Yoakim is how that's done, what
7 happens within the control means. What is done with the ID once it enters
8 the control means, that part is silent. And in fact, in his deposition, Mr.
9 Jobin --

10 Mr. Easton, may I have, please, the slides back? And Ms.
11 Rallabhandi, if I could go to 116 of K-fee slides.

12 He was asked -- and this is Mr. Jobin's deposition, Exhibit 2025,
13 page 174 to 176. He was asked whether Yoakim informs a person of
14 ordinary skill in the art how to control means that activates the pump, and he
15 says it's not getting into the detail of the software, and he hasn't cited a
16 particular -- the how of control means. Now, he says that that is not central
17 to his analysis, but without know what the control means is doing, you can't
18 say whether it is -- whether the pump activation is using that encoded
19 information from the ID means.

20 JUDGE TOURNQUIST: Well, walk me through this, because it
21 takes the ID means --

22 MR. BROOKS: Um-hum.

23 JUDGE TOURNQUIST: -- and then that -- whatever that was,
24 that information, it may activate a pump.

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1 MR. BROOKS: Not necessarily that information. The control
2 means takes that -- takes the information. We don't know what it does with
3 it, and we don't know what it does to activate the pump. It may simply
4 activate a switch. And so it doesn't need to use the encoded information to
5 activate the pump. It can simply process the information, and what is
6 described in Yoakim and these references is adjusting parameters,
7 parameters for the brewing. But that doesn't require, and that doesn't show,
8 that the encoded information is actually used to activate the pump itself.
9 And I think that that is a distinction that is required under the claim that is
10 not shown in the art here.

11 JUDGE TOURNQUIST: Okay. I just have to walk through the
12 language.

13 MR. BROOKS: Okay.

14 JUDGE TOURNQUIST: Both the disclosure and the claims to
15 make sure.

16 MR. BROOKS: Yeah. All right. Well, I would submit that that
17 aspect is missing from all of these references. And given my time, I won't
18 walk through every bit of it. I will briefly touch on ledge since that was
19 discussed.

20 And Ms. Rallabhandi, if we can go to 161.

21 One thing my colleague on Nespresso's side was silent on when he
22 was talking about Yoakim's disclosure and figure 28 is the fact that the
23 claim also requires that the wall has an inside surface, which faces the
24 beverage material. And in what you see in Yoakim figure 28 is --and what

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1 they're point to, this area, it does not face the beverage material. It's
2 actually above the beverage material. And so I don't think that that has been
3 shown, and I think, you know, we've explained why, in our paper, that ledge
4 also projects away from the central longitudinal axis and not towards.

5 And that one, I think it's telling, if you look at our infringement
6 contentions and you look at the accused product, the way that it -- the way
7 that it is designed is, in fact, from that inside surface, it comes -- the ledge
8 comes inward, because there is an indentation, a stamping of that. And so
9 when we're talking about projecting towards or away, this would be an
10 example in Yoakim figure 28 of the way in the accused product when you're
11 coming interior from the inside wall, that would be projecting towards. And
12 so that's --

13 JUDGE ABRAHAM: Are you arguing about how the cap was
14 made?

15 MR. BROOKS: My argument is -- I'm attempting to use the
16 differences as a way to highlight for Your Honors the difference between
17 projecting towards and projecting away.

18 JUDGE ABRAHAM: How -- I guess I don't understand how
19 that's relevant when the claim doesn't talk about how it's made. It just talks
20 about the developed product.

21 MR. BROOKS: No, I just -- no, I think I -- to the extent it's
22 unclear why projecting towards and projecting away are different, I was
23 using that as an example to explain --

24 JUDGE TOURNQUIST: Is there any disclosure in the Patent

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1 itself of projecting away like you mentioned? I think they've shown us a
2 couple figures from the Patent that look exactly like -- not exactly like it, but
3 the same general structure.

4 MR. BROOKS: Yeah. I would submit that not exactly the same.
5 If you go to paragraph 148 -- sorry, slide 148. I think one example is figure
6 19 of the Patent. Again, those grooves there, 32. You can see, they are --
7 effectively, the way that capsule is shaped, the -- if you look at that figure,
8 and I think it's figure 21, which shows the interior side, that area that is
9 where the top of the groove is in this image, figure 19, projects inward to
10 provide that ledge that would be an example of what is claimed in our
11 claims.

12 And so at the top of the groove that are labeled 32. So from the
13 interior side.

14 JUDGE TOURNQUIST: So looking at figure 21 of the Patent,
15 where is the ledge? It's --

16 MR. BROOKS: So you see the -- yeah. So -- can I approach the
17 screen?

18 JUDGE TOURNQUIST: Sure.

19 MR. BROOKS: I'm sorry, Judge Ross. But it's effectively these
20 rounded -- in the rounded area here of each of the grooves. On the interior
21 side that is -- there's some element of coming in towards the center area of
22 the capsule as a consequence of the fact that the surrounding areas project
23 outward, as reflected in figure 19.

24 JUDGE TOURNQUIST: Okay.

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1 MR. BROOKS: Now, I've run deep into our rebuttal time, so I
2 will stop at this point unless there are other questions.

3 JUDGE ABRAHAM: Okay. Thank you. You have about 29
4 minutes left.

5 MR. CARSTEN: Thank you, Judge.

6 JUDGE ABRAHAM: We'll round it up to 30.

7 MR. MCCRAW: Appreciate it. Thank you, Your Honors.

8 And if I may ask, and I apologize if this is an inconvenience,
9 would it be possible to just have a quick bathroom break just because it's
10 been a somewhat long session before the next portion?

11 JUDGE ABRAHAM: Yeah. I think that --

12 MR. MCCRAW: I appreciate it.

13 JUDGE ABRAHAM: We can take about a five-minute break.

14 MR. MCCRAW: Thank you.

15 (Whereupon, the above-entitled matter went off the record at 12:06
16 p.m. and resumed at 12:12 p.m.)

17 JUDGE ABRAHAM: Okay. Let's go back on the record. All
18 right. We've got maybe about 30 minutes left.

19 MR. MCCRAW: Great.

20 JUDGE ABRAHAM: So you can begin when you're ready.

21 MR. MCCRAW: All right. Thank you, Your Honors.

22 So I'd like to start with going back to the Yoakim/Jarisch
23 combination that Mr. Carsten was discussing, and I just want to recenter us
24 here, because he made things sound very complex and very unpredictable,

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1 and that's not what we're dealing with. We're dealing with a very simple
2 combination of prior references that are intended to be used with one
3 another. And I believe Mr. Carsten asked the question of, well, if it was so
4 obvious, you know, why didn't they put these all-in-one patent or one
5 document. But that's not the right question. We're not dealing with
6 anticipation. We're dealing with obviousness, and patentee doesn't need to
7 take basic known features like a particular capsule shape when it's
8 disclosing an invention and a solution of moving an optical code. It doesn't
9 need to recite everything that's already known in the art. So I don't think
10 the fact that Yoakim and Jarisch aren't in the same document really matters
11 in any way.

12 And I think the bulk of what you heard from Mr. Carsten was
13 after-the-fact analysis, really based on this later-in-time patent and not
14 actually what a POSITA knew at the time and was taught by Yoakim and
15 Jarisch. And they repeatedly suggested that there really isn't evidence in the
16 record, and I just want to address that, because that's certainly not true. But
17 before we even get there, I'd like to start just by comparing K-fee's patent to
18 Nespresso's. Can we go to slide 62, please?

19 This is what you're dealing with in K-fee's patent. It says the
20 barcode alternatively can be attached to the base element's edge averted
21 away from the membrane. There is no discussion, no disclosure. There's a
22 little stick figure of a box with a camera and it doesn't show anything about
23 how it's configured in the chamber. It doesn't show anything about how it's
24 read. It doesn't explain whether it goes through some kind of chamber or

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1 how you would do it. There's simply -- it's just devoid of detail here.

2 Now, if we could go to slide 63, please. This is Jarisch and Jarisch
3 929. They go through in exacting detail exactly how you would set this up,
4 how you would arrange this, and how it would work. And so to suggest that
5 there's not enough information, that there's not an expectation of success is
6 just contrary to the facts here and what we see. And the patentee cannot
7 hold the prior art to more disclosure than -- you know, require more out of
8 the prior art than what the actual patent even discloses.

9 But I want to go back to the explicit motivation here that's very
10 clear. Could we go to slide 19, please? So we do have Jobin -- we have
11 Jobin explaining -- they say Jobin wouldn't explain how you do this. He
12 explained exactly how to do this. Jarisch teaches how to modify the
13 centrifugal brewing chamber like Yoakim, which you see, the read a code on
14 the bottom of the flange. You put the light source at the bottom. You use a
15 straight chamber, and you run it through the top. There's all these problems
16 that you hear about from K-fee about distortion of light or, you know, any
17 kind of refraction issues. What they're doing is they're bodily incorporating
18 this bend that you see in Yoakim, but nobody's suggesting -- the Petition is
19 not suggesting that we have a bend. It explains very clearly use Jarisch 929.

20 Could we go to slide 21, please? Another thing here, you know,
21 they really suggest that Jarisch is just a completely different system that
22 would never work with Yoakim. I just want to show you these two images,
23 because Jarisch explicitly states it is modifying a centrifugal beverage
24 system like what you see on the left, Denisart. Denisart is also part of the

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1 common family of Nestle patents and overlapping inventors, and you have
2 the exact same figure in Yoakim. You have more similarity in the prior art
3 in this case than you normally see in any other case. So the idea that these
4 are somehow completely far apart is just contrary to the facts in the record.

5 Slide 36, please. And this is just more of Jobin's testimony that
6 you see exactly of how you would operate and utilize this combination.

7 Slide 42, please. And so, you know, they say that Jobin's silent on
8 this, but he's not. He's saying all of the problems that Mr. Glucksman
9 identifies with reasonable expectation of success, vibrations, mass balancing,
10 distinguishing light reflecting, first of all, that is all things that Glucksman
11 has pulled from future prior art and tried to backdoor them into the start of
12 the art at the time. But Jobin is clear, these problems were understood to
13 someone at the time, and someone like Jobin who's actually designing these
14 types of systems, and Yoakim and Jarisch address it. You have Jarisch that
15 is actually hold the capsule in rotation. So you don't have a vibration issue
16 with Jarisch. You have -- you know exactly how the light would travel
17 through a straight chamber, it's not bent, so there's no light reflecting issue.
18 You might have sort of a sensor strength issue, but, you know, that's just
19 something you can address. This is a predictable art, this is a mechanical art.

20 Slide 49, please. So again -- and this just goes back to my other
21 point. All of the problems they're identifying are based on something that is
22 not the Petition's mapping. They are telling you that all these problems
23 would come from using Yoakim's bent chamber, but that isn't the
24 combination, that isn't what Jarisch tells you to do. Jarisch gives you a very

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1 simple solution.

2 Let's go to slide 23. And I just want to reiterate this, because they
3 say that there's no motivation. The motivation is clear. Your Honors
4 already found this motivation. The bottom of the rim is away from the
5 liquid injection and beverage delivery areas so there's a lower risk for the
6 code to become unreadable. And they say that, well, Yoakim doesn't need
7 that.

8 Let's go to slide 26. Their own expert explain that residue builds
9 up inside the chamber made of dried, organic acids or oils. This is exactly
10 what this is about. Any kind of chamber or coffee machine, if you use it
11 over and over again, you get all this -- you know, I'll use Mr. Carsten's term,
12 schmutz inside the chamber, and Mr. Glucksman agrees with that. And
13 that's what you need to get the code away from. It's common sense, and
14 Jarisch tells you how to do it.

15 The other reason that Jobin identifies, slide 27 -- and this is --
16 again, this is the testimony of Jobin. They've suggested that Jobin didn't
17 provide testimony on this. He provided ample testimony on this, that it's an
18 advantageous location to move the optical code because you're going to
19 have piercing in that same location, and that's going to pierce and distort the
20 membrane, and you need to move the optical code to some other location.
21 So it's advantageous in that respect.

22 Can we go to slide 29, please? You know, they said, well, Jarisch
23 doesn't have any reason that the liquid would build up in the chamber, but
24 they're very clear that there's a flow restriction that you can implement there

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1 that would be a seal that allows the liquid to actually build up in that
2 chamber inside. And you have Jobin or Glucksman, K-fee's expert, even
3 admitting, the liquid would be pressing up against the valve outside of the
4 membrane. So you had a system where the liquid is out there, all sitting,
5 every time you brew it, out in that chamber. So this idea that there's not
6 going to be residue inside here, just -- it just doesn't make sense and it's
7 contrary to the facts.

8 Could we go to slide 41? And I just, again, want to note, because
9 they make it sound like the capsule, you know, wouldn't be able to be
10 designed in a way that fits or designed for a specific coffee machine, but a
11 person of skill in the art knows how to design a particular capsule for a
12 particular coffee machine.

13 Could I go to slide 24, please? I want to address this pyramid plate
14 point that they made regarding Jarisch 929. And what's happening here is
15 they're reading only a portion of this sentence. Jarisch 929 explains that the
16 locations are advantageous because they provide under the rim a large area
17 for the symbols to be disposed that's less prone to damages caused by the
18 processing module, that's everything I've just been telling you about, the
19 processing module. They say the pyramid plate, and then they also say and
20 also ingredients projects. So this -- and, you know, they're getting very
21 worked up about the concept of you don't see a pyramid plate in Jarisch.
22 Well, you know, why don't we go back to slide 21?

23 This is the system that Jarisch is telling you that it's modifying. So
24 whatever they're complaining about, there's not a pyramid plate, it doesn't

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1 matter because it's the same system that Jarisch is indicating to modify.

2 So unless there are any questions on the Yoakim/Jarisch
3 combination -- I guess let me make sure I've addressed everything here.

4 I just -- I do want to, for a moment, go to slide, I guess, 34. So
5 Jarisch teaches -- there's no substantial reconstruction. You put the
6 coding -- you put the reader exactly at the bottom and it tells you that's how
7 the light is reflected. It's very clear how Jarisch teaches this.

8 Can we go to 37, please? There's no snug fit or vibration issue.
9 That is -- yes, it's a concern. It's something that a person with ordinary skill
10 in the art would know about and they would want to design something with
11 that in mind. I know Jobin testified to that. But the plain teachings of
12 Jarisch say you hold the capsule and you drive it in rotation. There's
13 nothing -- there's nowhere in the text of Jarisch that says, hey, we keep a
14 gap, we keep a gap for a particular reason. They've blown up an image 500
15 percent and tried to point out some gap, but it's not in the teachings of
16 Jarisch.

17 And if we go to slide 38, please. That's also Jarisch 929 telling
18 you that you hold it and drive it in rotation.

19 Slide 43, please. And again, I just wanted to point out, this is
20 completely consistent with Yoakim where Yoakim tells you the capsule
21 holder can be hollow at its center to accommodate all capsules of the set. In
22 another mode, the capsule holder can have a bottom wall that's deep enough
23 to receive the longer capsules. Look to the right. It's the exact type of
24 chamber that is consistent with what Yoakim is discussing.

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1 Can we go to slide 39, please? Jobin agrees there's no gap here.

2 So we have testimony from Jobin there's no gap, there's no reason that
3 there's going to be vibrations or any problem here.

4 Slide 43. And slide 41. And slide 42. And again, I just want to go
5 back to this slide because we do have testimony from Jobin that these
6 problems are not problems that someone wouldn't understand and know
7 how to do.

8 Another point I'd like to point out, slide 45, Jarisch teaches you
9 how to read a rotating code. One of the points they made is, well, it's going
10 to be too complex because you're rotating the code. Jarisch goes into detail
11 exactly how you would do the -- where the reader is and what the actual
12 code elements are -- what they look like.

13 So that's all that I have on Yoakim/Jarisch unless there are any
14 particular questions. And then I would like to respond to some points made
15 about the Yoakim embodiments, because -- you know, going back to that,
16 Your Honor, I think this is just spot on with the General Electric v. Raytheon
17 case, and there's a couple things that are said in that case that I just want to
18 address. They -- the quote here, which I think is very appropriate for right
19 now, the Board's approach would require a motivation to combine each
20 element of the claim, even those present together in a reference. This
21 analysis unduly dissects prior art references into collections of individual
22 elements, requiring a party showing obviousness to re-do the work already
23 done in the prior art reference.

24 JUDGE OBERMANN: Counsel.

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1 MR. MCCRAW: Yes?

2 JUDGE OBERMANN: We've read that part of the decision, but
3 I'll ask you the question, did that case involve a situation where a patent
4 challenger was picking and choosing features of different embodiments or --

5 MR. MCCRAW: So I think, Your Honor, that case was quite
6 similar to this case, and let me --

7 JUDGE OBERMANN: And I'd also like you to distinguish the
8 Stepan case.

9 MR. MCCRAW: I also will address that, Your Honor.

10 JUDGE OBERMANN: Okay.

11 MR. MCCRAW: Yes. So what was going on in the GE/Raytheon
12 case is you had this Wendus reference. The Wendus reference taught both a
13 one-stage and a two-stage turbine engine, and then there were a series of
14 structural features that were associated with the turbine engine. And I think
15 the claim that was at issue related to a two-stage turbine engine, but the
16 petitioner had used some of the elements from the one-stage. So you had
17 two different embodiments going on in the GE/Raytheon case. And that was
18 why they said you don't have to actually, you know, combine or explain any
19 kind of motivation there. And I think this quote is salient. They say, it does
20 not matter that GE did not explain why an artisan would be motivated to use
21 each element disclosed in Wendus. That Wendus treats the claim
22 parameters as desirable is enough motivation for an artisan to combine them
23 with a two-stage turbine, as long as the artisan can make it with a reasonable
24 expectation of success.

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1 JUDGE OBERMANN: But you're doing a lot more here. You're
2 picking -- it sounds like you're picking and choosing from sort of a plethora
3 of different figures and disclosures.

4 MR. MCCRAW: Your Honor, I don't believe that's what's going
5 on here, and if we could start actually with slide 14 of K-fee's slide, could
6 we pull that up real quick?

7 JUDGE OBERMANN: I just don't want you to forget about
8 Stepan.

9 MR. MCCRAW: I will not forget about Stepan.

10 Just looking with your eyes at these capsules, they are all shaped
11 the same, they are all utilized in the same way, they all go in the same
12 system, sitting face up in a chamber, they're all pierced in the center, they're
13 all pierced --

14 JUDGE OBERMANN: I hate to interrupt you again, but you're
15 telling me this, but did your expert do this?

16 MR. MCCRAW: Well, our expert walked through all the elements
17 that are shown in Yoakim and walked through why they're in the Petition.
18 And I think the reference itself does this. This is the GE point. We don't
19 have to redo what's in the reference.

20 And so let's go back to our slide 20, please. Wrong slide. I think
21 that's -- maybe 113 instead? Yes. Paragraph 20. So again, we have
22 Yoakim telling us up front the device of the invention conveniently prepares
23 the liquid food from any of the capsules disclosed herein. Yoakim has told
24 us all of this works together. If the Petitioner is required, whenever there is

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1 a parent that has sort of different permutations, having to guess whether
2 those are considered different embodiments, and affirmatively in the petition
3 put everything together, and even look back at continuations and parts and
4 references that are not part of the record to sort of come to a conclusion
5 about whether or not that is one embodiment, that's not the standard, and
6 that's too onerous for a petitioner. We don't need to redo it when the
7 petition tells us these things all go together, and there's no leap of
8 inventiveness. It's the core of this case as well. There's no leap of
9 inventiveness here.

10 Now I do want to talk to you about Stepan. I don't want to forget
11 Stepan. Stepan is a completely different situation because it is a complex
12 chemical compound. This is one of those situations where you have a list of,
13 you know, 100 surfactants and 100 polymers and you're sort of picking and
14 choosing between them, you know, coming upon something. Well, sure. Of
15 course, if you're going to just pick and choose random elements that are not
16 otherwise related in the reference to come on something very specific, yes,
17 of course, you're going to need to put forth some kind of motivation. But
18 that's not what we have, that's not what we have here. We have a very
19 predictable, easy-to-understand mechanical case. This is not a complex
20 Stepan situation.

21 And I just -- I do want to go back to -- yes. We have 113 on the
22 screen. When the reference tells you that all of this works together, you
23 don't have to redo that or explain that in any way. And then we have the --
24 you know, the device itself, rather than the capsule, can have a flow

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1 restriction means. It's telling you the device has all of these things.

2 Can we go to 114, please? And this is just going through. You
3 know, capsule has the identification means and the system of the invention
4 uses that identification means. Of course the images are going to sort of
5 focus on particular elements, but the patent itself has a purpose and it's a
6 particular device. In the opening Petition, the idea of having to just put a
7 motivation when you were using generic embodiments that are all related
8 and the patent relates them is more than what is required of a petitioner,
9 Your Honor. And it's forcing us to sort of parse each element individually,
10 and that's just not the, not the standard.

11 This really falls into the Boston Scientific case. There's really no
12 leap of inventiveness here, Your Honor. The fact that, okay, we're going to
13 take a flow restriction and seal and we're going to put it on the outside,
14 particularly when the patent tells you, yes, we're going to put it on the
15 outside. And our patent -- our Petition actually had a motivation set forth in
16 it.

17 JUDGE OBERMANN: But we still have to make sure, because
18 you just said the patent, and we want to make sure that this is not a
19 hindsight, you know, recreation --

20 MR. MCCRAW: Right.

21 JUDGE OBERMANN: -- where you are picking and choosing
22 using the patent's disclosure as the guidepost.

23 MR. MCCRAW: Right.

24 JUDGE OBERMANN: And I'm a little concerned that I'm not

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1 sure you're expert has done any of this.

2 MR. MCCRAW: Well, our expert walked through all the elements
3 of the claim and where they're found in Yoakim, and you know, for
4 example --

5 JUDGE OBERMANN: That's different. Most people, by the time
6 they get to this stage, they can show us where in the prior art each element
7 occurs. And a lot of times it comes down to why would you combine them
8 in the particular manner claimed.

9 MR. MCCRAW: Right.

10 JUDGE OBERMANN: So I'd like to hear, you know, what is
11 your evidence for picking those particular features in the manner claimed
12 and where is it in your papers?

13 MR. MCCRAW: Well, let's go, let's go, for example, back to
14 slide 8, please. Because I don't think what's happening here is picking and
15 choosing embodiments. First of all, you've repeatedly heard counsel say
16 that we utilized figure 23. Figure 23 is never actually utilized as one of our
17 features that we're relying on. This claim requires a base element with a
18 cavity. That's all of the capsules. The base element is symmetrical around a
19 longitudinal axis having an open end and a bottom portion. That's all of the
20 capsules. It has a first height that's defined by an open end and a bottom
21 portion. It has a rim extending outwardly comprising of top side and a
22 bottom side. This is all the capsules. We're not picking and choosing
23 anything. You have a cover. The cover has a particular height. You have a
24 barrier layer. Yoakim tells you, generically, when it's talking about its

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1 system, the capsule can have a barrier layer. When you have a beverage
2 machine, it says you have a sensor detector. That is in there. Throughout
3 the patent, it tells you you have an identification means and you want to
4 utilize it for the purpose of identifying the capsule. It's the purpose of
5 Yoakim. You have an insertion shaft that's common to all of these. You
6 have a chamfered mandrel that pierces it on the area that is offset. It's off to
7 the side. That's the outer piercing that occurs in all of them. You have a
8 seal. That is a flow restriction means. That is identified in figure 35. But
9 we have paragraphs 506 and 507 of Yoakim that clearly tell you you would
10 utilize that flow restriction means.

11 And there is a paragraph in the Petition -- can we pull that up real
12 quick? I believe it is slide 118. That we did include to say why you would
13 utilize that seal configuration. But this idea that we're picking and choosing
14 a series of capsules, I'm just not seeing it from the claim limitations that
15 we're providing. We just identified where they're found in the reference,
16 but we haven't combined anything.

17 And another point I'd like to look -- talk about just quickly, Your
18 Honors, is Glucksman, because I know we -- Patent Owner has relied
19 significant only Glucksman. But Glucksman, I don't think he's as cracked
20 up to be as they say. Can we go to -- let's see. Where is our Glucksman
21 slides? Can we go to slide 255, please?

22 So you need to go with the expert whose opinions are grounded in
23 correct legal principals. Can we go to 252? So Glucksman repeatedly
24 utilized -- based his opinions on incorrect legal analysis, and I think that's

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1 really fatal to this. You know, he looked at post-filing enablement evidence,
2 which is contrary to Entresto. Can we go to 249, please? He tried to say
3 that various things were not enabled. Jarisch wasn't enabled using a filter in
4 the machine, wasn't enabled -- he did it in all kinds of different places, but
5 he actually never conducted enablement analysis and doesn't understand it.

6 251, please. I think this one's important because Glucksman did
7 not apply Phillip's claim construction standard. I asked him, what did you
8 consider when you were evaluating whether the prior art taught these claims,
9 and he just said, I looked at the claims. And I said, well, what informed
10 them, did you look at anything else, did you look at the specification. He
11 did not look at anything else. So his opinions here about the claims are not
12 based on correct law. And I would submit, Your Honor, he also is in
13 violation of the GE/Raytheon case forcing us to combine, you know,
14 individual elements.

15 Additionally, he was unable to answer basic questions about K-
16 fee's patents. Can we go to 253, please? He couldn't tell us whether or not
17 K-fee's patent disclosed free of a filter. I asked him, well, okay, if it didn't
18 have a filter, that's in the claim, how would it operate, how would it operate
19 without a filter in the cavity. He didn't -- he couldn't answer that either.

20 Can we go to slide 254? I asked him about particular limitations. I
21 said, well, does the claim require this or not, and he said, yes, I understand
22 it's a yes-or-no question. He said, I'm not qualified. That's right there in
23 his answer. I'm not qualified to answer this question.

24 Jobin -- Glucksman, yes, he has designed some coffee machines in

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1 his day, but he has not evaluated the art correctly. He has, you know,
2 ignored, for example, paragraph 20 in Yoakim that says all the capsules can
3 be combined and utilized with any of the machines when he says that they're
4 incompatible even though Yoakim just says they're not incompatible.

5 If we go to 259 -- actually, let's go to 257 real quick. This is
6 important because Glucksman actually -- you know, yes, he's designed some
7 coffee machines, but he doesn't really have the identifier experience that's
8 required under the definition of skill in the art. And I asked him. He -- in
9 this paragraph, he really touts having designed a smartphone beverage-based
10 system with identifiers, but I asked him, you know, does it have an optical
11 sensor for reading a code. He said, no. I said, who developed the capsule
12 identification system. Well, the identification system is not really
13 developed. You know, this was just -- this was not a focus of our
14 development. We just included this concept in the patent. This is all -- this
15 is nothing like the detail that we have from Michael Jobin.

16 Can we go to 258, please? Our expert, Michael Jobin, is a
17 gentlemen who has designed single-serve beverage systems. He has
18 designed product identification systems. He's designed a homebase beer
19 dispenser system that focused on identification technologies that integrated
20 identifiers like barcodes. He has extensive experience with this particular
21 type of technology, and he evaluated the art correctly. He look at what it
22 said. He didn't ignore motivations and explicit things. He looked at
23 Yoakim as a whole for what it taught. He didn't ignore -- you know, look at
24 a particular embodiment and ignore everything else. He looked at what the

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1 whole reference taught to a person of skill in the art.

2 Can we go to 259? So I would submit, Your Honor, Jobin checks
3 all the boxes. He analyzed the prior art correctly. He interpreted the claims
4 under Phillips. He has taken positions that are consistent with the art, and he
5 has experience of beverage and fluid systems integrating identifiers. He
6 beats Jobin on all this. I understand Jobin is older. I understand he has
7 maybe been designing basic coffee systems for a bit longer, but Jobin is the
8 expert you should give more weight to, Your Honor, in this circumstance.

9 And I just want to address a couple other quick points, Your
10 Honor. Castellani, you know, they make a big deal about the fact that
11 Castellani is not a centrifugal system, but Castellani is very clear that it is to
12 be used with automatic espresso machines. There is nothing about
13 Castellani that's inconsistent with a centrifugal system. And they point to a
14 paragraph that says, you know, there's -- it abuts the -- I think they said that
15 the arm abuts the five-rest position, but again, that is just below the rim.
16 They haven't provided any evidence that it's anything other than below the
17 rim. So there's no problem with Castellani.

18 And then the other thing I'd like to address quickly is this pump
19 encoded information. Can we go to slide 102, please? So here -- I don't
20 understand their confusion here. The identification means is associated to
21 the control means, meaning that it will read a code that is encoded on the
22 capsule, which will then be used by the control means to adjust the machine,
23 one of which it explicitly tells you is the pump. And they said, well, we
24 don't know what it's doing. Well, if we look at 0522, it says the control

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1 means is selectively activating the pump associated with the volume of
2 liquid. So we know this. This idea that Yoakim doesn't disclose using
3 encoded information to activate the pump, I just don't understand it. It's
4 right here.

5 And I'd like to reserve the rest of my time for Mr. Palmer unless
6 there are any questions for me.

7 MR. PALMER: Thank you. I just want to touch based on the
8 plain and ordinary meaning of grooves that are spaced a distance between
9 the flange and the closed bottom. So we've heard the other side say that
10 Rapparini does not disclose that limitation because the grooves in Rapparini
11 run from the flange towards the bottom. That is exactly what is in the spec
12 at columns 12, line 2 through 9, as I mentioned earlier.

13 But Judge Tornquist, to your question with respect to figure 21, if
14 you take a look at 21, the groove -- if you take a look at the groove on the
15 far-right side, it's touching the flange. So that's spaced a distance between
16 the flange and the bottom of the capsule. This one's turned upside down.
17 So if you go from the flange at the bottom, run it up to the top, it's touching
18 the flange. That's spaced a distance between the flange and the closed
19 bottom.

20 That's the intrinsic evidence. That's what you need to look at
21 when you look at the plain and ordinary meaning. And we submit that that's
22 exactly the same that Rapparini discloses. It discloses the grooves that run
23 from the flange towards the closed bottom.

24 JUDGE ABRAHAM: So this is figure 21 of one of the challenged

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1 patents, right?

2 MR. PALMER: Yeah. That's figure 21 of the '910 patent.

3 JUDGE ABRAHAM: And what was the cite that you gave?

4 MR. PALMER: It is column 11, line 18 through, column 12, 23.

5 But the specific cites, column 12, lines 2 through 9. And to get it in the
6 record, according to the invention, provision is made for the grooves 32 to
7 be extended vertically across the wall region. That is, they run straight from
8 the flange to the bottom region. The term spaced a distance between the
9 flange and the closed bottom is nowhere in the spec. So you need to look at
10 the spec, what the spec discloses to determine what that claim language
11 means, and we think the specification, as well as the figures, are pretty clear
12 as to the permissibility of the groove to run up the flange and run from the
13 flange to the closed bottom.

14 JUDGE ABRAHAM: Okay. So you've used up your time.

15 Any other questions from the panel? Okay.

16 MR. PALMER: Okay.

17 JUDGE ABRAHAM: Thank you very much.

18 Whenever you're ready.

19 MR. CARSTEN: Thank you.

20 So with respect to GE, it was, in fact, one embodiment. I read it
21 quickly over the break, and I'm going to quote from 1339 of the GE case. In
22 its description of the advanced engine, Wendus discloses all elements of
23 claims 9 through 14, except that it teaches a one-stage high-pressure turbine
24 instead of the at-least-two-stage high-pressure turbine taught in claim 9 and

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1 narrowed to two stages in claim 14. It was one embodiment in GE, and for
2 that reason, it's distinguishable. There is no reason -- there was no rationale
3 to pick and choose between embodiments and no necessity to actually
4 discuss it. That was done on an element-by-element basis. And so I submit,
5 with respect, that GE is not controlling here.

6 Stepan is the controlling authority. And what they've done in
7 terms of picking and choosing elements from the various five embodiments
8 in Yoakim, it just doesn't work.

9 Moreover, the one thing you didn't hear from my learned friend,
10 when he talked about the Yoakim embodiment and combining those, was no
11 reference and citation at all to Mr. Jobin because there is none. He never
12 even tried to justify it. So for that reason, I think from the get-go, the ability
13 or the reliance -- and we saw that clear as day on -- when I annotated slide
14 10 of Nespresso earlier -- in my earlier position that they must rely and
15 necessarily rely upon multiple embodiments there.

16 I also heard my learned friend say that he hasn't relied on figure
17 23. I have page 56 of the '910 Petition, and at the top of the page, you will
18 see, voila, it's figure 23. I don't know what he's talking about.

19 With respect to the two paragraphs from Mr. Jobin that were
20 identified in connection with combining the multiple embodiments of
21 Yoakim with Jarisch, I submit, look at TQ delta. These are about as
22 conclusory paragraph as you can possibly get from an expert, and that can't
23 constitute substantial evidence. And that's all he could, that's all he could
24 point to, but it just missed.

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1 With respect to the notion that this is a simple issue and not at all --
2 and totally predictable, I call your attention to Mr. Glucksman's declaration
3 at paragraph 76. And while he doesn't use the word unpredictable, he does
4 describe the difficulty and complexity of these systems and why it's
5 important to have a reason to actually do the combinations and describe
6 what it is you're doing.

7 There was a cite to -- in 26 at residue. This was a quote from Mr.
8 Glucksman's deposition where he said, dried oils, et cetera. When you -- as
9 you look at figure 61 from Yoakim and you see the way it operates, there is
10 no opportunity for liquid to leave a residue where the -- in where the
11 detector sits. That's what Mr. Glucksman talked about and testified to.
12 Moreover, that is -- that question was completely divorced from figure 61.
13 That was speaking in abstract. They were speaking in generalities.

14 So had they wanted to actually get Mr. Glucksman's opinion as to
15 whether figure 61 would be subject to schmutz, I guess, for lack of a better
16 term, they could've asked him that and they chose not to.

17 And when it comes to sort of the kind of character assessment
18 you've heard, we sort of outline what happened here at the deposition,
19 noticing it for two days, and then showing up late and taking two hours of
20 deposition and then calling it quits. You know, those questions were
21 ridiculous, kindly. And the quotations that we're seeing on the slide are out
22 of context. So for example, I've heard my learned friend say, well, Mr.
23 Glucksman said he wasn't qualified. No. He said he wasn't qualified to
24 answer that question yes or no. That's a different thing. He was never given

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1 the opportunity, because the very next question, which didn't appear on the
2 slide, was let's move on.

3 JUDGE ABRAHAM: Okay.

4 MR. CARSTEN: So for all those reasons, I submit that when you
5 go back and when you look at Mr. Jobin's declarations, please bear in mind
6 TQ delta. And I'd also note that for the first time in my life, having argued
7 many, many of these, I've heard the Petitioner specifically invoke common
8 sense at least twice here, and that's gap filling. That's an Arendi problem.
9 And that's inappropriate.

10 Unless you have any questions.

11 JUDGE ABRAHAM: Okay. I think we're good.

12 MR. CARSTEN: Thank you so much for your indulgence. I
13 appreciate it.

14 JUDGE ABRAHAM: All right. Well, thank you, everyone, for
15 your time today. We'll go off the record. The case is submitted and we'll
16 issue a decision in due course.

17 (Whereupon, the above-entitled matter went off the record at 12:49
18 p.m.)

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