UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

K-fee System GmbH,

Plaintiff,

v.

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

Defendants.

Case No. CV 21-3402-GW-AGRx

FINAL JUDGMENT OF NONINFRINGEMENT

Having granted Defendant Nespresso USA, Inc. ("Nespresso")'s Motion for Summary Judgment of Noninfringement, and for the reasons stated in the Court's now final ruling (Dkt. No. 209) it is **HEREBY ORDERED, ADJUDGED, AND DECLARED** that:

(1) The Court's June 23, 2022 judgment (Dkt. 214) is vacated;

(2) Final judgment of noninfringement of U.S. Patent Nos. 10,858,176, 10,858,177, and 10,870,531 is entered in favor of Nespresso and against Plaintiff K-fee System GmbH ("K-fee") on K-fee's claims of infringement;

(3) Nespresso's declaratory judgment counterclaims are hereby dismissed without prejudice as moot;

(4) K-fee shall take nothing by its Complaint; and,

(5) As the prevailing party, Nespresso is awarded its costs.

Dated: June 28, 2022

Hon. George H. Wu
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 21-3402-GW-AGRx	Date	June 17, 2022
Title	*K-fee Sys. GmbH v. Nespresso USA, Inc., et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	None Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
None Present	None Present	

PROCEEDINGS: **IN CHAMBERS - FINAL RULING ON NESPRESSO USA, INC.'S MOTION FOR SUMMARY JUDGMENT OF NONINFRINGEMENT [126]**

Attached hereto is the Court's Redacted Ruling on Defendant's motion for summary judgment which came on for hearing on June 16, 2022. *See* ECF No. 209. Prior thereto, a tentative ruling was provided to the parties. After considering the moving, opposition, and concomitant filings (including the Court's *Markman*/Claims construction, *see* ECF No. 111), plus the arguments of counsel at the hearing, the Court adopts its tentative ruling as its final decision and GRANTS the motion for summary judgment.

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Initials of Preparer JG

K-fee System GmbH v. Nespresso USA, Inc., Case No. 2:21-cv-03402-GW-(AGRx)
Ruling on Defendant's Motion for Summary Judgment (redacted)[1]

I. INTRODUCTION

In this patent infringement action, Plaintiff K-fee System GmbH ("K-fee" or "Plaintiff") filed suit against Nespresso USA, Inc. ("Nespresso" or "Defendant") for infringing U.S. Patent Nos. 10,858,176 ("the '176 Patent"), 10,858,177 ("the '177 Patent"), and 10,870,531 ("the '531 Patent") (collectively, the "Asserted Patents"). *See* Docket Nos. 1-1, 1-2, 1-3. Plaintiff sells single-use beverage capsules and systems that use a barcode to convey "optimum brewing parameters." Docket No. 1 at ¶ 3. Plaintiff's products are protected by the Asserted Patents. *Id.* Plaintiff alleges that Defendant's single-use Vertuo coffee pods and related systems infringe the Asserted Patents. Defendant brings declaratory relief counterclaims for invalidity and non-infringement. *See* Docket No. 26.

On March 10, 2022, the Court issued its Claim Construction Order. Docket No. 111. Based upon the Court's construction of "barcode," Defendant has now filed an early motion for summary judgment, arguing that under the Court's construction, its products do not infringe. The motion is fully briefed. *See* Docket Nos. 126, (Motion) 135 (sealed); 178-1[2] (Opposition), 182 (sealed); 183 (Reply), 187 (sealed).

For the reasons stated below, the Court **GRANTS** the motion.

II. BACKGROUND

The Asserted Patents, which share a specification, are entitled "Portion Capsule Having an Identifier."[3] The Asserted Patents "relate[] to a portion capsule for producing a beverage, comprising a base element having a cavity in which a beverage raw material is provided and which is closed by a membrane fastened to the base element." Spec. at 1:11-14. Recognizing that a

[1] Following the hearing, Defendant requested that certain under seal material be redacted from the publicly filed version of this Order. The Court has reviewed the proposed redactions and finds them consistent with the earlier sealing order. Therefore, the Court **GRANTS** the request.

[2] Plaintiff did not file a standalone version of its opposition. Plaintiff is ordered to review Local Rule 79-5 concerning proper procedures for requesting sealing and comply therewith in the future. *Compare* Docket Nos. 126, 127 (properly filed motion); 183, 184 (properly filed reply).

[3] Because the Asserted Patents share a specification, the Court cites the shared specification collectively as "Spec."

variety of such beverage capsules were becoming widespread, the inventors observed that "it is possible that the manufacturer's capsules [will be] used in a coffee machine designed by another manufacturer, although they are not suited for it." *Id.* at 1:17-19. The inventors believed "[t]his may result in significant security issues and/or the coffee machine may be damaged." *Id.* at 1:19-21.

The disclosed beverage capsule sought to solve this problem by affixing "an identifier" to the "membrane fastened to the base element" that seals the capsule such that the identifier "allows to individualize the respective portion capsule." *Id.* at 1:31-34. "In the context of this invention[,] individualizing means that the respective portion capsule can be assigned to a group of capsules that are suitable for the coffee machine preferably." *Id.* at 1:62-65. Also, "individualizing means that those portion capsules that are not appropriate for the coffee machine cannot be inserted into and/or directly fall through the holder, which is designed for the portion capsules in the coffee machine, and/or the coffee machine operates only with the corresponding portion capsules." *Id.* 2:3-8. The coffee machine "will be activated [only] if the detected identifier matches with the [stored] reference." *Id.* at 2:11-12.

In one embodiment, "the identifier may be included in the membrane," "[p]referably" as "a layer or partial layer of the membrane." *Id.* at 2:61-63. Also, "[p]referably the identifier is a machine-readable imprint" such as "a barcode, a logo, or a repeat pattern." *Id*. at 3:1, 3:5-6. The identifier can also be "an electrically conductive section, which can be placed all over the portion capsule, but is localized on the side wall, the edge and/or the floor preferably." *Id.* at 3:8-11. "The electrically conductive section, which is inserted into the coffee machine, can become part of an electric circuit and causes therefore a measurable change, which leads to the identification of the respective portion capsule." *Id.* at 3:11-15. In sum, "[i]f the portion capsule is customized according to the invention, portion capsules that are not in line with the coffee machine will be prevented from inserting into the coffee machine." *Id.* at 3:20-23. The identifier can also control "the temperature, the pressure and/or the amount of water." *Id.* at 3:27.

Figures 2A and 2B "show a portion capsule containing a barcode." *Id.* at 7:31-32.

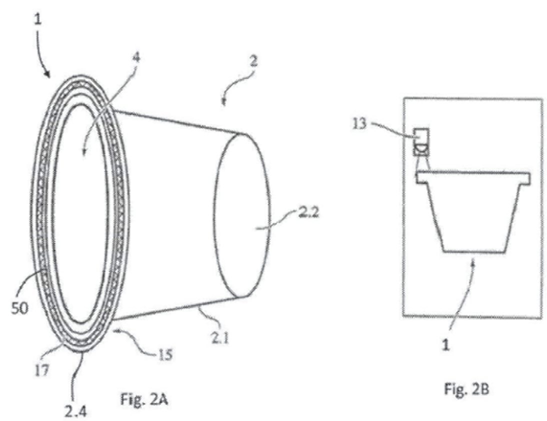


Fig. 2A Fig. 2B

Providing another example, Figures 19 and 20 "show a schematic view of a portion capsule according to an embodiment of the presented invention." *Id.* at 7:62-63.

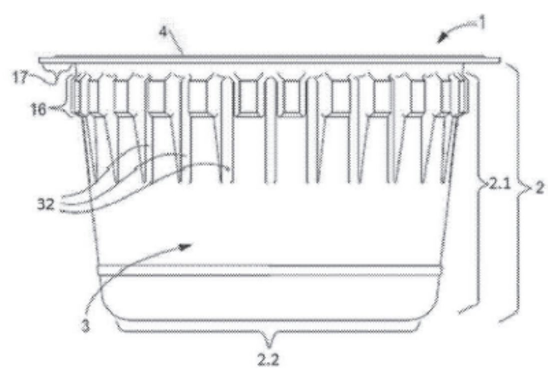


Fig.19

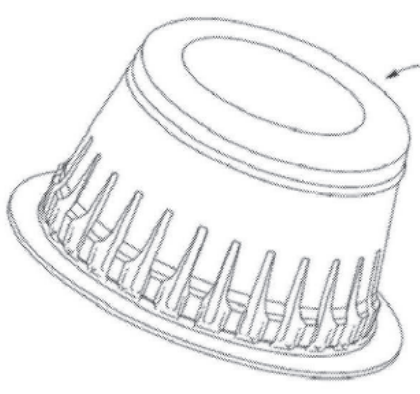


Fig.20

Plaintiff alleges that Defendant infringes independent method Claims 1 and 13, and dependent method Claims 3, 10-12, and 14 of the '176 Patent; independent system Claim 1 and dependent Claims 4, and 5 of the '177 Patent; and independent method Claims 1 and 10, and

dependent method claims 2-3, 5–8, 11, 14, and 16 of the ’531 Patent. *See* Docket No. 1 at ¶¶ 52, 78, 104. All asserted claims disclose “a barcode.” For example, Claim 1 of the ’177 Patent is illustrative of the asserted system claims and recites:

> 1. A beverage system for producing a beverage, comprising:
> a portion capsule comprising: a foil lid sealed to a base element having a cavity within which a beverage raw material is provided, the base element comprising a circumferential flange having a top side to which the lid is attached and a bottom side with a ***barcode*** located on the bottom side, and
> a beverage machine comprising: a detector to read the ***barcode***, a media chute configured to receive and support the portion capsule, and a pump controlled to push water into the portion capsule only upon a determination that the read ***barcode*** agrees with a stored reference,
> wherein the base element has a wall region with an electrically conductive section and radially spaced and vertically oriented drawn grooves, the cavity has radially spaced and vertically oriented drawn ribs.

See ’177 Patent at Claim 1 (emphasis added).

Following the *Markman* hearing, the Court construed “barcode” as having its plain and ordinary meaning, as further explained by K-Fee before the EPO during prosecution of the European counterpart patent. *See* Docket No. 111 at 23. Because the records from those proceedings were made part of the prosecution record of the ’176 Patent, the Court found them to be part of the intrinsic record here. *Id.* at 10. Although the Court declined to rely indiscriminately on statements made before the EPO, the Court noted such statements could be useful to inform claim construction. *Id.* In the EPO proceedings, K-Fee stated repeatedly that barcodes are a line code of bars having variable width. *See id.* at 11-12. But K-Fee clarified that the Jarisch reference did *not* disclose a barcode because that reference “comprises a code constructed of two different areas: a reflective area that represents ‘1’ and an absorbing area that represents ‘0’. The ‘bit code’ disclosed here [in Jarisch] is therefore strictly a binary code constructed of two binary symbols (‘0’ and ‘1’).” *Id.* at 12. Thus, K-Fee explained that Jarisch “discloses a ‘bit code’, but not a barcode, because the barcode – as shown above – is always constructed of bars having variable widths, and therefore contains more than only two binary symbols, such as ‘0’ and ‘1’.” *Id.* Based on these clear statements before the EPO, the Court “construe[d] ‘barcode’ as having its plain and ordinary meaning (*i.e.*, a code having bars of variable width, which includes the lines and gaps), the scope of which is understood by the clear and unequivocal statements K-fee made to the EPO (*i.e.*, the scope of barcode does not include the type of bit code disclosed in Jarisch/D1).” *Id.* at 13.

III. LEGAL STANDARD

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). A fact is material when, under the governing law, the resolution of that fact might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The burden of establishing the absence of a genuine issue of material fact lies with the moving party, *see Celotex*, 477 U.S. at 322–23, and the court must view the facts and draw reasonable inferences in the light most favorable to the nonmoving party, *Scott v. Harris*, 550 U.S. 372, 378 (2007).

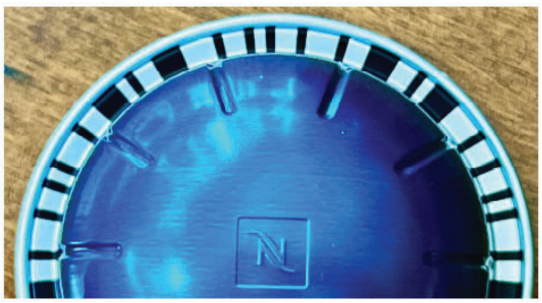
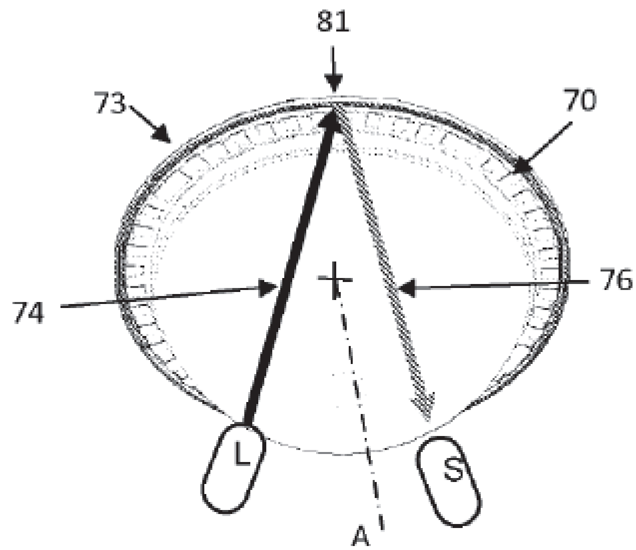
To meet its burden, "[t]he moving party may produce evidence negating an essential element of the nonmoving party's case, or, after suitable discovery, the moving party may show that the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1106 (9th Cir. 2000). Once the moving party satisfies its burden, the nonmoving party cannot simply rest on the pleadings or argue that any disagreement or "metaphysical doubt" about a material issue of fact precludes summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). There is no genuine issue for trial where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party. *Id.* at 587.

IV. ANALYSIS

A. Summary of the Parties' Positions

Based on the Court's construction of barcode, Defendant moves for summary judgment of noninfringement, arguing that the accused products lack barcodes. Defendant explains that the coding scheme used on the accused products [redacted] Mot. at 3. Further, Defendant contends that this coding scheme is a bit code, not a barcode, because the code encodes only two values, "0" and "1." *Id.* [redacted] *Id.* [redacted] *Id.* at 4. Based on this

explanation, Defendant argues its code is the same as that disclosed in Jarisch, *i.e.*, the bit code distinguished by K-Fee before the EPO.

Accused Products	Jarisch Reference (Fig. 5)
[redacted] 	

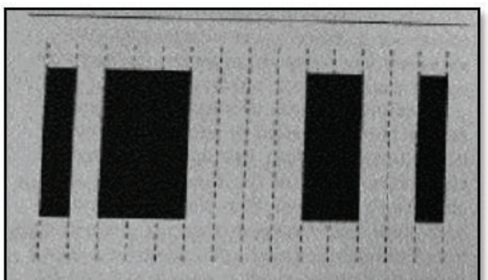
See id. at 3-4; *see also id.* at 9.

Defendant argues that "Jarisch describes precisely the same coding system [as that used in the Accused Products]: surfaces arranged in a circumferential pattern where an absorbing surface signifies a '0,' and a reflecting surface signifies a '1.'" *Id.* at 9. Accordingly, Defendant concludes that, "[b]ecause the Court's claim construction of 'barcode' unambiguously excludes the type of code used by the Accused Products, K-fee cannot show the existence of an element essential to [its] case." *Id.* Relatedly, Defendant argues that, even setting Jarisch aside, because the Accused Products do not contain a "code having bars of variable widths," there is no barcode as construed by the Court and thus no infringement. *Id.* at 10. This is because, Defendant contends, "[t]he 'wider' areas of light and dark—in both Jarisch [redacted]

REDACTED IN ORIGINAL

[redacted] *Id.* (*i.e.*, [redacted]

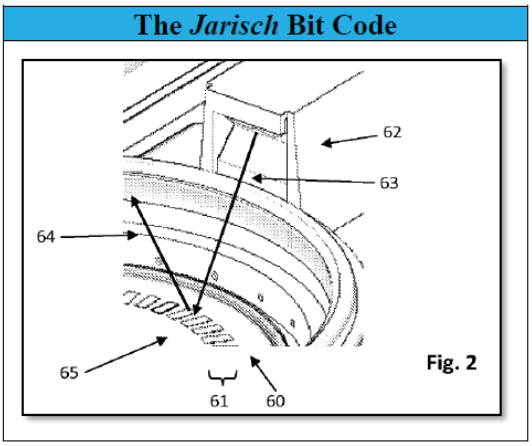
In response, Plaintiff argues that it "can easily establish that the [accused] Vertuo capsules include a barcode as construed by the Court," because the Accused Products are different from Jarisch in that Jarisch has "alternating dark and light bars of *equal* widths" whereas the Vertuo barcode "has alternating dark and light bars of *variable* width." Opp. at 1 (emphasis added).[4] Plaintiff contends that Defendant's motion seeks to "modify the Court's construction to the point of excluding virtually all barcodes, including supermarket barcodes." *Id.* Under the Court's actual construction, Plaintiff argues that "the Vertuo capsules clearly have alternating bars and gaps of *varying* widths and meet this definition." *Id.* at 2 (emphasis added). Plaintiff rejects Defendant's argument that the "Vertuo capsules do not really have variable-width bars and gaps in practice because they are [redacted] *Id.* Instead, Plaintiff explains that Vertuo capsules use "a modular barcode," which Plaintiff contends "is the most common type of barcode used in the industry." *Id.* Plaintiff argues that, before the EPO, K-Fee stated that this exact type of barcode is included in the general definition of barcode. *Id.* at 3.

K-fee "Barcode" Definition to the EPO	Vertuo Barcode Implementation
 **Figure 2.3** - Barcodes are made up of modules of light or dark bars – a module being the smallest increment used by a barcode to represent data	[redacted]

See id. Plaintiff contends that "[b]arcodes become wider or narrower based on how many dark or light modules are adjacent to each other," and "[t]his is the definition that K-fee argued strenuously for in the EPO and it is also precisely how the Vertuo barcode works." *Id.*

[4] Plaintiff observes that "[t]he problems with traditional barcodes led Jarisch to call its pattern of fixed-width rectangles a 'bit code,' a term rarely used and not well defined in the art, as a way to distinguish its idea from a more traditional barcode." Opp. at 9. Those problems included getting a reliable identification and accurate reading from the portion capsule. *Id.* at 13. Thus, Plaintiff contends that Jarisch's definition of "bit code" was based on "fixed-width rectangles." *Id.* at 9, 13. In providing this explanation, Plaintiff does not mention the relevance of the segments being encoded with only a "0" or "1."

Plaintiff argues this is different from Jarisch, which "shows bars of constant, non-variable width, which Jarsich (not K-fee) termed a bit code." *Id.* at 4.



See id.

Plaintiff supports its position with testimony from Dr. William Singhose, Ph.D, who opines that, in a modular barcode (as shown on p. 7 above, left), "a wide bar or gap is constructed of multiple light or dark modules," and these become "variable-width bars," hence, barcodes, "because the number of consecutive dark and light modules varies." *Id.* at 10 (citing Docket No. 182-1, Singhose Decl. ¶ 31); *see also id.* at 23 (the Jarisch bit code "is simply a series of rectangles and intermediate spaces"). Thus, Plaintiff concludes that the statements made before the EPO distinguishing Jarisch (bars of equal width) did not "unequivocally define the scope of 'barcode' to exclude the variable-width, modular barcode used on the accused Vertuo capsules." *Id.* at 7; *see also id.* at 14 (citing Singhose Decl. ¶ 43 ("The Nespresso Vertuo capsules show a line code consisting of bars having variable width."); Docket No. 182-6 (Jarisch Depo.) at 189:25-190:13, 179:1-8 ("by having bit codes of one one or one one one or zero zero zero zero, they appear to the human eye as different widths of segment")).

Plaintiff also questions whether Defendant's documents from 2013 show how current (accused) Vertuo capsules work (*i.e.*, whether they are different from Jarisch). *Id.* at 4. Plaintiff argues that, in his Declaration and during his deposition, Mr. Jarisch could only speculate about what Vertuo capsules do today. *Id.* at 4.

Finally, Plaintiff argues that the Vertuo barcodes do not represent only "0s" or "1s." *Id.* at 19. Rather, Plaintiff contends that, *e.g.*, two dark modules would represent "11" whereas two light modules would represent "00." *Id.* Plaintiff also relies on Defendant's coding for various Vertuo

capsules [redacted] *Id.* at 20-21 (citing, *e.g.*, [redacted]

In reply, Defendant argues that "[t]he inventors of Jarisch and chief architects of the Vertuo code each unequivocally testified that the Vertuo code is 'exactly' the same bit code described in their patent application [Jarisch]," *i.e.*, [redacted], each of which represents a 0 or a 1, respectively," so the Vertuo products cannot infringe. Reply at 1. Defendant observes that "[i]t is undisputed that the Vertuo code is constructed from [redacted], each of which only ever represents a 0 or a 1." *Id.* Because this makes it a bit code rather than a barcode, as K-Fee told the EPO, Defendant argues that its products cannot infringe for lack of barcode. *Id.*

Defendant rejects Plaintiff's attempt to distinguish Jarisch from the Accused Products because, Defendant argues, Plaintiff "relies exclusively (and disingenuously) on Figure 2 of Jarisch." *Id.* at 2. "As Mr. Jarisch repeatedly testified, it is Figures 4 to 7, and in particular Figure 5 [below, center], that correspond to the Vertuo capsules and code." *Id.*

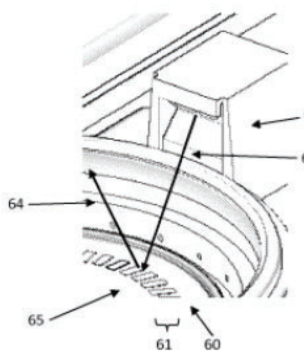
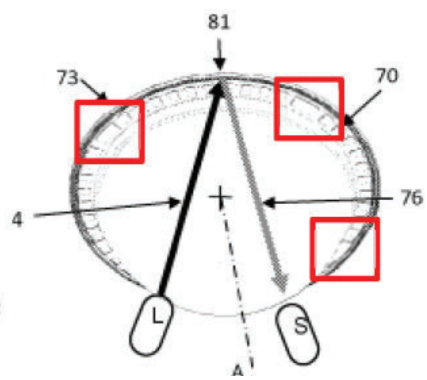
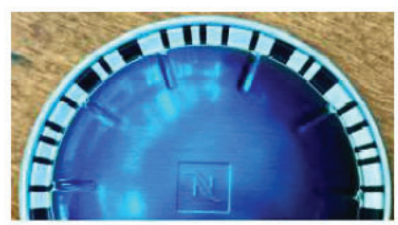


Fig. 2





Compare Jarisch Fig. 2 (above left) *with* Jarisch Fig. 5 (above center) *and* the accused Vertuo capsule (above right). Defendant explains that, although Figure 2 "show[s] alternating 0 and 1 bits that appear to be segments of equal size," Figure 5 has "at least three areas where there are consecutive bits of equal value, thus giving the appearance of wider segments, highlighted in red above." *Id.* at 3. Defendant observes that "K-fee ignores Figure 5 of Jarisch entirely," and "[i]t is nowhere to be found in K-fee's brief, Dr. Singhose's declaration, or K-fee's Statement of Genuine of Disputes." *Id.* at 12.

Defendant argues that the wider physical appearance in Vertuo cannot give rise to infringement because it is also present in Jarisch, which Plaintiff distinguished before the EPO to

obtain a patent. *Id.* Stated another way, "[i]f K-fee were right that a bit code is just a modular barcode where the bits 0 and 1 are modules that form variable width bars, Jarisch would disclose a barcode, contrary to what K-fee told the EPO." *Id.* at 9. Defendant rejects Plaintiff's argument that because the Vertuo code, when read overall, conveys more information than "0" or "1," because "[t]hat is why it is called a 'code'—its very purpose is to represent other information, in the same way that Morse code ultimately conveys a message that consists of something other than dots and dashes." *Id.* at 11 (*i.e.*, "Morse code is constructed of only dots and dashes, in the same way that the Vertuo code is constructed of only 0s and 1s"). Finally, Defendant rejects Plaintiff's challenges to Mr. Jarisch's testimony, arguing that "K-fee must do more than just speculate that the code might have somehow changed unbeknownst to Mr. Jarisch." *Id.* at 14. And Defendant rejects Dr. Singhose's testimony as not creating a genuine issue of material fact by simply asserting that the Vertuo code is a bar code because, "[e]ven if everything Dr. Singhose said were true, it would only conflict with what K-fee has already represented to the EPO about bit codes," *i.e.*, by now arguing that "a code that is constructed from only 0s and 1s is a barcode, not a bit code." *Id.* at 15.

B. Legal Framework

Determining utility patent infringement is a two-step process. *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1454 (Fed. Cir. 1998). "First, the court determines the scope and meaning of the patent claims asserted, and then the properly construed claims are compared to the allegedly infringing device." *Id.* (citations omitted). "Whether an accused device or method infringes a claim either literally or under the doctrine of equivalents is a question of fact." *Schoell v. Regal Marine Indus., Inc.*, 247 F.3d 1202, 1207 (Fed. Cir. 2001).

Because the ultimate burden of proving infringement rests with the patentee, an accused infringer may establish that summary judgment is proper "either by providing evidence that would preclude a finding of infringement, or by showing that the evidence on file fails to establish a material issue of fact essential to the patentee's case." *Novartis Corp. v. Ben Venue Labs., Inc.*, 271 F.3d 1043, 1046 (Fed. Cir. 2001). If the moving party meets this initial requirement, the burden shifts to the party asserting infringement to set forth, by declaration or as otherwise permitted under Fed. R. Civ. P. 56, "specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248.

C. Application

This infringement dispute turns on the type of code used in the accused products. More specifically, the Court considers whether the type of code used in the accused products is the same as that disclosed in Jarisch and distinguished by Plaintiff, and whether this question may be answered based on undisputed facts. The parties agree that the type of code disclosed in Jarisch does not fall within the scope of the Asserted Patents; indeed, to secure the European counterpart patent, K-Fee explained in no uncertain terms to the EPO why the code was different. Now, the parties present competing arguments on whether the accused products contain a Jarisch-like "bit code"/binary code or a traditional "barcode" as claimed in the Asserted Patents.

Considering the entire record at this stage, including K-Fee's statements to the EPO and before this Court, based on the undisputed facts, the Court concludes that the accused products do not contain a "barcode" as claimed in the Asserted Patents because the code employed by the accused products contains only "0s" and "1s," like the Jarisch bit code.

To reach this conclusion, the Court again considered the Jarisch reference and what K-Fee told the EPO about that reference, *i.e.*, what it does and does not include. Although Jarisch recognized that other drink pod patents used barcodes to brew beverages properly, Jarisch observed a "problem with identifying a capsule in a beverage preparation machine i[n] that the retrieving or reading information from the capsule is not always reliable or convenient." Docket No. 126-8 at 2:23-24. Thus, distancing the present invention from prior art that used traditional barcodes, Jarisch brought "a solution to this problem." *Id.* at 2:24-25. Specifically, "[i]n order to ensure a reliable reading or retrieval of information, [a] code is repeated along [the] circumference" of the capsule. *Id.* at 3:12-13. The Jarisch code "may be a bit code formed by a series of discrete polygonal (*e.g.*, rectangles or squares) or dot surfaces printed on the container and/or embossed in the container." *Id.* at 3:15-17. "Preferably, the code is printed or embossed to form a pattern which possesses surfaces having different reflective and/or absorbing properties to light." *Id.* at 3:20-21. For example, the "[m]irroring or absorbing surfaces [can] provid[e] bit '0' and, [the] [d]iffusing and reflective surfaces [can] provid[e] bit '1.'" *Id.* at 7:3-5. "The binary values '0' and '1' are arbitrar[il]y chosen and can be inversed." *Id.* at 7:7.

"In the most preferred embodiment, the code is present on the bottom of the rim of the capsule which is opposed to the lid of the capsule." *Id.* at 3:31-4:1. By placing the code on the bottom of the rim, it is less likely to get soiled by coffee and therefore more likely to be read

reliably. *Id.* at 4:1-4. In this embodiment (Figures 4-7), "[t]he bit code is formed of a succession of small rectangular surfaces having light mirroring properties and intermediate surfaces having flat mirroring and/or diffusing properties." *Id.* at 8:5-8. "The bit code may consist of: Inclined mirroring or (flat) absorbing surfaces for bit '0' and Flat mirroring or flat reflective (diffusing) surfaces for bit '1.'" *Id.* at 8:13-15. In this embodiment (Figures 4-6), "the number of bits and their bit code depend on the number and specific arrangement of mirror surfaces (*e.g.*, rectangles) and diffusing or absorbing surfaces (*e.g.*, zones between the rectangles). The same sequence of bits forming a 'code' can be repeated several times on the circumference of the rim. This repetition provides redundancy and more reliability to the reading." *Id.* at 9:15-19.

Based on this disclosure, Jarisch claims, in relevant part, a container with "a code adapted for being identified or read by external reading means." *Id.* at 11 (Claim 1). Jarisch also claims, as one example of such code, a "[c]apsule according to any of the preceding claims, wherein the code is a bit code formed by a series of discrete polygonal (*e.g.*, rectangles or squares) or dot surfaces printed on and/or embossed in the container," and where "the code is present on the bottom of the rim of the capsule which is opposed to the lid or foil of the capsule." *Id.* at 11 (Claim 6), 12 (Claim 13).

On its face, Jarisch rejected the use of traditional barcodes in favor of a simpler coding scheme using "bit code" that encodes only "0s" and "1s." K-Fee does not dispute this. Nor could it because this would be contrary to what K-Fee told the EPO to secure the earlier European counterpart patent. As discussed at length in the Claim Construction order, in opposing a novelty challenge based on Jarisch, K-Fee distinguished Jarisch from the claimed "barcode." Specifically, K-Fee averred to the EPO that a barcode is "always constructed of bars having variable widths, and therefore contains more than only two binary symbols, such as '0' and '1.'" *See* Dkt. 71-3 at 12 (emphasis in original). That is, unlike a barcode, K-fee averred that a bit code like that disclosed in Jarisch is "constructed of two binary symbols ('0' and '1')." *Id.* The EPO's decision confirms that the Jarisch binary code is not a barcode. *See* Docket No. 71-8 ("The [EPO] opposition division is of the opinion that **the binary code in [Jarisch] cannot be regarded as a barcode**, specifically because [Jarisch] intends to differentiate itself from these barcodes," and it is "not evident that the reflective and/or absorbing/diffracting surfaces disclose a barcode having variable widths.") (emphasis added).

In its Motion, Defendant presents evidence that the accused products use the same type of encoding scheme disclosed in Jarisch, *i.e.*, the code contains nothing more than two binary symbols, "0" and "1." *See, e.g.*, Docket No. 135-2 (Jarisch Decl.) at ¶ 8 ("The Vertuo code is based on two 'bits' (from **<u>bi</u>**nary dig**<u>its</u>**). Those bits are the values 0 and 1. The Vertuo code only ever encodes (and is only capable of encoding) either a 0 or a 1. No other values are encoded anywhere on the Vertuo capsules.") (emphasis in original); Docket No. 197-5 (Parentes Depo.) at 408:18-22 [redacted].

Plaintiff presents two primary arguments in opposition. *First*, Plaintiff argues that because an individual module that is encoded "0" or "1" sometimes appears next to a like module (*e.g.*, "00" or "11"), these module groups form bars of variable widths and thus a barcode. Relatedly, Plaintiff argues that if the Court does not adopt this interpretation of module barcodes, it would mean all traditional barcodes are not barcodes within the Court's definition. *Second*, Plaintiff argues that because the encoded "0s" or "1s" [redacted] they are not truly binary. The Court finds neither argument persuasive.

First, through an expert declaration, Plaintiff attempts to controvert whether a binary code comprised of "0s" and "1s" can become a barcode by placing some "0s" next to other "0s" or some "1s" next to other "1s," thereby creating the visual appearance of wider modules, which Dr. Singhose deems "bars." *See, e.g.*, Docket No. 182-1 (Singhose Decl.) at ¶¶ 18-20. Because this proffered definition is contrary to K-Fee's representations to the EPO—and contrary to Figure 5 in Jarisch—this testimony cannot form a genuine dispute of material fact. *See, e.g.*, *Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012) ("The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony."); *Block v. City of Los Angeles*, 253 F.3d 410, 419 n.2 (9th Cir. 2001) ("A party cannot create a genuine issue of material fact to survive summary judgment by contradicting his earlier version of the facts.").

As stated, before the EPO, K-Fee averred that a barcode "is <u>always</u> constructed of bars having variable widths, and therefore contains ***more than only two binary symbols***, such as '0' and '1.'" *See* Docket No. 71-3 at 12. K-Fee does not explain how using two binary symbols only, but in a different order, *e.g.*, 00, 11, instead of 0101, can make a bit code a bar code. Furthermore,

the Court observes that K-Fee provided its preferred definition to the EPO in the context of describing Jarisch Figure 5, a figure conspicuously and inexplicably absent from K-Fee's Opposition and the Singhose Declaration.[5] *See id.* at 11-12 (acknowledging "[t]he 'bit code' used in figures 4 to 7 therefore comprises a code constructed of two different areas: a reflective area that represents '1' and an absorbing area that represents '0,'" thus, "[t]he 'bit code' disclosed here is therefore strictly a binary code constructed of two binary symbols ('0' and '1')."

As Defendant observes, however, Figure 5 contains several depictions of "wider" reflecting or absorbing areas.

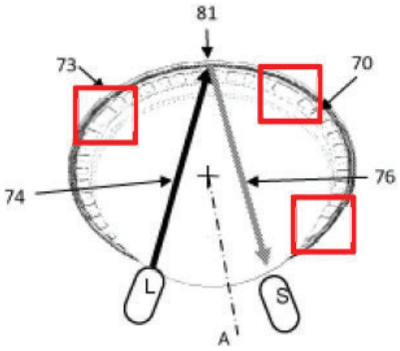


Fig. 5

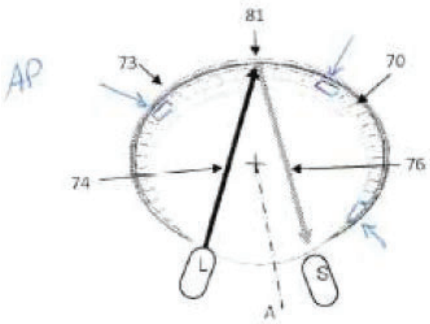


Fig. 5

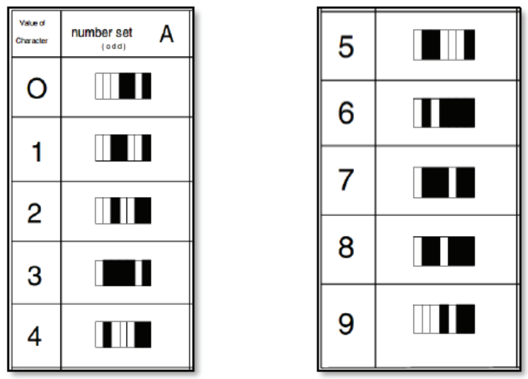
See Reply at 12 (excerpting Jarisch, Fig. 5 and version of Fig. 5 annotated by inventor). Because neither K-Fee nor its expert elected to provide any evidence contradicting Figure 5 or the inventor's testimony about what Figure 5 shows, that evidence stands unrebutted. Indeed, even as late as June 13, 2022 (three days before the hearing), in its response to Defendant's evidentiary objections to the Singhose Declaration, all Plaintiff said about Figure 5 is that it does not matter whether the barcode is on the top or bottom of the capsule rim and Figure 5 is a "low-quality" image. *See* Docket No. 200 at 1, 7. Given K-Fee's repeated failure to provide any rebuttal to Figure 5, the Court assumes K-Fee has none. Because the accused products encode only "0s" and "1s," like Jarisch, they are excluded from K-Fee's EPO definition of barcode, which has been adopted here. Thus, the accused products do not contain a barcode as claimed in the Asserted Ptaents.

Holding K-Fee to its representations before the EPO (*i.e.*, a binary code is not a barcode as

[5] As Defendant notes, in addition to Figure 5 coming up during the EPO Opposition, Defendant also raised it during the Markman hearing in this case. Therefore, Plaintiff has long been on notice of Figure 5. The Court interprets Plaintiff's silence on Figure 5 to be an acknowledged choice to forego any arguments attempting to distinguish Figure 5 and its relevance here.

claimed) will not exclude all traditional barcodes from the Court's definition of barcode as K-Fee suggests. Rather, the Court's application of K-Fee's *own* definition is consistent with K-Fee's representation that modular barcodes "are the norm." Opp. at 17. For example, K-Fee explains that one such modular barcode, the European Article Number (EAN) standard, and particularly the EAN-13 standard, "is used worldwide for barcodes used at retail points of sale." *Id.* K-Fee observes that this barcode "contains bars of variable width that represent more than 0's and 1's." *Id.* Specifically, this barcode contains 7-module groups, where each group represents an integer between 0 and 9 based on the shading of the modules within that group. *Id.*

Figure 1 — EAN-13 bar code symbol



Id. at 18.

The Court's construction of barcode, as represented by K-Fee to the EPO, would include the EAN-13 standard, however. The EAN-13 standard contains bars of variable width, and it is not a binary code because it encodes more than just "0s" and "1s." As shown above, it encodes all integers from 0-9. Each encoded module-group contains bars of variable width, which is what makes each integer different (*e.g.*, "1" is encoded in the pattern of two light modules, followed by two dark modules, two light modules, and one dark module, whereas "2" is encoded in the pattern of two light modules, followed by one dark module, two light modules, and two dark modules).

In contrast, the binary code in the accused products encodes "0s" and "1s" only, [redacted]

REDACTED IN ORIGINAL

[redacted]

K-Fee presents no evidence suggesting that the pattern of a binary code makes the code something other than binary (*e.g.*, 010101 is a binary code, as is 000111).[6]

Second, the Court rejects K-Fee's argument that because the binary code in the accused products is assigned further meaning [redacted] it is not binary. As Defendant observes, this argument ignores the basic principle of coding, which is that code translates into other useful information. Further, K-Fee distinguished Jarisch before ethe EPO based on what the code was "constructed of," not what information it presented. *See* Docket No. 71-3 at 12.

In sum, before the EPO, K-Fee averred that a binary code containing only "0s" and "1s" is not a barcode, but before this Court K-Fee and its expert are saying the opposite. This contradiction provides an insufficient basis on which to find a genuine dispute of material fact. Accordingly, the Court **GRANTS** Defendant's motion.

D. Evidentiary Objections

The parties have filed various requests for specific rulings on evidentiary objections and responses thereto. The Court rules on those objections as follows.

First, Plaintiff objects to portions of the Jarisch Declaration based on (1) the inability to authenticate Exhibits 1-4 based on lack of personal knowledge; (2) exhibits 1-4 are hearsay; (3) lack of personal knowledge as to paragraphs 6-17; (4) paragraphs 18-19 are improper expert testimony; (5) paragraphs 18-19 are irrelevant; (6) paragraphs 18-19 are inadmissible under Rule

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[6] Likewise, K-Fee's argument regarding "alternating" is unpersuasive because, by referencing "thick and thin" bars, the definition of barcode does not describe alternating modules (the modules are all the same width), but rather describes the general alternating pattern of dark and light bars, which are made up of modules, across an entire barcode, as generally depicted in the EAN-13 standard above. *See* Opp. at 18 (citing Docket No. 71-3 at 1314 ("Barcodes consist of a series of thick and thin alternating vertical dark and light bars")).

403; and (7) the entire declaration lacks personal knowledge. *See* Docket No. 182-3.

To reach its decision, the Court does not rely on Exhibits 1-4 to the Jarisch Declaration, except to the extent Plaintiff relies on any portion thereof for its own argument, the Court has analyzed that argument. Accordingly, these objections are moot. The Court relies on paragraph 8 only to the extent that Mr. Jarisch has personal knowledge. Accordingly, this objection is overruled. The Court does not rely on paragraphs 18-19 of the Jarisch Declaration, so the objections are moot. Even if certain of Plaintiff's objections were not moot, the Court would overrule them for the reasons outlined in Defendant's response. *See* Docket No. 187-3.

Second, Plaintiff also objects to the deposition of Alexandre Parentes (and any materials referencing or derived from this deposition) as new evidence submitted for the first time in reply, and because Defendant previously represented that Parentes's testimony was unnecessary to the early MSJ. *See* Docket No. 195. Defendant responds that it relied on the Parentes testimony properly in response to Plaintiff's speculative arguments raised in the Opposition, it made no misrepresentations about Mr. Jarisch being the "sole declarant" in support of the MSJ, and that the Parentes testimony did not exist at the time Defendant filed its MSJ because Parentes was deposed weeks later, on May 24, 2022. *See* Docket No. 198.

The Court has reviewed the Parentes testimony and finds that it does not differ in substance from Mr. Jarisch's testimony on barcode. Accordingly, because the Parentes deposition occurred after the motion was filed, and because the two witnesses provide similar testimony, the Court sees no basis on which to strike this evidence. The Court observes that Defendant apparently suggested to Plaintiff that Plaintiff file an unopposed sur-reply given Plaintiff's concerns about the timing of the Parentes deposition. Two days before the hearing, Plaintiff filed an unopposed request to file a sur-reply, including the sur-reply. *See* Docket No. 201. The Court grants Plaintiff's request and has considered the sur-reply. The sur-reply does not address K-Fee's unequivocal statements to the EPO that a barcode always contains more than only two binary symbols. Even if the Court disregards the Parentes testimony and relies on the Jarisch testimony only, this would not change K-Fee's statement to the EPO.

Third, Defendant objects to the Singhose Declaration on the grounds that (1) Dr. Singhose did not provide an expert report; (2) his opinions are conclusory; and (3) his opinions are inadmissible and immaterial to summary judgment or provide improper legal conclusions. *See* Docket No. 187-2. Plaintiff responds that the challenged evidence is admissible and properly

supported. *See* Docket No. 200. Given the Court's rulings above, Defendant's objections are moot.

V. <u>CONCLUSION</u>

For the reasons stated, the Court **GRANTS** Defendant's Motion. Defendant is ordered to lodge a proposed judgment within seven days of this Order.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 21-3402-GW-AGRx	Date	June 17, 2022
Title	*K-fee Sys. GmbH v. Nespresso USA, Inc., et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	None Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None Present	None Present

PROCEEDINGS: **IN CHAMBERS - FINAL RULING ON NESPRESSO USA, INC.'S MOTION FOR SUMMARY JUDGMENT OF NONINFRINGEMENT [126]**

Defendant's motion for summary judgment came on for hearing on June 16, 2022. *See* ECF No. 209. Prior thereto, a tentative ruling was provided to the parties. After considering the moving, opposition, and concomitant filings (including the Court's *Markman*/Claims construction, *see* ECF No. 111), plus the arguments of counsel at the hearing, the Court adopts its tentative ruling as its final decision and GRANTS the motion for summary judgment. By June 22, 2022: (1) the parties are to indicate if there is any portion of the tentative ruling that contains confidential material that should be redacted before the ruling is publicly filed; and (2) the Defendant is to prepare a proposed judgment.

Initials of Preparer JG