

No. 2009-1557

**United States Court of Appeals
for the Federal Circuit**

HAEMONETICS CORP.,

Plaintiff-Appellee,

v.

BAXTER HEALTHCARE CORP. and FENWAL INC.,

Defendants-Appellants.

**Appeal From The United States District Court
For The District of Massachusetts
In Case No. 05-CV-12572, Judge Nathaniel M. Gorton**

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CERTIFICATE OF INTEREST

Counsel for defendants-appellants certifies the following:

1. The full name of every party represented by me is:

Baxter Healthcare Corp.; Fenwal, Inc.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

The real parties in interest are named in the caption.

3. All parent corporations and any publicly held companies that own 10 percent of more of the stock of the party or amicus curiae represented by me are:

Baxter Healthcare Corp. is a wholly owned subsidiary of Baxter International Inc.

Fenwal, Inc. is a wholly owned subsidiary of Fenwal Holdings, Inc.

4. The name of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are appearing in this Court are:

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TABLE OF ABBREVIATIONS

In addition to the abbreviations set out in Fenwal’s opening brief (at pages ix-x), this reply brief uses the following abbreviations:

'488 patent	U.S. Patent No. 6,322,488, issued November 27, 2001, entitled “Blood Separation Chamber With Preformed Blood Flow Passages And Centralized Connection To External Tubing” (A7953-A8032)
Board	Board of Patent Appeals and Interferences
FBr. ____	Brief of Defendants-Appellants
HBr. ____	Brief of Plaintiff-Appellee

All emphases in this brief are added and internal quotation marks are omitted unless otherwise indicated.

INTRODUCTION

Haemonetics solved a known problem (the large size of prior-art blood centrifuges) in a common-sense way (by making the centrifuge smaller). In an effort to save its plainly obvious patent—which the PTO has ordered to be reexamined (HBr. xi)—Haemonetics invents a new claim limitation requiring the separation cup to be “rigid,” disregards binding precedent, and misrepresents the record on appeal. These tactics cannot salvage the flawed judgment of infringement.

- Claim 16 of the '983 patent is invalid for obviousness. The Supreme Court and this Court's predecessor have long held that a mere change in size or proportion is *not* patentable. Haemonetics has no answer to the authority cited by Fenwal. Instead, Haemonetics reads an extraneous “rigidity” limitation into the claim. The patent contains no such limitation.
- Claim 16 is also invalid for anticipation. Undisputed and corroborated trial evidence showed that Baxter independently conceived a separation cup containing every element of the asserted claim before the inventor did, and that Baxter reduced that cup to practice eight months before him.
- The judgment of infringement also cannot stand. Law and logic dictate that the definitional term “centrifugal unit” be construed to refer to the same object throughout claim 16: the assemblage of the separation cup and tubing. Also, the claim is indefinite because it is insolubly ambiguous as to where and how the “height” and “radius” of that “centrifugal unit” should be measured.
- Invalidity and noninfringement aside, the district court clearly erred by granting Haemonetics—in addition to future damages—an injunction against, and a provisional royalty on, Fenwal's post-verdict sales.

The judgment should be reversed, and claim 16 of the patent declared invalid and not infringed.

ARGUMENT

I. CLAIM 16 IS INVALID

Haemonetics' attempt to read a "rigidity" limitation into claim 16 cannot save it, because that claim contains no limitation directed to the composition of the separation chamber. Instead, as Fenwal showed (FBr. 22-25), the prior art—including the '163 patent, which the inventor knew about but did not cite during prosecution—discloses every element actually contained in claim 16. The only claimed "advance" is reducing the dimensions of prior-art devices, but this common-sense solution, which functioned so predictably that the inventor conceded that it required no testing, is obvious as a matter of law under *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398, 421 (2007), and *Powers-Kennedy Contracting Corp. v. Concrete Mixing & Conveying Co.*, 282 U.S. 175, 185 (1930), among many other authorities. Moreover, Fenwal offered undisputed, corroborated evidence that Baxter employees—who were working to miniaturize the highly similar Amicus[®] device—both conceived and reduced the ALYX[®] separation cup to practice before the inventor, which reinforces the obviousness of claim 16 and renders it invalid for anticipation.

A. Claim 16 Is Obvious

Claim 16 Contains No "Rigidity" Limitation. Rather than respond to Fenwal's arguments on obviousness, Haemonetics contends that the '983 patent requires the claimed separation chamber to be constructed of a rigid, "non-

flexible” material. HBr. 38. This misrepresentation cannot save the patent from obviousness. Haemonetics is bound by the language of the claims; this Court “can neither broaden nor narrow claims to give the patentee something different than what he has set forth.” *K-2 Corp. v. Salomon S.A.*, 191 F.3d 1356, 1365 (Fed. Cir. 1999). Simply put, the text of claim 16 does *not* require that the cup be rigid (*see* A114-15), as Fenwal’s expert, Dr. Robin Felder, explained at trial (A3500-01). The Supreme Court explained over a century ago: “[W]e know of no principle of law which would authorize us to read into a claim an element which is not present, for the purpose of making out a case of novelty or infringement. . . . This doctrine is too obviously untenable to require argument.” *McCarty v. Lehigh Valley R.R. Co.*, 160 U.S. 110, 116 (1895).

In fact, as Haemonetics acknowledges (HBr. 45), it was *Baxter* who obtained a patent that claimed, among other things, “[a] blood separation chamber” with “*formed . . . walls*” and a base comprising a “*molded body*” (’488 patent 75:24, 28, 45 (A8032)). Haemonetics cites the testimony of Fenwal’s witnesses discussing the rigid separation chamber that Baxter incorporated into the ALYX[®] system, and contends that this testimony “confirm[s] the novelty of *Mr. Rochat’s* invention.” HBr. 42-43. But this is a red herring. Testimony about the rigid chamber of the ALYX[®] system (or about differences between Baxter’s prior-art

Amicus[®] device and its ALYX[®] system (*see* HBr. 42-44)) does not show nonobviousness of Haemonetics' '983 patent.¹

It Is Obvious to Make Existing Devices Smaller. Haemonetics' appellate argument that the claim requires a "rigid" cup is also belied by the admissions of both the inventor, Rochat, and Haemonetics that the "innovation" of the '983 patent was "reducing and proportioning the dimensions of the [separation] cup." (A901; *see also* A3186.) In fact, as Haemonetics acknowledges, the examiner's reason for allowing the patent (over the limited prior art cited by Rochat) had nothing to do with "rigidity," but rather was bottomed in "size and weight reduction" and "ease of transport and handling." (A4854.) However, the Supreme Court and this Court's predecessor have both squarely held that "a mere change in proportion," *Powers-Kennedy*, 282 U.S. at 185, or a "mere change of size," *In re Wolfe*, 251 F.2d 854, 856 (C.C.P.A. 1958), is not a patentable advancement. *See* FBr. 31-34 (citing cases); *In re Bigio*, 381 F.3d 1320, 1327 (Fed. Cir. 2004) (affirming the Board's rejection of an application where "[t]he differences [were] mere change of size and substitution of material of the most obvious kind")

¹ In fact, Baxter's contemporaneous, independent development of the ALYX[®] system evidences the patent's *obviousness*. FBr. 31 n.6. Haemonetics contends that the '488 application is a secondary indicator of *nonobviousness* because Baxter filed it shortly after Rochat filed his '983 application. But Haemonetics cites no evidence—and none exists—suggesting that Baxter copied the '983 patent, so Haemonetics' analogy to *Panduit Corp. v. Dennison Manufacturing Co.*, 810 F.2d 1561, 1571-72 (Fed. Cir. 1987) (*see* HBr. 47), fails.

(quoting *Wolfe*, 251 F.2d at 856). Indeed, the examiner’s conclusion is flatly contrary to the holding of *In re Lindberg* that “it is not regarded as inventive to merely make an old device portable or movable without producing any new and unexpected result.” 194 F.2d 732, 735 (C.C.P.A. 1952).

Tellingly, Haemonetics does not respond to this unambiguous authority. Haemonetics instead cites *Wang Laboratories, Inc. v. Toshiba Corp.*, 993 F.2d 858 (Fed. Cir. 1993), and asserts that differences in size can support a legal conclusion of nonobviousness. HBr. 34. But *Wang* concerned only the *factual* question of whether larger SRAMs (static random-access-memories), “*not* used in PCs,” could be “analogous art” to smaller DRAMs (dynamic random-access-memories), which *were* used in personal computers. 993 F.2d at 864. Because the references were not “analogous,” the Court did not consider the *legal* question of whether the prior art rendered the patent obvious. *See id.* at 864-65. Haemonetics does not assert—and could not plausibly assert—that the prior-art references in this case (particularly the Amicus[®] device and the ’163 patent) are non-analogous; the references are plainly in the same “field of endeavor” as the patent, *id.* at 864. *Compare* ’983 patent 1:13-14 (A110) (“FIELD FO [*sic*] THE INVENTION”: “This invention relates to centrifuge systems for the general processing of fluids”), *with* ’163 patent 1:17-18 (A7102) (“FIELD OF THE INVENTION”: “This invention relates to centrifugal processing systems and apparatus.”).

Every Element of Claim 16 Is in the Prior Art. Rochat and Haemonetics' expert, Dr. George Russell, conceded that the prior art contained all but three elements of claim 16. (A3153-55; A3207-08.) As for the remaining elements, Haemonetics does not dispute on appeal that

- The '163 patent—which Rochat did not disclose to the examiner—discloses “a plurality of channels extending radially in the base.” FBr. 22-23.
- Rochat measured the dimensions of the Amicus[®] device at trial (A3162-63) and stated that it discloses a height-to-radius ratio within the range claimed in the '983 patent. FBr. 23-24.
- Haemonetics' own PCS[®] product and the first-stage RBC processing chamber of the '163 patent disclose radii between 25 mm and 50 mm. FBr. 25.

To the extent Haemonetics contends that the prior art does not contain the dimensional limitations because the prior art addressed only *interior* dimensions, not *exterior* dimensions, Haemonetics is wrong. When Rochat measured the dimensions of the Amicus[®] device, he measured the “outer most” “exterior” dimensions and concluded that the device disclosed a height-to-radius ratio within the range claimed in the '983 patent. (A3162-63.) In addition, the evidence of the 40 mm radius of Haemonetics' PCS[®] product comes from a measurement made by Rochat himself (A6103), who contended that the “radius” and “height” of a separation chamber, such as described in claim 16, refer to “the external

dimension[s].” (A3143.)² Thus, there is no dispute that the prior art discloses every element of claim 16.

There Was a Clear Motivation to Combine. Fenwal explained in its brief that common sense—a paramount consideration under *KSR*—taught that a smaller version of existing centrifuges would have been desirable. FBr. 26-35. Moreover, there was ample evidence tendered at trial—much of it introduced by Haemonetics—of a motivation to combine prior-art elements to create a portable 2RBC device. FBr. 26-28. For example, Haemonetics’ Vice President and Chief Medical Officer testified on direct examination that “mobility is the key” to performing apheresis at mobile blood drives (A3135), where most RBCs are collected (A3131). He explained:

You have to have devices that are small enough, that are light enough, and don’t take up too much space Blood is often collected in a conference room. So you need to have equipment that is small enough, light enough, so that the staff can move these devices around. . . . [M]ost of the people who collect blood are women, and they’re often young women or middle-aged women for whom back strain and strength is an issue. So you need – ***small is better. Light is better. Portability is better still.***

(A3135.) Fenwal’s Senior Director of International Sales agreed: “Portability is an important attribute [in a RBC apheresis device]. . . . [I]t’s almost a requirement” (A3406.) This evidence of “demands known to the design

² This argument also assumes that the district court’s claim-construction and indefiniteness rulings were correct, which they were not. *See infra* Part II.

community” clearly establishes a “reason to combine the known elements in the fashion claimed by the patent at issue,” *KSR*, 550 U.S. at 418, and renders the patent claim obvious.

Rochat’s Combination Yielded Predictable Results. *KSR* also instructed that “[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *Id.* at 416.

Here, there is ample evidence that the result from the reduction in size was entirely predictable. As Fenwal explained (FBr. 28-29), Rochat candidly admitted that he “did not do any test” of the height-to-radius ratio because the dimensions were “not new” and “in the formula” developed by Richard Brown. (A3155-56.)³

Haemonetics contends that certain “failed attempts” by Baxter to reduce the ALYX[®] system to practice prove the nonobviousness of Rochat’s invention.

HBr. 35. Even if *Baxter’s* development efforts were relevant to the dimensional limitations claimed by *Rochat*, Haemonetics cites no record evidence of purported “failures” at developing a centrifugal unit with the dimensions claimed. To the extent that Haemonetics is referring to the flexible bag wrinkling (FBr. 15-16) or to

³ Exemplary of Haemonetics’ misrepresentation of the record is its assertion that Baxter “admi[tte]d” that it could not derive the dimensions of the ALYX[®] cup from Brown’s equations. HBr. 39. But the testimony Haemonetics cites actually *confirms* that Baxter used Brown’s equations to design the ALYX[®] cup. (*See, e.g.*, A3350 (Testimony of Kelly Smith: “I looked at using the predictive formula that Richard Brown developed” to “determine the radius for the purposes of determining the volume of the interface of blood”).)

the four months it took Baxter to reduce its conceived device to practice (FBr. 44-46), these production obstacles—which Baxter readily overcame—had nothing to do with the *dimensional limitations* claimed by Rochat.

Haemonetics’ Attacks on Dr. Felder Are Baseless. Left with no other ground to support the judgment of nonobviousness, Haemonetics resorts to *ad hominem* attacks on Fenwal’s expert, Dr. Felder. Haemonetics rehashes an argument—which the district court rejected in denying Haemonetics’ motion to strike (A3775; A3792)—that Dr. Felder’s testimony must be disregarded because, although he “holds a Ph.D. in chemistry,” he testified that one of ordinary skill in the art would have a bachelor’s degree in engineering. HBr. 45. But this Court has made abundantly clear that a qualified expert may testify even if he does not precisely fit the description of one of ordinary skill. *See Endress + Hauser, Inc. v. Hawk Measurement Sys. Pty.*, 122 F.3d 1040, 1042 (Fed. Cir. 1997) (“The ‘person of ordinary skill in the art’ is a theoretical construct used in determining obviousness under § 103, and is not descriptive of some particular individual.”). Dr. Felder was plainly qualified to testify as an expert. He is a Professor of Pathology and founder and director of the Medical Automation Research Center at the University of Virginia (A3498), and has designed, patented, and reduced to practice several medical devices, including centrifuges. (A3516.) In fact,

Haemonetics' own expert, Dr. Russell, acknowledged that Dr. Felder "ha[d] more experience with medical devices than [Dr. Russell]." (A3206.)

This is a textbook case of obviousness. The district court's denial of Fenwal's motion for JMOL should be reversed, with instructions to enter judgment of obviousness.

B. Claim 16 Was Anticipated by Baxter's Prior Invention

Baxter Conceived Every Element of Claim 16 Before Rochat. While Haemonetics contends that Rochat conceived claim 16 on April 20, 1998 when he purportedly recognized the so-called "1:1" height-to-radius ratio, Haemonetics *never* introduced substantial evidence supporting that conception date, as Fenwal has explained. FBr. 36 n.9. Haemonetics' brief confirms that the *only* evidence of its alleged conception date is Rochat's self-interested testimony (A3143-45) about one notebook page (A6264) that says "Brevet [patent] Claim." (A3145.) As such, Haemonetics' claim of conception on April 20 is belied not only by the lack of corroboration, *see Coleman v. Dines*, 754 F.2d 353, 359 (Fed. Cir. 1985) ("Conception *must* be proved by corroborating evidence which shows that the inventor disclosed to others his completed thought . . ."), but also by the fact that Rochat did not even include the height-to-radius ratio in the original patent claim

that became claim 16 (*see* A4684-85 (original claim 15)).⁴ Moreover, Rochat’s “conception” document refers to *internal* dimensions (FBr. 57), not the *external* dimensions to which Haemonetics argues that claim 16 refers.

Even if Haemonetics had established conception on April 20, 1998, Fenwal’s brief outlines undisputed evidence showing that Baxter conceived every element of claim 16 no later than April 8, 1998. FBr. 36-44. Haemonetics contends that Baxter’s conception is defeated by its continued pursuit of a flexible-bag separation chamber. HBr. 25. But this argument is a *non sequitur*. *Parallel* pursuit of a flexible chamber cannot defeat Baxter’s *earlier* conception of the ALYX[®] cup. Moreover, as explained above, claim 16 does not address the composition of the separation chamber, so Fenwal did not need to prove “conception” of a “rigid” cup to prove its anticipation defense. (Tellingly, Haemonetics’ own brief does not mention any “conception” by Rochat of the purported “rigidity” limitation. *See* HBr. 24-25.) Even so, sketches from early April 1998 clearly show a rigid chamber (*see* FBr. 39-40 (citing A5190; A6642; A7211)), and Baxter engineers Smith and Brown both testified that the Cygnet team settled on the molded chamber design in March 1998. (A3345; A3440-41.)⁵

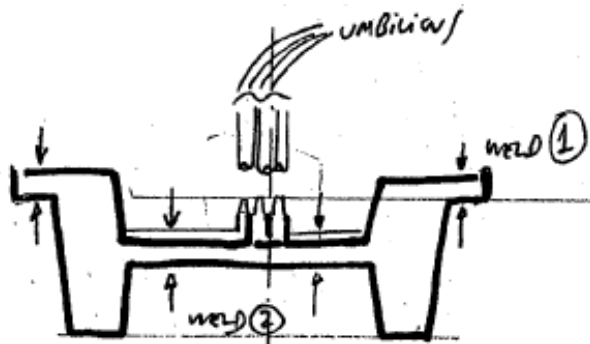
⁴ The height-to-radius ratio limitation did not appear in the file history until an October 2001 amendment. (A4792.)

⁵ Haemonetics also asserts that prior invention is somehow defeated because the Amicus[®] device used a “singular tube,” not the “plurality of channels” claimed in the ’983 patent. HBr. 26. But the documents evidencing Baxter’s development

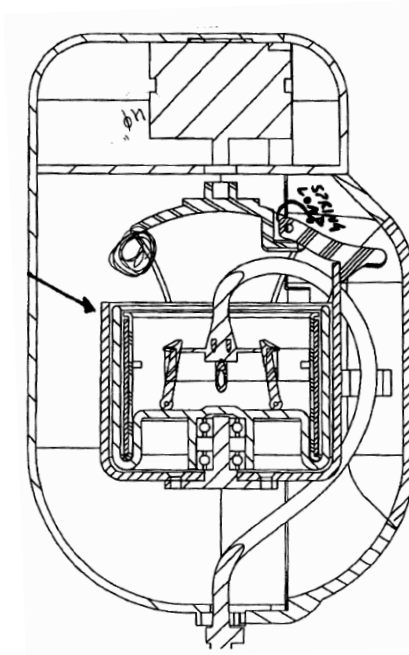
Haemonetics' arguments that other elements of claim 16 are not disclosed by Baxter's development record also fail. The fact that Kelly Smith's conception documents do not specifically recite "a height between 75 and 125% of the radius" does not defeat Baxter's prior conception because, as explained in Fenwal's brief (FBr. 42-44), (i) the law does not require such specificity to corroborate conception, *see Burroughs Wellcome Co. v. Barr Labs., Inc.*, 40 F.3d 1223, 1230 (Fed. Cir. 1994), and (ii) Baxter's Cygnet team was working to miniaturize the prior-art Amicus[®] device, which Rochat himself testified had a height-to-radius ratio within the range claimed. (A3162-63.) While Haemonetics correctly points out that one particular sketch excerpted in Fenwal's brief does not show an umbilicus (or, in the words of claim 16, "a single tubular component") (HBr. 27-28), many other development documents, not to mention the Amicus[®] device that the Cygnet team was miniaturizing (A7086; A7109 ("umbilicus 102")), show that umbilicus. (*See, e.g.*, A6642; A6646-49; A7206.) Examples are illustrated below.

(continued...)

of the ALYX[®] system plainly include a "plurality of channels." *See* FBr. 39 (citing A5190). Moreover, Dr. Felder made clear that the '163 patent (embodied in the Amicus[®] system) includes a "plurality of channels." (A3506-07.)



(A6642 (Apr. 1, 1998))



(A6653 (Mar. 11, 1998))

In light of this evidence, Dr. Felder testified that Baxter's documents showed conception of every element of claim 16 no later than April 8, 1998. FBr. 42. Haemonetics never rebutted Dr. Felder's testimony (FBr. 42), and does not argue on appeal that it did. Instead, Haemonetics faults Dr. Felder for not making an element-by-element comparison of the trial exhibits and claim 16. HBr. 28. But Dr. Felder's conclusion and its bases were clear. He referred to a demonstrative exhibit addressing each element of claim 16 (A3500; A8953 (demonstrative exhibit)), reviewed many boxes of documents produced by the parties (A3499), and considered all of the trial testimony (*id.*). Haemonetics cannot diminish the force of Dr. Felder's unrebutted testimony of prior conception by making a *post hoc* demand for a more specific comparison.

Unable to refute the merits of Dr. Felder’s testimony, Haemonetics lodges more baseless attacks against his credibility and reliability, arguments that the district court rejected in denying Haemonetics’ motion to strike Dr. Felder’s supplemental report. (A3128.) Contrary to Haemonetics’ contention (HBr. 29), Dr. Felder did *not* state in his initial report that “Fenwal’s earliest conception date was on or around July 1998.” Rather, Dr. Felder stated that “Baxter employees invented the ALYX system . . . *prior to* April 9, 1999” (the filing date of the ’983 patent) (A3065), and that “there [was] evidence that many” elements of claim 16 “were developed by Baxter . . . *before July 7, 1998.*” (A3051.) Dr. Felder framed his conclusions in this manner because Haemonetics had refused to respond to an interrogatory requesting Haemonetics’ asserted conception date. (A1252-53; A1271-73.) Haemonetics first claimed the April 20 conception date in an expert report lodged *at the same time as Dr. Felder’s*. (A1255.)

Moreover, there was nothing untoward about the timing of the supplemental report that Dr. Felder filed. Haemonetics brought the timing of that report on itself by obstructing Fenwal’s efforts to depose Rochat until a deposition was set by court order for the night before trial. (A2588-93; *see also* FBr. 10 n.1.) As the court ruled in denying Haemonetics’ motion to strike, the timing “of the supplemental report was justified because the report was based on documents not

made available to the defendants and to Doctor Felder until the day before the report was produced.” (A3128.)

Baxter Exercised Reasonable Diligence and Reduced the ALYX[®] System to Practice Before Rochat. Baxter reduced the ALYX[®] system to practice in August 1998. Haemonetics attempts to obscure the undisputed evidence of reduction to practice (*see* FBr. 44-46) by contending that, in August 1999, Baxter was “struggling with . . . the method of attaching the umbilicus to the separation bowl.” HBr. 22. But the method of attaching the umbilicus is not an element of claim 16. Moreover, Kelly Smith testified that Baxter undertook these welding experiments when “preparing for *production* of the ALYX device.” (A3365.) This Court has squarely held that “[o]nce the invention has been shown to work for its intended purpose”—as Baxter’s successful August 1998 experiments indisputably showed (FBr. 45)—“reduction to practice is complete” and “[f]urther efforts to *commercialize* the invention are simply not relevant.” *Loral Fairchild Corp. v. Matsushita Elec. Indus. Co.*, 266 F.3d 1358, 1362-63 (Fed. Cir. 2001).

Accordingly, Haemonetics’ assertion that Baxter did not reduce the ALYX[®] system to practice until commercial marketing in 2003 is also baseless. HBr. 30. First, as noted, “commercial marketing” is not required to establish reduction to practice. *Scott v. Finney*, 34 F.3d 1058, 1061 (Fed. Cir. 1994) (“Reduction to practice does not require that the invention . . . be in a commercially satisfactory

stage of development.”). Moreover, no one could possibly dispute that Baxter reduced the ALYX[®] system to practice by September 3, 1999, when it filed the ’488 patent application. (A7953.) And the same undisputed evidence that shows Baxter’s efforts to reduce the ALYX[®] system to practice in 1998—such as Kelly Smith’s lab notebook (A6383-6492 (showing development efforts through October 2000)) and Smith’s unrefuted testimony that she “was 100 percent dedicated to the ALYX project” in 1998 and 1999 (A3352)—shows a continuing exercise of diligence throughout 1999.

In sum, undisputed evidence shows that Baxter both conceived of and reduced the ALYX[®] separation cup to practice before Rochat. The Court should reverse the denial of Fenwal’s motion for JMOL of prior invention and order judgment for Fenwal.

II. FENWAL DOES NOT INFRINGE CLAIM 16

Even if claim 16 could survive an invalidity analysis, Fenwal does not infringe it. Both the claim and specification show that “centrifugal unit” refers to the assemblage of the separation cup and associated tubing. FBr. 46-53. Haemonetics does not dispute that Fenwal’s ALYX[®] system does not infringe under that construction. FBr. 52. Further, even if “centrifugal unit” could be construed otherwise, the patent is insolubly ambiguous as to how the “radius” and

“height” of the “centrifugal unit” should be measured. FBr. 53-59. Fenwal is therefore entitled to a judgment of noninfringement as a matter of law.

A. “Centrifugal Unit” Refers to the Assemblage of the Separation Cup and Tubing

Haemonetics’ primary claim-construction argument on appeal is that the first use of “centrifugal unit” in claim 16 is a nonlimiting preamble term. HBr. 51.

However, the text of the claim, viewed in light of the specification (*see* FBr. 47, 50) and this Court’s case law, clearly shows that “centrifugal unit” provides a limiting definition, and that the Court should therefore give “centrifugal unit” the same meaning throughout claim 16.

Preambles, like other claim language, are construed under established principles of claim construction. *Bell Commc’ns Research, Inc. v. Vitalink Commc’ns Corp.*, 55 F.3d 615, 620 (Fed. Cir. 1995). Accordingly, “a claim preamble has the import that the claim as a whole suggests for it.” *Id.* “[W]here a patentee defines a structurally complete invention in the claim body and uses the preamble only to state a purpose or intended use for the invention,” the “preamble is not limiting.” *Catalina Mktg. Int’l, Inc. v. Coolsavings.com, Inc.*, 289 F.3d 801, 808 (Fed. Cir. 2002). However, where, as here, “the preamble contributes to the *definition* of the claimed invention,” the preamble limits the scope of the claim. *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1350 (Fed. Cir. 1998).

Claim 16 defines “centrifugal unit,” in the initial use of the term, as “comprising” two elements: (i) “a centrifugal component,” which, neither party disputes, refers to the separation cup alone (A202), and (ii) “a plurality of tubes.” (A114.) The claim then repeats the term “said unit” or “centrifugal unit” multiple times. (A114-15.) The obvious conclusion is that the antecedent of “said unit” is the cup-plus-tubing assembly.

When (as in claim 16) a preamble contains the antecedent for “said” structure repeated in the body of the claim, this Court has consistently held the preamble to be limiting. In *Bell*, the preamble recited “a ‘method for transmitting a *packet* over a system comprising a plurality of networks . . . *said packet including a source address and destination address.*’” 55 F.3d at 621 (ellipsis in original). The claim then recited “the steps of ‘assigning, by said source device, one of said trees to broadcast *said packet* and associating with *said packet* an identifier indicative of said one of said trees.’” *Id.* (emphasis altered). Because “said packet” was repeated in the body of the claim, the Court determined that the body “incorporate[d] by reference the preamble phrase ‘said packet including a source address and a destination address,’” and that, therefore, the term “said packet” as used in the body, should be construed to require “*both* source and destination addresses,” as defined in the preamble. *Id.*

Similarly, *Electro Scientific Industries, Inc. v. Dynamic Details, Inc.* involved a patent claim whose preamble recited “a tool positioning system” for cutting “*circuit boards* each having at least a first conductor layer, a dielectric layer, and a second conductor layer.” 307 F.3d 1343, 1347 (Fed. Cir. 2002) (emphasis altered). The claim repeated the term “circuit boards” many times, reciting limitations such as “mounting the *circuit boards* on a slow positioner stage.” *Id.* (emphasis in original). The Court concluded that the “preamble definition limit[ed] the term ‘circuit boards’ throughout the claim,” because “[t]he preamble *defines* ‘circuit boards’ as ‘at least first and second substantially identical circuit boards each having at least a first conductor layer, a dielectric layer, and a second conductor layer.’” *Id.* at 1348. Thus, the Court concluded, “[r]eferences throughout the rest of the claim to ‘circuit boards’ rely upon and derive antecedent basis from this preamble language.” *Id.*; accord *Griffin v. Bertina*, 285 F.3d 1029, 1033 (Fed. Cir. 2002) (holding preamble term to be limiting where “[t]hat aspect of the invention [was] again stated in the body of the count”); *Pitney Bowes, Inc. v. Hewlett-Packard Co.*, 182 F.3d 1298, 1306 (Fed. Cir. 1999) (similar).

Just as in *Bell* and *Electro Scientific*, claim 16’s preamble defines a “centrifugal unit” as cup-plus-tubing, and the body then repeats “said unit” and “centrifugal unit.” (A114-15 (referring to “said unit . . . turn[ing] around an axis” and to the radius and height of that “centrifugal unit”).) The later uses, which

specifically cross-reference the preamble, “rely upon and derive antecedent basis from” the definition in the preamble, *Electro Scientific*, 307 F.3d at 1348, and accordingly should be given the same meaning: an assemblage of a “centrifugal component” (*i.e.*, the separation cup) and a “plurality of tubes.”

If Rochat did not intend for the preamble to define the term “centrifugal unit” as it is used throughout the rest of the claim, he could have used a different term as a “descriptive name.” *IMS Tech., Inc. v. Haas Automation, Inc.*, 206 F.3d 1422, 1434 (Fed. Cir. 2000). Indeed, Rochat had many opportunities to revise the claim, but did not. FBr. 51-52. As the Court wrote in *Chef America, Inc. v. Lamb-Weston, Inc.*, it is not the Court’s job to “rewrite the patent” “as the patentees wish they had written it.” 358 F.3d 1371, 1373-74 (Fed. Cir. 2004) (affirming a claim construction that required heating batter-coated dough to a temperature where “it would be burned to a crisp” and noting that “[p]laintiff’s patent could have easily been written to reflect the construction plaintiff attempts to give it today”); *see also* FBr. 51-52 & n.12.

Moreover, the body of claim 16 does not “intrinsically set[] forth the complete invention,” as Haemonetics claims. HBr. 50. Without the preamble’s recitation of a “centrifugal unit *comprising* a centrifugal component and a plurality of tubes” (A114), one would be left with no clear answer about how to measure the dimensional limitations set forth later in the claim. *See infra* Part II.B; *see also*

FBr. 58-59 (discussing possible measurements of “radius” and “height”). By contrast, in the cases cited by Haemonetics (HBr. 54-55), the context of the repeated claim terms made clear both that the term had different meanings in different uses, and what those meanings were. *See Microprocessor Enhancement Corp. v. Tex. Instruments Inc.*, 520 F.3d 1367, 1376 (Fed. Cir. 2008) (noting the “ease of determining the appropriate meaning of each use of the term from its context”); *Wilson Sporting Goods Co. v. Hillerich & Bradsby Co.*, 442 F.3d 1322, 1328 (Fed. Cir. 2006) (noting that “modifiers” to the repeated term “produce[d] significant differences in the geometries in each defining claim”); *Epcon Gas Sys., Inc. v. Bauer Compressors, Inc.*, 279 F.3d 1022, 1031 (Fed. Cir. 2002) (noting that “the term ‘substantially’ was used in two contexts with a subtle but significant difference”).⁶

Haemonetics is also wrong to claim that “[n]owhere does the Specification suggest” that “centrifugal unit” may include the tubing. HBr. 50. As explained in Fenwal’s brief (FBr. 47-50), the specification plainly describes “a centrifugal unit [that] *includes* a centrifugal component *and* a plurality of tubes.” (A111 (3:21:22).)

While Haemonetics’ brief (HBr. 50) quotes from the description of a *different*

⁶ As explained in Fenwal’s brief (FBr. 47-50), a stipulation about the meaning of “centrifugal unit” in independent claim 1 cannot trump the plain language of independent claim 16. Haemonetics’ argument for “consistent” interpretation of claim terms is belied by its own claim-construction argument, which would give “centrifugal unit” two different meanings *in the very same claim*.

embodiment, Haemonetics offers no reason to ignore the embodiment cited by Fenwal (or, for that matter, the plain language of claim 16).

Haemonetics nevertheless contends that its concededly “awkward reading” (A922) of the terms “centrifugal unit” and “said unit” to refer to two different objects in the very same claim is required because reading “centrifugal unit” to refer to the assemblage of the vessel and tubing would “necessarily exclude . . . every embodiment disclosed in the ’938 [*sic*] Patent.” HBr. 53. Haemonetics contends that the length of the tubing is “much longer” than the height of the vessel, “resulting in a height far exceeding the claimed 125% of the radius.” HBr. 53. But if the Court were to adopt Fenwal’s construction, the relevant radius would be substantially increased, too. Accordingly, contrary to Haemonetics’ repeated assertions (HBr. 13, 17, 51), the district court did *not* accept this argument and did *not* determine that Fenwal’s proposed construction of “centrifugal unit” would eliminate *any* preferred embodiment. (*See* A13-14.) Moreover, Haemonetics points to *nothing* in embodiments of the ’983 patent indicating the scale of the drawings. It is black-letter law that “figures in a patent are *not* drawn to scale unless otherwise indicated.” *Hockerson-Halberstadt, Inc. v. Avia Group Int’l, Inc.*, 222 F.3d 951, 956 (Fed. Cir. 2000). The Court should reject Haemonetics’ speculation about the dimensions of the drawings, construe the term “centrifugal unit” to refer to the assemblage of the separation cup and tubing, and, because

Fenwal indisputably does not infringe under that construction (FBr. 52), order judgment of noninfringement.

B. Alternatively, Claim 16 Is Indefinite

In its opening brief, Fenwal explained that claim 16 is indefinite because, although it recites a “centrifugal unit” with certain “height” and “radius” limitations, it gives no answer as to how those dimensions should be measured. FBr. 53-59. Haemonetics offers no persuasive reason why a person skilled in the art of blood separation would, consistent with Haemonetics’ proposed construction, definitely understand that the terms “radius” and “height” refer to the “external outermost dimensions” of the separation cup only.

Haemonetics asks the Court to disregard undisputed evidence that the *interior* height and radius of a separation chamber determine whether blood separation will actually occur and, hence, whether a centrifuge will actually function to separate blood. HBr. 56-57. But, tellingly, Rochat himself used internal dimensions in developing the ’983 patent. FBr. 57; *see also* A6200-01 (Rochat applying Richard Brown’s equations). In addition, Dr. Felder (A3501-02), Richard Brown (A3496-97), and Kelly Smith (A3350) all testified that a person of ordinary skill would read the dimensional limitations to refer to *internal* dimensions. As explained in Fenwal’s brief (FBr. 55), Brown confirmed that the portion of the specification emphasized by Haemonetics (HBr. 59) actually

addresses the “physics” of separation (and hence internal dimensions)—as shown by its references to “centrifugal *enclosure 3*” and the rotation speed of the chamber. (A3496-97.) Moreover, Haemonetics’ assertion that “*anyone*” skilled in the art would interpret “height” and “radius” to refer to *exterior* dimensions (HBr. 57-58), cannot be squared with its (erroneous) contention that “The Prior Art Addresses Only The *Interior* Dimensions Of The Blood Separation Chamber” (HBr. 9).

Haemonetics asserts that Dr. Felder stated that one skilled in the art could interpret “height” and “radius” to refer to the “outermost dimensions of the vessel” (HBr. 58), but Haemonetics mischaracterizes Dr. Felder’s report. Dr. Felder’s primary opinion was that

a person of ordinary skill in the art reading the ’983 patent would principally be concerned with the G-force necessary for achieving the desired separation of components of a liquid, such as blood, ***and would thus be focused on the height and radius measurements of the mid point of the separation chamber, which are relevant to calculating such a G-force.***

(A1241.) Dr. Felder did not “agree[.]” with Haemonetics that the radius could be measured to the external “outermost” *lip* of the separation cup. HBr. 58. After all, blood does not flow through that lip (as shown by the sample ALYX[®] cups filed with the Court (A8987; A8990)), so it has no bearing on whether the centrifuge will function to separate blood components. (A3502.) Instead, Dr. Felder indicated that one *could* measure the radius of the separation chamber to the internal *wall* as an alternative to measurement at the separation interface. (A1240-

41.) Under *that* measurement, the ALYX[®] system would *still* not infringe, because the height-to-radius ratio would be between 127 and 130%. (A1241.) Indeed, Dr. Felder analyzed four ways in which one might measure the ALYX[®] cup. (*Id.*) He concluded—and Haemonetics’ expert agreed (A3213)—that the *only* measurement under which the ALYX[®] cup would infringe was to include the solid lip in the radius measurement. (A1241; A3502.) But at no point did Dr. Felder state that one of ordinary skill would include this lip in the radius measurement. (A1226-46.)

To claim that the relevant limitations are not insolubly ambiguous, Haemonetics puts great weight on Dr. Russell’s testimony that one of ordinary skill would read “radius” and “height” to refer to the “external outermost dimensions” because “the advantages claimed in the ’983 Patent all depend upon external dimensions.” HBr. 57. Dr. Russell was referring to the reduced size and increased portability touted by Rochat and Haemonetics, *see supra* Part I.A, and discussed in the specification (FBr. 50-51). But to the extent that these “advantages” are relevant, they suggest that one should measure not just the separation cup, but the *full assemblage of cup and tubing* (as Fenwal urges, *see supra* Part II.A), since *that* measurement will determine the space needed to accommodate the spinning components and, hence, the overall size of the device. FBr. 51.

In light of all the conflicting textual indicators about how to measure the claimed device, the district court was wrong to conclude that claim 16 was not

insolubly ambiguous. The Court should reverse the district court’s grant of JMOL to Haemonetics and order judgment for Fenwal.

III. HAEMONETICS IS NOT ENTITLED TO AN INJUNCTION OR A FUTURE ROYALTY IN ADDITION TO FUTURE DAMAGES

Fenwal’s opening brief showed that Haemonetics consistently and repeatedly argued for past *and* future damages—from its pre-trial memorandum through to its closing argument. FBr. 59-62. Having also obtained a permanent injunction and provisional royalty, Haemonetics now insists that the jury ignored its requests for future damages because the verdict form used the past tense (*i.e.*, “has suffered” (A104)). This expedient response conflicts with the law and defies common sense. A jury’s judgment is presumed to encompass all evidence and argument presented at trial, absent a limiting instruction. FBr. 59-62. Given the emphasis that Haemonetics’ counsel and expert placed on future damages, the mere use of the past tense in the verdict form—without any further clarification—cannot reasonably be viewed as having directed the jury not to consider future damages. FBr. 60 n.13. Because the jury’s \$15 million verdict has compensated Haemonetics for any future infringement, and because Haemonetics’ arguments show that damages are adequate, Haemonetics is not entitled to a permanent injunction and provisional royalty. FBr. 62.

Haemonetics maintains that the verdict form “instructed the jury to determine damages through the date of trial.” HBr. 60. But the form says no such

thing. (A104.) Rather, the district court instructed the jury that it “may assess damages *beginning* on [April 1, 2004]”—full stop. (A96.) There was no end date mentioned in the charge nor any instruction to ignore Haemonetics’ repeated requests for *\$13 million* in future damages.

Haemonetics’ reliance on the tense of the verdict form also falters when measured against the other portions of the trial record discussed in the opening brief (and tellingly ignored in Haemonetics’ response):

- Haemonetics argued in the pre-trial memorandum that it was entitled to both past *and* future infringement damages totaling \$35 million. (A1813.)
- Haemonetics’ counsel argued *three times* in his opening statement that Haemonetics “lost profits equal to about \$35 million,” including \$13 million in *future* damages. (A3000-01; *see also* A2997.)
- Haemonetics’ damages expert, Creighton Hoffman, testified at trial that “damages continue on after this trial” and discussed his calculation of \$13 million in future damages. (A3423-24; *see also* A8942.)
- Haemonetics’ counsel at closing repeated the called-for future damages *five more times*—indeed, the very last thing Haemonetics asked of the jury was “\$35 million of lost profits.” (A3808; *see also* A3801; A3804; A3807-08.)

In this context, the grammatical nuance of the verdict form—unaccompanied by any other instruction—was far too subtle to reasonably apprise a lay jury not to consider Haemonetics’ explicit requests for future damages.

Haemonetics therefore cannot distinguish this case from *Innogenetics, N.V. v. Abbott Laboratories*, where this Court held that a patentee was not entitled to an injunction after it argued and received compensation for future damages. 512 F.3d

1363, 1379-80 (Fed. Cir. 2008).⁷ The jury here was in virtually the identical situation as the jury in *Innogenetics* in that (i) Haemonetics repeatedly argued for, and presented expert testimony on, future damages and (ii) there was no jury instruction to ignore Haemonetics' explicit requests for future damages or to limit damages to the date of judgment. With over one-third of the damages requested by Haemonetics covering future sales, there is no reason to believe that the jury failed to consider or award damages for alleged past *and* future infringement. FBr. 61-62 & n.14.

Nor can Haemonetics justify the injunction by belatedly pointing to *additional* arguments it might have made on future lost profits. HBr. 63. As the plaintiff, Haemonetics controlled its case, and having elected to argue for future damages—Haemonetics concedes that it presented evidence of “\$13 million in *additional* lost profits” (HBr. 62-63)—it was of course required to present *all* arguments on this front at trial. *See, e.g., Uncle Henry's Inc. v. Plaut Consulting*

⁷ *Fresenius USA, Inc. v. Baxter International, Inc.*, cited by Haemonetics (HBr. 64), is inapposite because the accused infringer there “cite[d] *no* evidence indicating that the jury also considered post-verdict sales of disposable products linked to machines sold pre-verdict.” 582 F.3d 1288, 1303 (Fed. Cir. 2009). Similarly off point is *Acumed LLC v. Stryker Corp.*, 551 F.3d 1323, 1327-29 (Fed. Cir. 2008) (*see* HBr. 63), as there was no argument that the patentee there had quantified damages for the defendants' future infringement or that the jury had awarded future damages.

Co., 399 F.3d 33, 49 (1st Cir. 2005) (plaintiff’s request for a certain amount in damages “waived any damages in excess” of that amount).⁸

At bottom, Haemonetics can offer no cogent explanation for *why* it presented evidence on future damages if the jury was never to consider it. Indeed, such extraneous argument would raise questions of bad faith, as the wholly irrelevant yet repeated reference to millions of dollars in additional damages could only serve to confuse the jury and prejudice Fenwal. *See* Fed. R. Evid. 401-03. Moreover, Haemonetics’ quantification of and demand for future damages establish that monetary relief provides adequate compensation and that Haemonetics will not suffer irreparable injury without an injunction. In the absence of any limiting instruction notifying the jury that it was to ignore Haemonetics’ arguments, the judgment must be deemed to have included future damages.

⁸ Haemonetics, furthermore, was well aware of the potential use of ALYX[®] for the collection of plasma and platelets—it was *Haemonetics* that drew out this point with reference to a 2004 document produced during discovery (A3407; A7143-59). Nothing prevented Haemonetics at trial from making an argument for future lost profits based upon these potential new protocols. Moreover, although Haemonetics points out that its calculations for future damages only went out five years (HBr. 62-63), it neglects to mention that this five-year period was intended to be fully compensatory since its expert, Creighton Hoffman, “assume[d] that all the ALYX machines would be coming out of use during that period” (A3423).

It was therefore clear error for the district court to provide Haemonetics additional relief with respect to future harm, and the injunction, provisional royalty, and any post-judgment interest related thereto should be vacated.

CONCLUSION

This Court should reverse the judgment of the district court and order judgment as a matter of law for Fenwal. Alternatively, the Court should vacate the judgment and remand, with appropriate instructions, for further proceedings. In all events, the Court should vacate the permanent injunction and provisional royalty entered by the district court.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B), because it contains 6,968 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14 point font.

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