UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of	
CERTAIN ACTIVITY TRACKING DEVICES, SYSTEMS, AND COMPONENTS THEREOF	**Inv. No. 337-TA-963**

ORDER NO. 31: MARKMAN ORDER

(February 17, 2016)

A *Markman* hearing was held in this Investigation on December 18, 2015. Counsel for the parties appeared at the hearing representing Complainants AliphCom d/b/a Jawbone and BodyMedia, Inc. (collectively, "Complainants"); Respondents Fitbit, Inc., Flextronics International Ltd., and Flextronics Sales and Marketing (A-P) Ltd. (collectively, "Respondents"); and the Commission Investigative Staff ("Staff"). In advance of the hearing, Complainants and Respondents filed initial claim construction briefs on November 17, 2015.[1] Staff filed a brief on November 20, 2015.[2] Complainants and Respondents filed rebuttal briefs on December 4, 2015.[3] The parties submitted an updated joint claim construction chart on December 23, 2015.

[1] Complainants' and Respondents' initial briefs are referenced herein as "CIB" and "RIB," respectively.

[2] Staff's Brief is referenced herein as "SB."

[3] Complainants' and Respondents' rebuttal briefs are referenced herein as "CRB" and "RRB," respectively.

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I. PROCEDURAL HISTORY

On August 18, 2015, the Commission issued a Notice of Investigation in this matter upon a complaint alleging violations of section 337 the Tariff Act of 1930, as amended, by reason of infringement of certain claims of U.S. Patent No. 8,073,707 (''the '707 patent''); U.S. Patent No. 8,398,546 (''the '546 patent''); U.S. Patent No. 8,446,275 (''the '275 patent''); U.S. Patent No. 8,529,811 (''the '811 patent''); U.S. Patent No. 8,793,522 (''the '522 patent''); and U.S. Patent No. 8,961,413 (''the '413 patent''), and misappropriation of trade secrets. Notice of Investigation at 2; 80 Fed. Reg. 36,576-77 (2015). The Notice of Investigation named three respondents: Fitbit, Inc., Flextronics International Ltd., and Flextronics Sales and Marketing (A-P) Ltd. *Id.* Complainants assert claims 19, 23, and 24 of the '707 patent; claims 1-18 and 20-28 of the '546 patent; claims 1, 2, 4, 5, 8-10, 13-15, 18, and 19 of the '275 patent; claims 1, 5-7, 16, and 17 of the '811 patent; claim 2 of the '522 patent; and claims 1-3, 5, 7-9, 11, and 12 of the '413 patent. *Id.* The parties identified and briefed terms from the '522, '546, and '811 patents for construction. [4]

II. LEGAL STANDARD

"[T]he construction of claims is simply a way of elaborating the normally terse claim language[] in order to understand and explain, but not to change, the scope of the claims." *Embrex, Inc. v. Serv. Eng'g Corp.*, 216 F.3d 1343, 1347 (Fed. Cir. 2000) (alterations in original)

[4] In many instances, the parties did not apprehend the claim construction positions taken by opposing parties until after the submission of initial briefs, and, in some instances, after the submission of rebuttal briefs. *See, e.g.*, SB at 6, fn. 2; *Markman* Hrg. Tr. at 93:24-94:12. As a result many of the arguments presented in the briefs relate to issues that are either undisputed or, if disputed, would not affect claim construction. Moreover, as they began to apprehend the opposing positions, the parties made new arguments, which were presented for the first time in the Complainants' and Respondents' rebuttal briefs or at the *Markman* hearing. To the extent it is necessary and appropriate to do so, this order addresses these new arguments.

(quoting *Scripps Clinic v. Genentech, Inc.*, 927 F.2d 1565, 1580 (Fed. Cir. 1991). "[O]nly those [claim] terms need be construed that are in controversy, and only to the extent necessary to resolve the controversy." *Vivid Techs., Inc. v. Am. Sci. & Eng'g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999).

Claim construction focuses mainly on the intrinsic evidence, which consists of the claims themselves, the specification, and the prosecution history. *See generally Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc). The Federal Circuit in *Phillips* explained that, in construing terms, courts must analyze each of these components to determine the "ordinary and customary meaning of a claim term," which is "the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention." *Id.* at 1313.

"It is a 'bedrock principle' of patent law that 'the claims of a patent define the invention to which the patentee is entitled the right to exclude.'" *Id.* at 1312 (quoting *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1115 (Fed. Cir. 2004). "Quite apart from the written description and the prosecution history, the claims themselves provide substantial guidance as to the meaning of particular claim terms." *Id.* at 1314. For example, "the context in which a term is used in the asserted claim can be highly instructive," and "[o]ther claims of the patent in question, both asserted and unasserted, can also be valuable sources of enlightenment as to the meaning of a claim term." *Id.*

"[T]he specification 'is always highly relevant to the claim construction analysis. Usually, it is dispositive; it is the single best guide to the meaning of a disputed term.'" *Id.* at 1315 (quoting *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996). "The longstanding difficulty is the contrasting nature of the axioms that (a) a claim must be read in view of the specification and (b) a court may not read a limitation into a claim from the

specification." *Innova/Pure Water, Inc.*, 381 F.3d at 1117. The Federal Circuit has explained that there are certain instances when the specification may limit the meaning of the claim language. For example, "the specification may reveal a special definition given to a claim term by the patentee that differs from the meaning it would otherwise possess. In such cases, the inventor's lexicography governs." *Phillips,* 415 F.3d at 1316. The specification also "may reveal an intentional disclaimer, or disavowal, of claim scope by the inventor." *Id.* In such cases, "the inventor has dictated the correct claim scope, and the inventor's intention, as expressed in the specification, is regarded as dispositive." *Id.*

In addition to the claims and the specification, the prosecution history should be examined if in evidence. "The prosecution history . . . consists of the complete record of the proceedings before the PTO and includes the prior art cited during the examination of the patent. Like the specification, the prosecution history provides evidence of how the PTO and the inventor understood the patent." *Id.* at 1317 (internal citations omitted). "[T]he prosecution history can often inform the meaning of the claim language by demonstrating how the inventor understood the invention and whether the inventor limited the invention in the course of prosecution, making the claim scope narrower than it would otherwise be." *Id.*

If the intrinsic evidence does not establish the meaning of a claim, then extrinsic evidence may be considered. "[E]xtrinsic evidence[] consists of all evidence external to the patent and prosecution history, including expert and inventor testimony, dictionaries, and learned treatises." *Id.* at 1317 (internal quotation marks and citations omitted). Extrinsic evidence is generally viewed "as less reliable than the patent and its prosecution history in determining how to read claim terms." *Id.* at 1318. "The court may receive extrinsic evidence to educate itself about the invention and the relevant technology, but the court may not use extrinsic evidence to arrive at a

claim construction that is clearly at odds with the construction mandated by the intrinsic evidence." *Elkay Mfg. Co. v. Ebco Mfg. Co.*, 192 F.3d 973, 977 (Fed. Cir. 1999).

III. LEVEL OF ORDINARY SKILL IN THE ART

The issue of the appropriate level of ordinary skill in the art was not fully addressed in the briefing or at the hearing. Complainants did not address the issue in their initial brief and, in their rebuttal brief, take the position that the issue does not need to be resolved at this juncture, because "any dispute regarding the appropriate level of ordinary skill in the art is immaterial for purposes of claim construction of the terms at issue." CRB at 2. Although Respondents address the issue in their initial briefing, they do so in passing, acknowledging Complainants' and Respondents' competing positions, and note that they do not believe that the parties' dispute regarding the level of ordinary skill is material to claim construction. RIB at 2-3. Staff—relying on Respondents' articulation of Complainants' position—indicates that it agrees with Complainants' position with respect to the '522 and '546 patents, but disagrees with Complainants' position with respect to the '811 patent. SB at 2. Staff does not provide its formulation of the appropriate level of ordinary skill in the art with respect to the '811 patent. Given that the level of ordinary skill in the art does not affect the construction of any disputed term, it is not addressed in this order.

IV. U.S. PATENT NO. 8,793,522

The '522 patent, entitled "Power Management in a Data-Capable Strapband," issued on July 29, 2014, naming as inventors Hosain Sadequr Rahman, Richard Lee Drysdale, Michael Edward Smith Luna, Scott Fullam, Travis Austin Bogard, Jeremiah Robison, Max Everett Utter II, and Thomas Alan Donaldson. RIB, Ex. 4 ('522 patent).

A. Overview

The '522 patent is directed to a power management method for a data-capable band. '522

patent, col. 1:22-29. The band has sensors to gather information about the user, such as the user's vital signs (*e.g.*, heart rate, pulse), movement (*e.g.*, direction, speed), surrounding environment (*e.g.*, altitude), and location. *Id.* at 12:47-64. The gathered information can be analyzed by the band's processor to determine the user's physical, emotional, and mental states. *Id.* at col 4:61-5:10. So that a user is able to "purchase a charged device . . . unencumbered by a requirement to charge the device when . . . the package is first opened," the band is shipped from the manufacturer to the retailer with a charged battery. *Id.* at col. 8:38-61; 23:39-42.

A "transitory power manager" is used to prevent the battery from being depleted while it is being shipped. *Id.* at col. 22:61-66. While the band is being shipped, the transitory power manager places the band in a power mode in which the band's components are placed in hibernation and "little (*i.e.*, negligible) or no current is drawn." *Id.* at col. 22:43-49. After it detects a signal indicating that the user is using the band (*e.g.*, an input button being activated, the band being connected to a power source, *etc.*), the transitory power manager switches the device to a second power mode, such as the operational mode. *Id.* at col. 23:23-28; 23:35-38; 25:42-44. Once in the operational mode, the "components of a strapband can receive power in response to requests or implementations by a user." *Id.* at col. 23:43-49; 25:53-55.

B. Prosecution History of the '522 Patent[5]

Application No. 13/180,320 matured into the '522 patent and was filed on July 11, 2011. The '522 patent claims priority to Provisional Application Nos. 61/495,994, 61/495,995, 61/495,997, and 61/495,996, all four of which were filed on June 11, 2011. The application contained 28 claims including application claim 5, which depended from independent application

[5] A certified copy of the prosecution history of the '522 patent was filed as Appendix E to the Complaint.

claim 1 through intervening application claims 2 and 3. In the first and only office action, the examiner rejected application claims 1, 2, and 3 as being unpatentable over U.S. Patent No. 5,795,301 to Yasukawa *et al.* ("Yasukawa") in view of U.S. Patent No. 7,260,732 to Bittner ("Bittner"). '522 Patent Office Action (Sep. 12, 2013) at 2-5. The examiner objected to application claim 5, but indicated that it would be allowable if amended and rewritten into independent form. *Id.* at 8. Application claim 5 was amended and rewritten into independent form to include the limitations of application claims 1, 2, and 3 and issued as independent claim 2, the sole claim asserted from the '522 patent. '522 Patent File History, Amendment (Mar. 13, 2014) at 3, 8.[6]

C. Asserted Claim

Complainants assert independent claim 2 against Respondents. Complaint, ¶6. Independent claim 2 reads:

> 2. A **band** comprising:
>
> a subset of sensors;
>
> a controller coupled to the subset of sensors;
>
> an energy storage device;

[6] Although the examiner also indicated that application claim 4 would be allowable if rewritten into independent form to incorporate the limitations of the claims from which it depended, in the same office action, the examiner expressly found that the claim was obvious in light of the cited prior art. '522 Patent File History, Office Action (Sep. 12, 2013) at 4-5, 8. Like application claim 5, application claim 4 depended from independent application claim 1 through intervening application claims 2 and 3. As discussed above, the examiner rejected application claims 1, 2, and 3 as being unpatentable over Yasukawa in view of Bittner. *Id.* at 4-5. The examiner also found that the sole limitation of application claim 4 was disclosed in Yasukawa. *Id.* at 4-5. The applicants did not contest the examiner's findings that the limitations of application claims 1, 2, 3, and 4 were disclosed in the cited prior art, but amended application claim 4 into independent form. '522 Patent File History, Amendment (Feb. 13, 2014) at 3, 8. As amended, application claim 4 was allowed and issued as independent claim 1. '522 File History, Notice of Allowability (Mar. 24, 2014) at 1.

a connector configured to receive power and control signals, the connector coupled to the energy storage device;

a power manager comprising:

a transitory power manager configured to manage power consumption of the **band** during a first power mode in which no power is applied to the subset of sensors; and

a power clock controller configured to modify a clock rate of a clock signal for application to the controller as a function of a mode of operation of the **band**

wherein the transitory power manager is configured further to manage the power consumption of the **band** during a second power mode in which power is applied to the subset of sensors, the second power mode being subsequent to the first power mode,

wherein the transitory power manager is configured to detect an application of power to the connector, and, responsive to the application of power, the transitory power manager switches the **band** from the first power mode to the second power mode;

wherein the first power mode and the second power mode coincide with a first interval of time and a second interval of time, respectively; and

wherein the first interval of time comprises an amount of time during which the **band** is shipped from a first geographic location to a second geographic location with the subset of sensors in an inoperable state and the second interval of time comprises another amount of time during which the subset of sensors in an operable state.

'522 patent, col. 30:41-31:7 (disputed term in bold).

D. Claim Construction: "band"

Term	Complainants' Construction	Respondents' Construction	Staff's Construction
"band"	data-capable device that may be worn as a strap or band around an arm, leg, ankle, or other bodily appendage or feature	*plain and ordinary meaning*	*no construction necessary; plain and ordinary meaning. If construed:* a substantially flat encircling strip

The term "band" appears in the preamble and body of claim 2 of the '522 patent. Complainants argue that the specification expressly defines "band" to mean a "data-capable device that may be worn as a strap or band around an arm, leg, ankle, or other bodily appendage or feature." CIB at 8. Respondents and Staff dispute Complainants' contention that the specification defines "band" and argue that "band" should be given its plain and ordinary meaning and that no construction is necessary. SB at 7-9; RIB at 10-11. In the alternative, Staff argues that if a construction of the term's plain and ordinary meaning is needed, the term should be construed to mean "a substantially flat encircling strip." SB at 9.

No party disputes that the claimed "band" is a data-capable device, although the parties arrive at their conclusions differently. Complainants rely upon what they contend to be the applicants' express definition of the term in the specification, whereas Respondents and Staff rely upon claim language requiring the claimed "band" to have sensors and a controller. CIB at 8; SB at 9; *Markman* Hrg. Tr. at 25:2-20. Thus, the parties' sole dispute is whether the applicants acted as their own lexicographers and limited the claimed "band" to only those data-capable bands "that may be worn as a strap or band around an arm, leg, ankle, or other bodily appendage or feature." For the reasons set forth below, I find that the applicants did not so limit the term "band" and that "band" should be accorded its plain and ordinary meaning, which does not require a construction.

1. The claim language does not limit "band" to only bands that may be worn as a strap or band around a bodily appendage or feature.

Claim 2's preamble recites "A band comprising" and the body sets forth the required elements of the "band": a subset of sensors, a controller, an energy storage device, a connector, and a power manager. '522 patent, col. 30:41-31:7. The claim lists a number of elements of the claimed power manager and, in so doing, makes reference to "the band": "a transitory power manager configured to manage power consumption of the ***band***;" "a mode of operation of the ***band;***" the power consumption of the ***band;***" "the transitory power manager switches the ***band*** from the first power mode to the second power mode;" and "the first interval of time comprises an amount of time during which the ***band*** is shipped from a first geographic location to a second geographic location." *Id.* at col. 30:48-31:3 (emphasis added). As acknowledged by Respondents and Staff, by requiring that the band have sensors and a controller, the claim language requires a band that is a data-capable device. SB at 9; *Markman* Hrg. Tr. at 25:2-20. The claim language, however, does not require the claimed device to be anything other than a "band" with the listed claim elements. Complainants do not contend otherwise, but instead argue that the specification provides an express definition of "band." CIB at 8-9.

2. The specification does not define "band" with the requisite clarity, deliberateness, and precision.

Although claim terms are generally "construed consistently with their ordinary and customary meanings, as determined by those of ordinary skill in the art," patentees can act as their own lexicographers and give a claim term a special definition that is different from the plain and ordinary meaning. *Merck & Co., Inc. v. Teva Pharmaceuticals USA, Inc.*, 395 F.3d 1364, 1370 (Fed. Cir. 2005); see also *Hill-Rom Servs., Inc. v. Stryker Corp.*, 755 F.3d 1367, 1371 (Fed. Cir. 2014). If a patentee elects to act as his or her own lexicographer, the patentee's definition governs. *Phillips,* 415 F.3d at 1316. Complainants argue that the '522 patent expressly defines

"band" in the following sentence: "Although used interchangeably, 'strapband' and 'band' may be used to refer to the same or substantially similar data-capable device that may be worn as a strap or band around an arm, leg, ankle, or other bodily appendage or feature." '522 patent, col. 4:17-21.

The standards for lexicography are "exacting" and require a patentee to "clearly" indicate that the term has been assigned a special meaning. *Hill-Rom*, 755 F.3d at 1371. In order to determine whether a patentee has acted as his or her own lexicographer, the entire specification, not just the statement constituting the alleged definition, must be examined. *Abbott Labs. v. Syntron Bioresearch, Inc.*, 334 F.3d 1343, 1355 (Fed. Cir. 2003) ("We hold that the passage cited by Syntron, taken ***in context***, does not provide reasonable clarity, deliberateness, and precision sufficient to narrow the definition of the claim term in the manner urged." (emphasis added)). The sentence in question occurs in a discussion of Figure 1, which depicts an "exemplary data-capable strapband system" with "strapbands (hereafter 'bands') 104-112." '522 patent, col. 4:13-24. While the specification states that "'band' may be used to refer to the same or substantially similar data-capable device that may be worn as a strap or band around an arm, leg, ankle, or other bodily appendage or feature," it also states that "bands" are not limited to such devices, "but may be used differently." *Id.* at col. 4:17-24. For instance, instead of being worn around a bodily appendage, the bands can be "affixed to clothing, or otherwise disposed at a relatively predetermined distance from a user's person." *Id.* at col. 4:28-31. Accordingly, when examined in context, the sentence that Complainants rely upon is not a definition, but one example of a possible implementation. *See also id.* at col. 4:25-28 ("As described above, bands 104-112 ***may be*** implemented as wearable personal data or data capture devices (*e.g.*, data-

capable devices) that are worn by a user around a wrist, ankle, arm, ear, or other appendage." (emphasis added)).

The Federal Circuit's holding in *Abbott Laboratories* is particularly instructive. In *Abbott Laboratories*, the accused infringer argued that the patent at issue defined the term "analyte" to require quantitative analysis by stating that "'analyte' refers to any chemical moiety which is to be measured quantitatively." 334 F.3d. at 1354-55 (internal citations and quotation marks omitted). The sentence relied upon by the accused infringer, however, was the last sentence of a four-sentence paragraph, the first sentence of which set forth a broader definition of "analyte" not requiring quantitative analysis: "As used herein, 'analyte' refers not only to the particular chemical moiety for which analysis is desired, but also to chemical moieties that are reaction products of the moiety to be determined with another chemical moiety." *Id.* (internal citations and quotation marks omitted). By presenting competing definitions for the same term, the patent failed to define "analyte" with "reasonable clarity, deliberateness, and precision." *Id.* In the absence of a clear definition set forth in the specification, the Federal Circuit held that "analyte" should be given its ordinary meaning. *Id.* at 1355.

The '522 patent similarly fails to provide a definition of "band" with the requisite "clarity, deliberateness, and precision." After stating that "band" may be used to refer to bands that may be worn around a bodily appendage and feature, the specification immediately states that bands may be used differently, including by being affixed to clothing. '522 patent, col. 4:17-31. Moreover, Complainants' argument that the '522 patent's specification provides a special definition for the term "band" is weaker than the argument rejected in *Abbott Laboratories*. First, the statement at issue in *Abbott Laboratories* stated without qualification that the term "analyte" "***refers*** to any chemical moiety which is to be measured quantitatively."

334 F.3d at 1355 (emphasis added). In contrast, the statement at issue in this investigation states only that "band" "***may be*** used to refer to the same or substantially similar data-capable device that ***may be*** worn as a strap or band around an arm, leg, ankle, or other bodily appendage or feature." '522 patent, col. 4:17-21 (emphasis added). Second, the statement in *Abbott Laboratories* occurred in the "Summary of the Invention" section of the patent, whereas the sentence that Complainants rely upon in this investigation occurs in a discussion of an embodiment. Thus, while it was clear that the statement in *Abbott Laboratories* was intended to apply to the invention as a whole, it is not clear that the sentence relied upon by Complainants is so intended. *See, e.g.*, *Shell Global Solutions (US) Inc. v. RMS Eng'g.*, 782 F.Supp. 2d 317, 338-40 (S.D. Tex. 2011) (finding that statement did not limit the scope of the claim term, because the statement described a preferred embodiment, not the invention).

For the foregoing reasons, I find that the patentees did not define the term "band" with the clarity, deliberateness, and precision needed. Accordingly, "band" should be given its plain and ordinary meaning. *Abbott Laboratories*, 334 F.3d at 1354-55.

3. The plain and ordinary meaning of "band" does not require a construction.

No party contends that the plain and ordinary meaning of "band" requires a construction. Although Staff proposes a construction for "band," it does so only "[i]n the event the [Administrative Law Judge] determines that a construction of 'band' is necessary." SB at 9. Otherwise, Staff's position is that the term "requires no construction because it is used with its plain and ordinary meaning." *Id.* at 2-3. Respondents also take the position that the plain and ordinary meaning of "band" does not need a construction. RIB at 10-11. While Complainants propose a construction for the claim term "band," the proposed construction uses the term "band": "data-capable device that may be worn as a strap or ***band*** around an arm, leg, ankle, or

other bodily appendage or feature." CIB at 7 (emphasis added). Presumably, "band," as used in Complainants' proposed construction, is being used in accordance with its plain and ordinary meaning. By incorporating the term "band" in their proposed construction, Complainants tacitly acknowledge that the plain and ordinary meaning of "band" does not require a construction.

Accordingly, because only claim terms in controversy need to be construed, in the absence of any dispute as to the plain and ordinary meaning of "band," I find that no construction of the term is necessary. *Vivid Techs.*, 200 F.3d at 803; *see also O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1362 (Fed.Cir.2008) ("[C]ourts are not (and should not be) required to construe ***every*** limitation present in a patent's asserted claims.") (emphasis in original); *U.S. Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1568 (Fed.Cir.1997) ("Claim construction is a matter of resolution of ***disputed*** meanings and technical scope, to clarify and when necessary to explain what the patentee covered by the claims.") (emphasis added).

V. U.S. PATENT NO. 8,398,546

The '546 patent, entitled "System for Monitoring and Managing Body Weight and Other Physiological Conditions Including Iterative and Personalized Planning, Intervention and Reporting Capability," issued on March 19, 2013, naming as inventors Christopher Pacione, Steve Menke, Eric Teller, Scott Safier, Raymond Pelletier, Mark Handel, Johnathan Farringdon, Eric Hsiung, Suresh Vishnubhatia, James Hanlon, John M. Stivoric, Neal Spruce, and Steve Shassberger. RIB, Ex. 5 ('546 patent).

A. Overview

The '546 patent is directed to a monitoring and management system for helping individuals achieve weight loss goals. '546 patent, col. 4:15-21. An individual should experience weight loss by consuming fewer calories than the number of calories burned. *Id.* at col. 4:1-3. While conventional systems offered a number of ways to count consumed calories, in

order to determine calories burned, they relied on users to manually enter their physical activities. *Id.* at col. 4:3-11. In contrast to the conventional systems, the system disclosed in the '546 patent calculates the user's caloric expenditure by automatically tracking data relating to the user's "physiological and contextual parameters." *Id.* at col. 4:33-55; 9:41-10:18. Physiological parameters include such parameters as the user's heart rate, pulse rate, respiration rate, skin temperature, core body temperature, and blood pressure, while contextual parameters relate to the user's activity state, environment, surroundings, and location. *Id.* at col. 10:5-9; 10:22-30. In order to assist the user in attaining his or her weight-loss goal, the system can suggest various activities and use the tracked data to determine whether the user complied with the suggestions. *Id.* at col. 35:50-55; 36:1-21. The system can make a follow-up suggestion based on its determination of whether the user complied with the first suggestion. *Id.*

B. Prosecution History of the '546 Patent[7]

Application No. 10/940,214, which matured into the '546 patent, was filed on September 13, 2004 as a continuation in part to Application No. 10/638,588 filed on August 11, 2003. Application No. 10/638,588 was filed as a continuation of Application No. 09/602,537, which in turn was filed on June 23, 2000 as a continuation in part to Application No. 09/595,660 filed on June 16, 2000. The '546 patent also claims priority to Provisional Application Nos. 60/502,764 and 60/555,280 filed on September 13, 2003 and March 22, 2004, respectively.

Although the original application that matured into the '546 patent contained 278 claims, in response to an election requirement, the applicants withdrew all of the claims other than application claims 89, 119-122, 151-155, and 179-192. '546 Patent File History, Response (Jul.

[7] A certified copy of the prosecution history of the '546 patent was filed as Appendix K to the Complaint.

31, 2006) at 46. This subset of claims consisted of one independent claim (application claim 89) from which the remaining claims depended. Through a series of amendments, application claim 89 was cancelled and replaced with application claim 279, which in turn was cancelled and replaced with application claim 286. Ultimately, application claim 286 would be amended and issue as claim 1.[8]

On August 17, 2011, after a series of rejections and amendments, the examiner rejected application claim 286 in its then-current form as obvious. '546 Patent File History, Office Action (Aug. 17, 2011) at 3-11. The rejected claim required a sensor device to "detect[] data of at least one of a physiological and contextual parameter of said individual" and a processing unit to use that data to determine whether the user complied with the system's first suggestion to engage in an activity. '546 Patent File History, Response (Jun. 30, 2011) at 35. The rejected application claim did not require a processing unit configured to derive physiological and contextual data from the detected data. *Id.* Although the applicants argued that the claim was allowable over the cited prior art, the examiner allowed the claims subject to an examiner's amendment that amended application claim 286 into substantively its final form.[9] '546 Patent File History, Response (Feb. 16, 2012) at 38; '546 Patent File History, Notice of Allowability (Nov. 7, 2012) at 2.

[8] In the course of the prosecution, the applicants also added dependent application claims 279-285 and cancelled dependent application claim 155.

[9] After allowance, the applicants amended the claims, including application claim 286, "to correct for clerical and antecedent basis errors." '546 Patent File History, Amendment (Feb. 6, 2013) at 39.

C. Asserted Claims

Complainants are asserting claims 1-18 and 20-28 against Respondents. Complaint, ¶6.

Claim 1 reads:

> 1. A system to provide feedback for an individual's weight-loss goal, said system comprising:
>
> a. a wearable sensor device for detecting data; and
>
> b. a processing unit in electronic communication with said sensor device, said processing unit configured to accomplish the following steps, thus providing said feedback:
>
> (i) derive physiological and **contextual data** of the individual from data detected by said sensor device;
>
> (ii) prompt said individual to establish a weight-loss goal;
>
> (iii) generate a first suggestion to engage in an activity to assist said individual to achieve said weight-loss goal;
>
> (iv) determine weight-loss;
>
> (v) generate a second suggestion to engage in an activity to assist said individual to achieve said weight-loss goal if said weight-loss goal is not progressing toward the goal;
>
> wherein said second suggestion is based upon a determination of whether or not the individual complied with said first suggestion; and
>
> wherein said determination of whether or not the individual complied with said first suggestion is based on said derived physiological and **contextual data** of the individual.

'546 patent, col. 60:15-38 (disputed term in bold). Claim 1 is the sole independent claim of the '546 patent. The asserted dependent claims add limitations requiring that the processing unit be configured to perform certain tasks (claims 2-9, 15-18, 20-24, 26, 27), and that the system have a database (claims 10-14) or an algorithm (claim 25), or be configured for particular uses (claim 28). *Id.* at col. 60:39-61:26.

D. Claim Construction: "contextual data of the individual"

Term	Complainants' Construction	Respondents' Construction	Staff's Construction
"contextual data of the individual"	data relating to the individual's activity state, environment, surroundings, or location	non-physiological information regarding the individual's activity state, environment, surroundings, or location	Information relating to an individual's activity state, environment, surroundings, or location

The term "contextual data of the individual" appears in claim 1 of the '546 patent. '546 patent, col. 60:15-38. As reflected in their proposed constructions, the parties agree that "contextual data of the individual" is information that relates to an individual's activity state, environment, surroundings, or location. The primary dispute is whether contextual data is limited to non-physiological data. Respondents argue that the claim language and specification distinguish between physiological data and contextual data, and therefore "physiological data" cannot be "contextual data." RIB at 15-17. Complainants argue that the patent defines "contextual" through its definition of "contextual parameters" and that this definition does not limit "contextual data" to non-physiological data. CIB at 5-6. Staff argues that "contextual data" should not be limited to non-physiological information, because the specification teaches that "contextual data" can be derived from "physiological data." SB at 11-12. For the reasons set forth below, I find that "contextual data of the individual" means "data relating to an individual's activity state, environment, surroundings, or location."

1. "Contextual data" is "data relating to an individual's activity state, environment, surroundings, or location."

All of the parties' proposed constructions of "contextual data" are based on the patent's definition of "contextual parameters." According to the specification, the alleged invention of the '546 patent is a method or system for collecting and manipulating data relating to an

individual's physiological parameters and contextual parameters. '546 patent, col. 9:41-10:4 ("In general, ***according to the present invention***, data relating to the physiological state, the lifestyle and certain contextual parameters of an individual is collected and transmitted . . . to a site . . . where it is stored for later manipulation and presentation to a recipient.") (emphasis added). Although the specification does not explicitly define the term "contextual data," it explicitly defines the term "contextual parameters": "Contextual parameters as used herein means parameters relating to activity state or to the environment, surroundings and location of the individual, including, but not limited to, air quality, sound quality, ambient temperature, global positioning and the like." *Id.* at col. 10:5-9. There is no dispute that the patentees defined "contextual parameters" through this sentence. As reflected in their proposed constructions, the parties agree that "contextual data" is data that relates to an individual's "contextual parameter," *i.e.*, activity state, environment, surroundings, or location.

- "data relating to the individual's ***activity state, environment, surroundings, or location***," Complainants' Proposed Construction (emphasis added);
- "non-physiological information regarding the individual's ***activity state, environment, surroundings, or location***," Respondents' Proposed Construction (emphasis added); and
- "Information relating to an individual's ***activity state, environment, surroundings, or location***," Staff's Proposed Construction (emphasis added).

Although Respondents argue that "parameter" is used in the specification to refer to "a conclusion or . . . something that is derived from the data itself," an explicit definition of "parameter" is unnecessary for the construction of "contextual data." *Markman* Hrg. Tr. at 43:19-45:13. Claim 1 recites "contextual data," not "contextual parameters," and the parties agree that the claimed "contextual data" is data derived from data detected by the sensor device. *See, e.g.*, '546 patent, 60:18-31 (requiring a processing unit configured to "***derive*** physiological and contextual data of the individual from data detected by said sensor device" and configured to

use "said ***derived*** physiological and contextual data" to determine whether user complied with system's suggestion) (emphasis added); *Markman* Hrg. Tr. at 52:7-17; 63:4-19; 70:15-20. Moreover, as discussed above, all of the parties' proposed constructions of "contextual data"—including that of Respondents—incorporate the specification's definition of "contextual parameter."

Accordingly, "contextual data" is "data that relates to a contextual parameter," wherein a "contextual parameter" is a "parameter[] relating to activity state or to the environment, surroundings and location of the individual." '546 patent, col. 9:41-10:9. Thus, "contextual data of the individual" means "data relating to an individual's activity state, environment, surroundings, or location."

2. "Contextual data" can be derived from "physiological" data.

Respondents' proposed construction limits the claimed "contextual data" to certain types of "non-physiological information." This is problematic, because the claimed "contextual data" is data derived from detected data. The specification teaches that data relating to contextual parameters, such as "activity states, including exercising, sitting, traveling in a motor vehicle, and lying down," can be derived from data detected by physiological sensors, such as a heart rate sensor or skin temperature sensor. *Id.* at col. 50:24-34. In fact, Respondents conceded at the hearing that data relating to a contextual parameter (an individual's activity state) can be derived from physiological data:

> For example, an ***activity state*** of an individual, resting or sleeping, awake, sedentary, and so on, can be informed by ***physiological data***. If we look at the ***physiological data*** and the individual's heart rate is 135 beats per minute and their respiratory rate is 70 breaths per minute, you can be pretty certain that that individual is not sleeping and not sedentary but, rather, that they are active or just were active, because otherwise they would not have those kind of ***physiological characteristics***.

Tr. at 45:14-46:10 (emphasis added).

This interpretation of the specification is fully consistent with the claim language, which allows for the claimed "contextual data" to be derived from physiological data, as well as contextual data. In particular, claim 1 requires a processing unit configured to "derive physiological and contextual data of the individual from data detected by said sensor device." 60:21-22. Accordingly, although the processing unit must be able to derive both physiological data and contextual data,[10] this is derived from "data" detected by the sensor device, without specifying a physiological or contextual source.

Respondents' argument that "non-physiological information" cannot be contextual data because the '546 patent distinguishes between physiological data and contextual data, is unpersuasive. Physiological data and contextual data are different types of data. Because the specification defines contextual parameters to include the activity state of an individual, as well as the environment, surroundings, and location of the individual, some data may relate to both a physiological parameter and a contextual parameter. '546 patent at col. 10:5-9 ("Contextual parameters as used herein means parameters relating to activity state or to the environment, surroundings and location of the individual, including, but not limited to, air quality, sound quality, ambient temperature, ***global positioning*** and the like.") (emphasis added). It is also clear

[10] At the hearing, Complainants argued for the first time that claim 1's recital of "physiological and contextual data" refers to data that is both physiological and contextual, as opposed to "physiological data and contextual data." *Markman* Hrg. Tr. at 52:7-53:14. After conceding that the phrase could be construed to require a processing unit configured to derive both physiological data and contextual data, Complainants took the position that the interpretation of this phrase would not affect the construction of "contextual data of the individual." *Id.* at 54:13-23. Accordingly, in view of Complainants' concessions at the hearing, this order assumes *arguendo* that the term "physiological and contextual data" means "physiological data and contextual data."

that while there may be an overlap between the two categories of data, they are not co-extensive. For instance, contextual data includes data that is not and cannot be derived from physiological data, such as data indicative of an individual's global position. *See id.* (identifying "global positioning" as a contextual parameter). Similarly, physiological data that does not relate to a contextual parameter would not be contextual data.

Nor does the Federal Circuit's holding in *Texas Digital Sys., Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1209–10 (Fed. Cir. 2002) counsel a different result. As acknowledged by Respondents, the Federal Circuit's decision that the terms at issue in that case were mutually exclusive was based on an examination of the intrinsic record. RIB at 17. Specifically, in *Texas Digital*, the Federal Circuit found that the claim terms' plain and ordinary meanings and the specification and prosecution history of the patent at issue indicated that "display areas" and "background area" were mutually exclusive. *Texas Digital*, 308 F.3d at 1209-10. In this case, the intrinsic record indicates that "physiological data" and "contextual data" are distinct, but overlapping in scope.

Accordingly, for the foregoing reasons, I decline to limit "contextual data" to non-physiological information.

3. "Data" does not need to be construed.

Staff's and Respondents' proposed constructions substitute "information" for "data." Although Complainants argue that it is unnecessary to construe "data," because it has a commonly understood meaning, they do not object to construing "data" as "information," so long as it is understood that "information" and "data" are synonymous terms. *Markman* Hrg. Tr. at 59:20-25. Staff argues that it would be beneficial to construe "data" to mean "information," because it is preferable not to define a term with itself and it would help distinguish the claimed "contextual data" from the data detected by the sensor device. *Markman* Hrg. Tr. at 69:3-15.

As noted by Complainants, "data" has a commonly understood meaning; one which all of the parties appear to understand and agree upon. The parties have not articulated a dispute regarding the meaning of "data" itself. Rather the parties' dispute concerns what data constitutes "***contextual*** data," a dispute resolved by my construction. To substitute one synonymous term for another in the absence of a dispute would be an "exercise in redundancy." *U.S. Surgical Corp.*, 103 F.3d at 1568. Nor would substituting "information" for "data" aid in distinguishing "contextual data" from data detected by the sensor device. The claim language expressly and clearly states that the "contextual data" is derived by the processing unit from data detected by the sensor. Substituting "information" for "data" would add no additional clarity. Accordingly, I find it unnecessary to construe "data." *O2 Micro*, 521 F.3d at 1362; *Vivid Techs.*, 200 F.3d at 803; *U.S. Surgical Corp.*, 103 F.3d at 1568.

VI. U.S. PATENT NO. 8,529,811

The '811 patent, entitled "Component Protective Overmolding Using Protective External Coatings," issued on September 10, 2013, naming as inventors Richard Lee Drysdale, Scott Fullam, Skip Thomas Orvis, and Nora Elam Levinson. RIB, Ex. 1 ('811 patent).

A. Overview

The '811 patent is directed to a method of manufacturing a personal data-capture device having a protective overmolding. '811 patent, Abstract, col. 1:23-26. The overmolding protects the components of the device from being damaged by shock or environmental forces, such as temperature and water. *Id.* at col. 9:38-44. The process of forming the protective overmolding, however, subjects the device to "rigorous temperatures, pressures, or other environmental conditions" during fabrication. *Id.* at col. 8:60-9:3. As a result, sensitive electronic components, such as printed circuit board assemblies, sensors, and computer memories, could be damaged during the overmolding process. *Id.* at col. 2:11-18. To prevent this from happening, the '811

patent teaches that a protective layer can be applied over the sensitive components prior to the overmolding process. *E.g.*, *id.*, col. 3:57–4:4; 4:15–28. The '811 patent further teaches that the overmolding can be formed in multiple layers (*e.g.*, an inner molding and an outer molding). *Id.* at col. 5:9-14; 5:47-49.

B. Prosecution History of the '811 Patent[11]

Application No. 13/427,839, which matured into the '811 patent, was filed on March 22, 2012. The application was filed as a continuation to Application No. 13/135,728, which was filed on July 12, 2011 as a continuation in part to Application No. 13/158,416 filed on June 11, 2011, which in turn is a continuation in part of Application No. 13/158,372, filed on June 10, 2011. The original application contained 26 claims, including independent application claims 1 and 16,[12] which would issue as claims 1 and 16. Application claims 1 and 16 were directed to methods requiring the selective application of a "curable coating" (application claim 1) or "protective material" (application claim 16) on a subset of components of a wearable device and the formation of a "molding." '811 File History, Application at 2-3 (Apr. 9, 2012). In order to overcome the examiner's rejection of the pending claims, the applicants amended the application claims into their current form to require, *inter alia*, the formation of one or more inner moldings and an outer molding. '811 Patent File History, Amendment and Response (Jan. 14, 2013) at 1,

[11] A certified copy of the prosecution history of the '811 patent was filed as Appendix K to the Complaint.

[12] Because of a numbering error in which two claims were numbered "4," the claims in the original application were numbered 1 to 25, with application claim 16 being numbered "15.". On April 9, 2012, the applicants amended the claims to correct the numbering. '811 Patent File History, Preliminary Amendment (Apr. 9, 2012) at 6.

5.[13]

C. Asserted Claims

Complainants are asserting independent claims 1 and 16 and dependent claims 5-7 and 17 of the '811 patent against Respondents. Complaint, ¶6. Claim 1 reads:

> 1. A method, comprising:
>
> selectively applying at least one covering substantially over one or more of a plurality of elements coupled with a framework for a wearable device configured to be worn by a user, the plurality of elements including at least a sensor;
>
> selectively **forming a first inner molding** that covers all or substantially all of the at least one covering, the plurality of elements, and the framework;
>
> selectively **forming a second inner molding** that covers all or substantially all of the first inner molding; and
>
> selectively **forming an outer molding** of the wearable device, the outer molding covering all or substantially all of the second inner molding, the outer molding configured to be positioned in contact with the user.

'811 patent, col. 13:40-54 (disputed terms in bold). Claims 5 and 7 depend directly from claim 1. Claim 5 requires that the "the outer molding comprise[] a hydrophobic material." *Id.* at 13:61-62. Claim 6 requires that the outer molding to be "configured to provide a waterproof seal over the plurality of elements." *Id.* at 13:63-65. Claim 7 requires a pattern to be "formed on the outer molding." *Id.* at 14:1-2.

Claim 16 reads:

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[13] In the same amendment, the applicants added dependent application claim 27. '811 Patent File History, Amendment and Response (Jan. 14, 2013) at 1, 5.

16. A method, comprising:

selectively applying at least one protective material substantially over one or more of a plurality of elements coupled with a framework for a wearable device configured to be worn by a user, the plurality of elements including at least a sensor;

forming one or more inner moldings substantially over a subset or all of the framework, the at least one protective material and the plurality of elements, after the selectively applying, at least one of the one or more inner moldings having a protective property; and

forming an outer molding of the wearable device that covers all or substantially all of the one or more inner moldings, the outer molding configured to be positioned in contact with the user.

Id. at col. 14:24-38 (disputed terms in bold). Claim 17 depends from claim 16 and requires that "the plurality of elements [be] configured to perform an operation using data from the sensor." *Id.* at col. 14:39-41.

D. Claim Construction: "forming a ... molding"/"forming an outer molding" /"forming one or more inner moldings"

Terms	Complainants' Construction	Respondents' Construction	Staff's Construction
"forming a . . . molding" (claim 1)/ "forming an outer molding" (claims 1 and 16)/"forming one or more inner moldings" (claim16)[14]	*No construction necessary. If construed:* using a mold to form a . . . material	using a . . . mold to apply material	making with a mold . . . . a molding[15]

The term "forming a ... molding" appears twice in claim 1 of the '811 patent. *Id.* at col. 13:40-54. In addition, claims 1 and 16 contain the following similarly-worded limitations: "forming an outer molding" (claims 1 and 16) and "forming one or more inner moldings" (claims 1 and 16). *Id.* at col. 13:51; 14:30; 14:35. Although the parties propose constructions for the terms "forming a . . . molding," "forming an outer molding," and "forming one or more inner moldings," their dispute concerns the claim language surrounding these claim terms, not the claim terms themselves.[16] The claim language requires forming moldings that "cover[]" or are

[14] The parties identified the claim term "forming a . . . molding" for construction and not the terms "forming an outer molding" (claims 1 and 16) and "forming one or more inner moldings" (claim 16). Nevertheless, each party agrees that its proposed construction for "forming a . . . molding" also applies to these terms. *See, e.g.*, SB at 5, fn. 1; RIB at 5, CIB at 11; *Markman* Hrg. Tr. at 92:13-22; 95:19-96:12.

[15] On December 23, 2015, the parties submitted an updated joint proposed claim construction chart. Staff's revised proposed construction for the term "formed a . . . molding" ("making with a mold . . . an overmolding") does not reflect the Staff's position at the hearing. Accordingly, it is untimely and will not be considered.

[16] At the hearing, Staff and Complainants indicated that they had not realized that Respondents were contending that the claims required forming the moldings on the device until after reviewing Respondents' rebuttal brief. *Markman* Hrg. Tr. at 93:24-94:24, 100:11-21. Staff, however, acknowledged that the argument was set forth in Respondents' initial brief, but that Staff had overlooked it. *Id.* at 100:11-21.

"over" other moldings or the device itself. The parties agree that the terms require using a mold to form material into particular shapes, but disagree on whether the moldings must be formed on the device or whether the moldings can be formed in isolation from the device for later application. Respondents and Staff take the former position, while Complainants take the latter position. For the reasons set forth below, I find that the claims require forming the claimed moldings on the device and that the terms identified for construction should be given their plain and ordinary meaning, for which no construction is necessary.

1. The inner and outer moldings must be formed on the device.

Both independent claims 1 and 16 are directed to methods for forming moldings for a "wearable device." *Id.* at col. 13:40-54; 14:24-38. Claim 1 requires the formation of a first inner molding, a second inner molding, and an outer molding, whereas claim 16 requires the formation of "one or more inner moldings" and an outer molding. *Id.* Although the language varies slightly between claim elements, none of the parties has argued that the variations in language affect claim construction. In particular, Complainants acknowledge that the dispute concerns "a phrase that is varied a little bit from claim element to claim element in claim 1 and claim 16 of this patent, but we're treating them the same for purposes of these words 'forming a [. . .] molding.'" *Markman* Hrg. Tr. at 92:21-93:2. As set forth below, the plain and ordinary meaning of the claim language requires forming the moldings on the device. This interpretation is supported by the specification, which is directed to a method of protecting the components of a wearable device from being damaged by the overmolding process during fabrication.

a. The claim language requires forming the moldings on the device.

The language of both independent claims requires forming the claimed moldings on the device. Claim 16 requires "***forming*** one or more inner moldings ***substantially over*** a subset or all of the framework, the at least one protective material and the plurality of elements" of the

wearable device. *Id.* at col. 14:30-32. This language unambiguously requires forming the inner moldings on the wearable device. This interpretation is confirmed by claim 25, which depends directly from claim 16. *Phillips*, 415 F.3d and 1314 ("Other claims of the patent in question . . . can also be valuable sources of enlightenment as to the meaning of a claim term."). Claim 25 requires the additional step of "***removing and re-applying*** at least one of the one or more inner moldings after an inspection of the one or more inner moldings." '811 patent, col. 14:60-62 (emphasis added). An inner molding can only be removed and re-applied if it was formed on the device in claim 16's "forming one or more inner moldings" step. *Ortho-McNeil Pharm., Inc. v. Mylan Labs., Inc.*, 520 F.3d 1358, 1362 (Fed. Cir. 2008) ("[T]his court strives to reach a claim construction that does not render claim language in dependent claims meaningless."); *Wright Med. Tech., Inc. v. Osteonics Corp.*, 122 F.3d 1440, 1445 (Fed. Cir. 1997) ("[W]e must not interpret an independent claim in a way that is inconsistent with a claim which depends from it . . . .").

Similarly, the language used in claims 1's "forming a . . . molding" step and claim 1's and 16's "forming an outer molding" step require forming the molding on the device. These steps require the formation of an inner molding "that covers" the "covering, the plurality of elements, and the framework" of the wearable device, and the formation of a molding "covering" or "that covers" an inner molding:

- "selectively forming a first inner molding ***that covers*** all or substantially all of the at least one covering, the plurality of elements, and the framework" ('811 patent, claim 1 (emphasis added));
- "selectively forming a second inner molding ***that covers*** all or substantially all of the first inner molding" ('811 patent, claim 1 (emphasis added));

- "selectively forming an outer molding of the wearable device, the outer molding ***covering*** all or substantially all of the second inner molding" ('811 patent, claim 1 (emphasis added)); and
- "forming an outer molding of the wearable device ***that covers*** all or substantially all of the one or more inner moldings" ('811 patent, claim 16 (emphasis added)).

Claim 9, which depends from claim 1 through intervening claim 8, confirms this interpretation. Claim 8 adds the limitation of "performing an inspection of the outer molding to determine if the outer molding is defective." *Id.* at col. 14:3-5. If, after inspection, the outer molding is determined to be defective, claim 9 requires "removing" and "re-forming the outer molding." *Id.* at col. 14:6-9. Thus, claim 9 reflects that claim 1's "forming an outer molding" step results in the outer molding being formed on the device, such that it needs to be removed and reformed if it proves defective. *Ortho-McNeil*, 520 F.3d at 1362; *Wright Medical*, 122 F.3d at 1445.

b. The purpose of the claimed invention is to prevent damage to the device during fabrication by the overmolding process.

In addition to "stay[ing] true to the claim language," construing the claim language to require forming the moldings on the claimed device "most naturally aligns with the patent's description of the invention." *Phillips*, 415 F.3d at 1316 (quoting *Renishaw PLC v. Societa' per Azioni*, 158 F.3d 1243, 1250 (Fed.Cir.1998)); *see also Ormco Cop. V. Align Tech., Inc.*, 498 F.3d 1307, 1313 (Fed. Cir. 2007). The patent, entitled "Component Protective Overmolding Using Protective External Coatings," describes "techniques for component protective overmolding" to prevent the device from being damaged during the overmolding process, *i.e.*, the "application of protective layers, covers, molds, or the like" on a device. '811 patent, col. 1:23-25; 9:31-35. The patent teaches that conventional manufacturing techniques may result in sensitive electronic components being damaged or destroyed by the overmolding process. *Id.* at col. 2:11-18.

The patent proposes a solution to this problem in the form of a "covering" (also called a "protective coating" or "protective material" by the patent) that is applied over the sensitive components to protect against "damage resulting from the application of subsequent layers, coverings, moldings, or other protective material." *Id.* at col. 3:57-61; 4:5-28. The covering disclosed and taught in the '811 patent "allows for relatively small devices having sensitive electronics to be subjected to harsh environmental conditions during molding processes in order to form protective layers (inner molding 312, outer molding 412) over various types of devices." *Id.* at col. 6:29-34.

Consistent with the purpose of the invention disclosed in the '811 patent, in every embodiment molding is applied over the underlying components of the wearable device. '811 patent, Figs. 3, 4, 6A-6D, 10-12 and corresponding text. There are simply no embodiments described in which the molding process is performed in isolation from the device. *See, e.g.*, *Ormco Corp.*, 498 F.3d at 1313-14 (affirming district court's claim construction requiring the automatic determination of finish tooth positions, because, *inter alia*, "[n]owhere does the specification suggest or even allow for human adjustment of the computer-calculated tooth finish positions."); *Alloc, Inc. v. Int'l Trade Comm'n*, 342 F.3d 1361, 1370 (Fed. Cir. 2003) (affirming Commission's claim construction requiring "play," because, *inter alia*, "all the figures and embodiments disclosed in the asserted patents imply play, or, as in the case of Figure 1b, expressly disclose play").

Complainants' argument to the contrary is unpersuasive. Complainants' rely on boilerplate language recited *pro forma* after the detailed description of certain embodiments stating that the disclosed methods "may be implemented differently in the order, function, configuration, or other aspects described and is not limited to the examples provided above." *Id.*

at col. 7:51-54 (process 600); 8:53-56 (process 620); 9:54-57 (process 640); 10:38-41 (process 650); 12:62-65 (process 1000); 13:18-21 (process 1100); 13:29-32 (process 1200); *see also id.* at 11:35-38 (stating that "molding 802 may be shaped or formed differently and is not intended to be limited to the specific examples shown and described for purposes of illustration"). The specification, however, provides no indication or suggestion of which steps may be performed in a different order or how to perform the steps in a different order. For example, process 1200 is a two-step process (process 1200), the first step of which is to "[s]electively apply material over framework coupled with elements" (step 1202) with the second step being to "[m]old one or more layers over framework and material to protect and provide protective property" (step 1204). *Id.* at Fig. 12. Although the specification states that the steps can be performed in a different order, it offers no explanation how one would ***"[m]old*** one or more layers ***over*** framework and ***material*** to protect and provide protective property," if the "material" is applied after the moldings are formed on the device. Such rote recitations of "catch-all" language are entitled to little, if any, weight. *See, e.g., ICHL, LLC v. NEC Corp. of America*, 2010 WL 1609232, *17 (E.D. Tex. 2010) (giving no weight to "boilerplate language" stating that "various modifications can be made and alternative materials, shapes and dimensions may be utilized"); *Les Traitments Des Eaux Poseidon, Inc.*, 135 F.Supp.2d 126 (D. Mass. 2001) (finding that boilerplate language in the specification asserting that the general description is "non-restrictive" is entitled to little weight).

Moreover, even if the boilerplate language were found to disclose alternative embodiments, a claim construction excluding such alternative embodiments is perfectly proper. As discussed above, the language of the independent claims and the dependent claims requires forming the claimed moldings on the device. The boilerplate language cited by Complainants

affords no basis for rewriting the claims. *TIP Sys., LLC v. Phillips & Brooks/Gladwin, Inc.*, 529 F.3d 1364, 1373, (Fed. Cir. 2008) ("[T]the mere fact that there is an alternative embodiment disclosed in the '828 patent that is not encompassed by district court's claim construction does not outweigh the language of the claim, especially when the court's construction is supported by the intrinsic evidence."); *Intamin Ltd. v. Magnetar Tech., Corp.*, 483 F.3d 1328, 1336–37 (Fed. Cir. 2007) ("Under the proper claim construction with the conducting rail extending the length of the fixed device, the claim may well not cover this embodiment. Nonetheless, this court has acknowledged that a claim need not cover all embodiments.").

2. The "forming a . . . molding" terms do not need to be construed.

As noted above, the parties' sole dispute is whether the claim language requires the claimed moldings to be formed directly on the wearable device. For the reasons set forth above, I answer this question in the affirmative. With regard to the "forming a . . . molding" terms, Complainants argue that no construction is necessary, while both Respondents and Staff argue that the terms should be construed and Complainants have proposed a construction in the alternative. Isolated from the surrounding claim language, the terms identified for construction—"forming a . . . molding" (claim 1), "forming an outer molding" (claims 1 and 16), and "forming one or more inner moldings" (claims 1 and 16)—require only the formation of moldings.[17] As reflected in their proposed constructions, there is no dispute between the parties that forming a molding means using a mold to form material. Because there is no dispute as to the construction of the specific terms identified by the parties, no construction of these terms is

[17] As discussed above, however, when read in conjunction with surrounding claim language, the molding limitations do not merely require the formation of moldings; they require the formation of moldings "that cover[]" or "substantially cover" a portion of the claimed device (claims 1 and 16) and moldings "covering" or "that cover[]" an inner molding (claims 1 and 16).

necessary. *O2 Micro*, 521 F.3d at 1362; *Vivid Techs.*, 200 F.3d at 803; *U.S. Surgical Corp.*, 103 F.3d at 1568.

VII. CONCLUSION

For the reasons discussed above, I construe the disputed terms as follows:

No construction is necessary for the term "band" in claim 2 of the '522 patent. The term is being used in accordance with its plain and ordinary meaning.

The term "contextual data of the individual" in claim 1 of the '546 patent is construed to mean "data relating to an individual's activity state, environment, surroundings, or location."

No construction is necessary for the terms "forming a . . . molding" and "forming an outer molding" in claim 1 of the '811 patent and the terms "forming one or more inner moldings" and "forming an outer molding" in claim 16 of the '811 patent." These terms are being used in accordance with their plain and ordinary meanings. In addition, I find that claims 1 and 16 require forming the claimed moldings on the device.

Hereafter, discovery and briefing in this Investigation shall be governed by the construction of the claim terms in this Order.

SO ORDERED.

Dee Lord

Dee Lord
Administrative Law Judge

CERTAIN ACTIVITY TRACKING DEVICES, SYSTEMS, AND COMPONENTS THEREOF **Inv. No. 337-TA-963**

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served by hand upon the Commission Investigative Attorney, **Peter Sawert, Esq.**, and the following parties as indicated, on **February 17, 2016.**

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