

**UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.**

**Before the Honorable Dee Lord
Administrative Law Judge**

In the Matter of

**CERTAIN ACTIVITY TRACKING
DEVICES, SYSTEMS, AND COMPONENTS
THEREOF**

Investigation No. 337-TA-963

COMPLAINANTS' REBUTTAL CLAIM CONSTRUCTION BRIEF

I. INTRODUCTION

Pursuant to Order No. 4 (Setting Target Date and Date for Submission of Proposed Procedural Schedule) and Order No. 5 (Setting the Procedural Schedule), Complainants AliphCom d/b/a Jawbone and BodyMedia, Inc. (together, "Complainants" or "Jawbone") respectfully submit this Rebuttal Claim Construction Brief addressing the proper construction for three terms the Parties agreed to request to be construed before the Hearing.

In view of the parties' positions in the Initial Claim Construction Briefs, Complainants have modified their alternative proposed claim construction for the term "forming . . . a molding" ('811, claims 1, 16) to resolve a concern that Complainants' original alternative construction (and Staff's alternative proposed construction) did not fit grammatically with the surrounding claim language. Respondents identified that concern in their Initial Claim Construction Brief, *see* Respondents' Initial Br. at 7-8, and Complainants informed Respondents and Staff of their modified alternative proposed claim construction on November 25, 2015. In any event, Complainants continue to believe that no construction of that term is necessary and that it can be understood with its plain and ordinary meaning.

The table below summarizes Complainants' positions and proposed constructions, as revised, for the terms in dispute:

Term	Complainants' Proposed Construction
"contextual data of the individual" (’546, claim 1)	data relating to the individual’s activity state, environment, surroundings, or location
"band" (’522, claim 2)	data-capable device that may be worn as a strap or band around an arm, leg, ankle, or other bodily appendage or feature
"forming . . . a molding" (’811, claims 1, 16)	<u>REVISED:</u> <i>No construction necessary. If the term is construed, the proper construction is "using a mold to form a . . . material."</i> ¹

II. LEVEL OF ORDINARY SKILL IN THE ART

The Private Parties disagree on the amount of formal education the person of ordinary skill in the art would have possessed. Respondents' Initial Br. at 2-3. Staff supports Complainants' definition, except for the '811 patent, which Staff contends should be defined separately. Staff's Initial Br. at 4. Nevertheless, the parties appear to agree that any dispute regarding the appropriate level of ordinary skill in the art is immaterial for purposes of claim construction of the terms at issue. *See* Respondents' Initial Br. at 3. Accordingly, the ALJ need not resolve this dispute at this time and should reserve it for the Hearing.

¹ Complainants' original proposal for this term in the Opening Claim Construction brief was: *No construction necessary. If the term is construed, the proper construction is "making with a mold."*

III. DISPUTED CLAIM TERMS

A. “contextual data of the individual” (’546, claim 1)

Complainants’ Proposed Construction	Respondents’ Proposed Construction	Staff’s Proposed Construction
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

Respondents mischaracterize the invention of the ’546 patent. The ’546 patent is not merely directed at a system to monitor weight loss, as Respondents state. Respondents’ Initial Br. at 14. Rather, the ’546 patent is directed to a system for removing the inherent inaccuracies in tracking and monitoring caloric expenditure, through body-mounted sensors, to assist with weight management. ’546, Abstract.

Respondents are also incorrect in asserting that the “specification draws a clear line between ‘physiological’ data/sensors and ‘contextual’ data/sensors.” Respondents’ Initial Br. at 15. To the contrary, the specification explicitly states that physiological and contextual data can be represented by the *same* data signal. For example, as Complainants pointed out in their Initial Brief, the specification sets forth that “digital signal or signals representing certain **physiological and/or contextual characteristics** of the individual user may be used by microprocessor 20 to calculate or generate data indicative of physiological and/or contextual parameters of the individual user.” ’546, 13:30–34 (emphasis added). Respondents’ construction would impermissibly exclude this embodiment, by requiring that the contextual data always be separate from the physiological data. *See Osram GmbH v. Int’l Trade Comm’n*, 505 F.3d 1351, 1358 (Fed.Cir. 2007) (noting that a claim construction that excludes a preferred embodiment is rarely, if ever, correct).

Other portions of the specification further “blur” Respondents’ so-called “clear line

between ‘physiological’ data/sensors and ‘contextual’ data/sensors.” For example, the specification states “[t]he system can also predict data indicative of human physiological parameters including energy expenditure and caloric intake for any given relevant time period as well as other detected and derived physiological or contextual information.” ’546, 5:14-18. The specification further states that an alternate embodiment

includes at least two sensors adapted to be worn on an individual’s body selected from the group consisting of physiological sensors and contextual sensors, wherein at least one of the sensors is a physiological sensor. The sensors are adapted to generate data indicative of at least a first parameter of the individual and a second parameter of the individual, wherein the first parameter is physiological.

’546, 5:50-57. This embodiment contemplates an apparatus with two sensors, of which at least one is a physiological sensor. *Id.* In other words, this embodiment could be an apparatus with two sensors, both of which are physiological. The specification reinforces that *all* the sensors can be physiological, stating “[i]n either embodiment of the apparatus, the at least two sensors may be both physiological sensors, or may be one physiological sensor and one contextual sensor.” ’546, 6:3-5. Moreover, the sensors described in this embodiment generate data of at least one parameter that is physiological. *Id.* It is unspecified whether the second parameter can be contextual or physiological. However, had the inventors wanted to restrict the type of the second parameter, they could easily have done so. That they did not indicates that the second parameter can be contextual or physiological. In view of this, the ’546 patent contemplates that contextual data can be generated from *only* physiological sensors.² Respondents’ construction would exclude this embodiment, because it would require a separate contextual sensor; this is not required by the claims or the specification. Because Respondents’ proposed construction would improperly exclude this embodiment, it is incorrect and should be rejected. *Osram*, 505 F.3d at

² Staff correctly acknowledges that the “contextual activity state parameter may be derived in part from data supplied by physiological sensors.” (Staff’s Brief at 11).

1358.

For this same reason, Respondents’ argument that the claims “draw a distinction between physiological and contextual data, by requiring a processing unit that ‘derive[s] physiological and contextual data of the individual from data detected by said sensor device,’” is also incorrect. Respondents’ Initial Br. at 16 (citing ’546, 60:21-22). As discussed above, the specification contemplates a sensor device containing *only* physiological sensors. Once again, Respondents’ construction improperly excludes embodiments from the specification. *Osram*, 505 F.3d at 1358.

In view of the explicit construction for this phrase set forth in the specification, which Complainants’ proposal mirrors, Complainants’ construction is correct.

B. “band” (’522, claim 2)

Complainants’ Proposed Construction	Respondents’ Proposed Construction	Staff’s Proposed Construction
data-capable device that may be worn as a strap or band around an arm, leg, ankle, or other bodily appendage or feature	<i>Plain and ordinary meaning.</i>	<i>No construction necessary. Plain and ordinary meaning. If construed, the proper construction is “a substantially flat encircling strip.”</i>

Although Respondents contend that the term “band” should be given its plain and ordinary meaning, their argument reveals their intent to deprive the term of any meaning at all rather than give the term a meaning in the context of the patent as would be understood by a person of ordinary skill in the art at the time of the invention. “The words of a claim are generally given their ordinary and customary meaning *as understood by a person of ordinary skill in the art when read in the context of the specification and prosecution history.*” *Thorner v. Sony Computer Entm’t Am. LLC*, 669 F.3d 1362, 1365-67 (Fed. Cir. 2012) (citing *Phillips v. AWE Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005) (*en banc*)) (emphasis added). Contrary to

precedent, Respondents effectively ask the ALJ to ignore the explicit lexicography the patentee provided for this term in the specification and replace it with an undefined, but apparently all-encompassing, meaning that would be broad enough to include how a lay person may understand the term band (e.g., a rubber band). Respondents' arguments should be rejected because they ignore the "context of the specification and prosecution history" and the point of view of "a person of ordinary skill in the art." *Id.*

Respondents argue that the patentee's explicit definition for 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," '522 at 4:17–21, should be ignored in favor of "a common meaning that has been used in a variety of contexts over a long period of time." Respondents' Initial Br. at 11. Notably, Respondents do not say what that "common meaning" is, but their examples of such "a common meaning" illustrate the fallacy of this argument: "[P]eople intuitively understand what is meant by terms such as rubber band or headband." *Id.* The patentee recognized that the common meaning of the term—which can encompass a rubber band by example—does not capture the nature or context of the invention. For this reason, the term is explicitly defined in the patent. The patentee's definition should not be ignored.

Respondents also argue that the term "band" should be given an all-encompassing meaning because the term is "so commonly understood that in recent years, the phrase 'fitness band' . . . has entered the public lexicon." *Id.* As a threshold matter, Respondents fail to provide any evidence of the current "public lexicon" understanding of the term "fitness band" or to explain how that alleged meaning is consistent with the context of the invention. More importantly, patent terms are not construed based on the common understanding in recent years, but rather as they would be understood by a person of ordinary skill in the art at the time of the

invention. *Innova/Pure Water, Inc. v. Safari Water Filtration Systems, Inc.*, 381 F.3d 1111, 1116 (Fed. Cir. 2004) (“A court construing a patent claim seeks to accord a claim the meaning it would have to a person of ordinary skill in the art at the time of the invention.”). Thus, even assuming that the term “fitness band” has acquired some common public understanding—as Respondents contend—this understanding does not affect the patentee’s chosen definition for the term or a person of ordinary skill in the art’s understanding of the term *at the time of the invention*.

Respondents’ attempt to equate the patentee’s definition of the term “band” to another hypothetical—“a camera that ‘may be worn around one’s neck’”—erects a strawman and then knocks it down. *Id.* at 12. Contrary to Respondents’ argument, the patentee’s definition for the term “band” defines the necessary structure for the device—that it “may be worn as a strap or band around an arm, leg, ankle, or other bodily appendage or feature.” ’522, 4:20-21. Staff agrees. Staff’s Initial Br. at 8 (“the term ‘band’ does give some additional meaning and structure—though minimal—to the claim body’s listing of electronic components”).³ On the other hand, Respondents’ hypothetical camera does not describe any structure making it capable of being worn around one’s neck. Had a patentee defined a special type of camera specifically designed for such a use case as part of an invention in a patent, such lexicography too would be controlling.

³ Consistently, Staff also states that “the preamble term ‘band’ is only necessary to the body of claim 2 to the extent that it recites a vessel or structure that holds/contains the recited electronic components and adds some meaning or life to the body of the claim.” Staff’s Initial Br. at 9. The “data-capable” portion of Complainants’ proposed construction reflects the claimed device’s structure of containing the recited electronic components, not merely that it contains sensors from the other elements of the claim. Similarly, the remainder of Complainants’ proposed construction addresses the structure of the band that is not captured in the remainder of claim 2. Staff’s Initial Brief appears to agree but does not address why the ALJ should decline to construe the term as defined by the patentee as Complainants propose.

Respondents also erroneously conflate the patentee’s definition of the term “band” with exemplary embodiments, in attempting to argue that the term should not be limited to such embodiments. *Id.* at 12-13. The specification language on which Complainants rely for their proposed construction is not merely an embodiment—it is the patentee’s clear definition for the term: “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 at 4:17–21. All described embodiments are consistent with this definition, including those cited by Respondents. For example, Respondents rely on the following passages in the specification: (1) bands also “may be attached directly or indirectly to other items, organic, or inorganic, animate, or static,” *id.* at 4:20–23; (2) “bands [] can be attached to the body or affixed to clothing, or otherwise disposed at a relatively predetermined distance from a user’s person,” *id.* at 4:28–29; (3) bands 900 and the elements described above in connection with FIGS. 1–9[] may be varied in type, configuration, function, structure, or other aspects, without limitation to any of the examples shown and described.” *id.* at 19:50–53. Respondents’ Initial Br. at 12-13. Nothing in these descriptions is inconsistent with the patentee’s definition of the band. That the described bands may also be attached to “other items,” may be affixed to “clothing,” or may be of varied type, configuration, function, or structure, does not take away from the defined requirement that the band be a “data-capable device that may be worn as a strap or band around an arm, leg, ankle, or other bodily appendage or feature.”

One thing Complainants and Respondents agree on is that Staff’s alternative construction—a “substantially flat encircling strip”—is incorrect because it appears to impermissibly exclude the patent’s disclosed embodiments. Respondents’ Initial Br. at 13.

Staff's initial brief does not address this defect in Staff's proposed construction. Moreover, even if Staff's understanding of the terms "substantially flat" and "encircling" did not exclude the disclosed embodiments, this proposed construction adds unnecessary and unhelpful ambiguity that can and should be avoided.

C. "forming . . . a molding" ('811, claims 1, 16)

Complainants' Proposed Construction	Respondents' Proposed Construction	Staff's Proposed Construction
REVISED: <i>No construction necessary. If the term is construed, the proper construction is "using a mold to form a . . . material."</i>	using a . . . mold to apply material	REVISED: <i>No construction necessary. If the term is construed, the proper construction is "making with a mold . . . a molding."</i>

The term "forming . . . a molding" does not require construction and should be given its plain and ordinary meaning. Indeed, all parties agree that "forming . . . a molding" involves use of a mold. *See* Respondents' Initial Br. at 6 (noting the "point of agreement by Staff and the parties" that the claimed process "requires using a mold"); Staff's Initial Br. at 5-6 (noting the parties' agreement that "forming" a "molding" requires that "the formation process used in claimed methods must involve use of a mold in order for the resulting coverings to qualify as 'molding[s]'"). As Respondents acknowledge in their brief, this understanding also accords with the dictionary definition of the term "molding." Respondents' Initial Br. at 6 n. 3. Accordingly, the term needs no construction and should be given its plain and ordinary meaning.

Respondents' argument that this term needs construction focuses on what they perceive to be "a fundamental disagreement" regarding whether the formed molding must cover at least one covering. Respondents draw this perceived disagreement from Complainants' and Staff's original alternative construction proposal: "making with a mold." *Id.* at 6. In Respondents' view, this original alternative construction proposal "would read out the limitation that the

molding be formed such that it covers the underlying device, and replace it with an entirely new limitation that requires the *mold* to cover the underlying device.” *Id.* (emphasis in original). This perceived disagreement, however, appears to be a misunderstanding stemming from the fact that Complainants’ and Staff’s original alternative constructions did not perfectly fit grammatically with the surrounding claim language. *See* Staff’s Initial Br. at 6 (acknowledging Respondents’ argument that Staff’s and Complainants’ original proposed alternative construction “cannot be literally [] substituted in the claim language without altering its meaning due to the lack of a direct object in the [original] proposed construction.”). As the parties’ initial briefs make clear, all parties agree that the molding, not the mold, should cover the underlying device. The lack of any disagreement on this issue supports Complainants’ and Staff’s view that the term needs no construction and should be given its plain and ordinary meaning.

Should the ALJ determine that it is necessary to construe the term, Complainants have modified their alternative proposal to “using a mold to form a ... material” to address the grammatical awkwardness of their original alternative construction. There should be no such controversy with Complainants’ modified proposal. As described above, all parties agree that “forming” a “molding” requires using a mold. In their Initial Brief, Respondents’ key argument was that the term requires that “the *material* formed by the mold ‘covers all or substantially all’ of the underlying component or device.” Complainants’ current proposal is consistent with that argument. Applying the revised proposal to the first relevant limitation in Claim 1 yields “selectively [using a mold to form a] first inner [material] that covers all or substantially all of the at least one covering,” which mirrors what Respondents contend is the correct understanding of the term.

Staff similarly modified its alternative construction proposal to “making with a mold . . .

a molding.” Complainants do not object to Staff’s proposal as it reflects the plain and ordinary meaning of the term, but Complainants believe that their proposal avoids the redundancy inherent in use of the term “mold” twice and provides more clarity to the extent any is deemed necessary beyond the plain and ordinary meaning of the term.

Respondents’ proposed construction should be rejected because it would impermissibly restrict the scope of the claim limitation. Respondents attempt to inject a requirement into the claim that forming a molding must involve “applying” material using a mold. As explained in detail in Complainants’ Initial Brief, the specification makes clear that although a molding may be formed by applying the material into a mold cavity that surrounds the framework, it is not required to be so formed and it may be varied in its structure. Complainants’ Initial Br. at 12. Respondents’ Initial Brief fails to provide any argument for why their additional, restrictive limitation is appropriate or how it is supported by any intrinsic evidence. But as Complainants explained in their Initial Brief, in attempting to insert this additional requirement into the claim Respondents are improperly seeking to limit the claim to certain described embodiments. Complainants’ Initial Br. at 11-12. Claim scope must not be limited to any particular embodiment unless the patentee expressed a clear intent to do so. *Saunders Group, Inc. v. Comfortrac, Inc.*, 492 F.3d 1326, 1332 (Fed. Cir. 2007). Accordingly, the ALJ should reject Respondents’ proposed construction.⁴

⁴ Staff notes that “Respondents do not appear to have ascribed any particular meaning to the word ‘apply’ in their proposed construction in their Initial Brief.” Staff’s Initial Br. at 6 n.2. Respondents’ failure to provide any support in their brief for this attempted narrowing of the claim should lead the ALJ to reject the erroneous construction.

Dated: December 4, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the **COMPLAINANTS' REBUTTAL CLAIM CONSTRUCTION BRIEF** was served on the following parties in the manner indicated below, this 4th day of December, 2015:

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/s/ Laura O. Andrews
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