

**UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C. 20436**

**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

**RESPONDENTS FITBIT, INC., FLEXTRONICS INTERNATIONAL LTD., AND
FLEXTRONICS SALES & MARKETING (A-P) LTD.'S
RESPONSIVE CLAIM CONSTRUCTION BRIEF**

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Pursuant to Order No. 14 Ordering Resubmission of *Markman* Briefs, and Ground Rule 5.2.2, Respondents Fitbit, Inc., Flextronics International Ltd., and Flextronics Sales & Marketing (A-P) Ltd. (collectively, “Respondents”) hereby submit their Responsive Claim Construction Brief in this Investigation in response to the Initial *Markman* briefs by Complainants Aliphcom d/b/a Jawbone and BodyMedia, Inc. (“Complainants’ Brief”) and Staff (“Staff’s Brief”) regarding the disputed claim terms in U.S. Patent Nos. 8,529,811 (“the ’811 patent”); 8,793,522 (“the ’522 patent”); 8,398,546 (“the ’546 patent”).

I. INTRODUCTION

Each of Complainants’ proposed constructions suffers from the same fundamental flaw: instead of reading the claims in light of the full body of intrinsic evidence, Complainants cherry-pick language favorable to their proposed constructions and contend either that the language in isolation demonstrates that the patentee acted as his own lexicographer, or (if the language is not favorable) that it should be ignored for the purposes of claim construction.

For example, although the word “band” is frequently used and has a well-understood meaning (e.g., fitness band, hair band, rubber band), and although the asserted ’522 patent uses the word in a wide array of contexts, Complainants pick a single description of *how the band may be used* to define *what constitutes a band* for the purposes of the asserted claims. Similarly, although the ’546 patent explicitly juxtaposes “*physiological* and *contextual* data,” Complainant’s insist that contextual data and physiological data can be one and the same, based on a sentence that relates not to “contextual data,” but to the different “contextual parameters.” And finally, although the main teaching of the ’811 patent is that a molding process (e.g., injecting hot thermoplastics into a container to form a specific shape once it cools) can be performed over sensitive components if those sensitive components are first covered by a

protective material, Complainants ignore that teaching in proposing a construction where the molding process does not need to take place over the sensitive components in the first place. But if the molding is not formed over the sensitive components and sensors, there would be no need for the protective covering, or for the purported intention of the '811 patent.

Complainants' use of the specification simply cannot be reconciled with the directive that "the person of ordinary skill in the art is deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but *in the context of the entire patent*, including the specification." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (emphasis added); *see ICU Med., Inc. v. Alarais Med. Sys., Inc.*, 558 F.3d 1368, 1375 (Fed. Cir. 2009) ("It is true that we should not import limitations from the specification into the claims. But the line between construing terms and importing limitations can be discerned with reasonable certainty and predictability if the court's focus remains on understanding how a person of ordinary skill in the art would understand the claim terms. Indeed, the court should focus on how such a person would understand the claim term after reading the entire patent." (internal quotation marks and citations omitted)); *see also Ormco Corp. v. Align Tech., Inc.*, 498 F.3d 1307, 1313–14 (Fed. Cir. 2007) (construing claims based on the construction that "most naturally aligns with the patent's description of the invention" (quotation marks omitted)); *Alloc, Inc. v. Int'l Trade Comm'n*, 342 F.3d 1361, 1370 (Fed. Cir. 2003) (considering "whether the specification read as a whole suggests that the very character of the invention requires that the limitation be a part of every embodiment").

For these, and for the additional reasons below, the Commission should adopt Respondents' proposed constructions.

II. PATENTS-IN-SUIT AND DISPUTED CLAIM TERMS

A. Only Respondents’ proposed construction of “forming a . . . molding” properly reflects that the molding must be formed over the underlying components¹

Respondents’ Proposed Construction	Complainants’ Proposed Construction	Staff’s Proposed Construction
using a . . . mold to apply material	ORIGINAL: No construction necessary. If the term is construed, “making with a mold” NEW: No construction necessary. If the term is construed, “using a mold to form a . . . material”	No construction necessary. If the term is construed, the proper construction is “making with a mold . . . a molding.”

The parties and Staff uniformly agree that this limitation requires using a mold to form, or set, material into a particular shape. Indeed, all three proposed constructions require either “using a mold” or “making with a mold.” In essence, the limitation recites the industrial version of a process that frequently occurs in household kitchens: the use of a mold to shape Jell-O, bundt cakes, and other batters into a particular form or structure as they cool.

But Complainant’s and Staff’s initial proposed constructions were fundamentally flawed insofar as they required the *mold* (i.e., enclosing shell) to “cover[] all or substantially all” of the underlying component, whereas the claim language requires the *material formed by the mold* to cover the underlying component. Respondents’ Br. at 7–9. Recognizing this error, Complainants now seek to change their construction midstream.

Complainants’ new construction—“using a mold to form a . . . material”—resolves one problem, but injects a new one in its stead. Specifically, Complainants’ proposed construction

¹ As discussed in the initial Markman brief, Respondents do not believe that difference in the proposed levels of ordinary skill alters the construction of any of the disputed terms.

does not require the underlying component or device to be present while the molding material is shaped; rather, Complainants’ construction would permit the molding material to be formed and shaped in isolation, and then later attached as a fully shaped structure to the underlying component or device. But the entire purpose of the ’811 patent is to devise a way to form a molding that fully covers the underlying components or device, by shaping the molding directly over those underlying components or device, while at the same time mitigating the purported risk of damage due to applying high pressure and high temperature molding processes around fragile sensors. *See* ’811 patent, col 2:11–18 (“As a conventional example, sensitive electronic components such as printed circuit board assemblies (‘PCBA’), sensors, and computer memory [] can be significantly damages or destroyed during manufacturing processes where protective overmoldings or layers of material occurs using techniques such as injection molding, cold molding, and others.”). The molding process contemplated by the ’811 patent involves rigorous temperatures and pressures because both are necessary to keep the molding material in a pliable state such that it can be shaped using the mold. *See id.*, col. 9:2–3. This creates a manufacturing challenge because the temperatures and pressures of the molding process can damage the components that the molding material is intended to protect after being formed.

To solve this problem, the ’811 patent discloses—and claims—an initial step of selectively applying a “covering” or a “protective material” over the sensitive electronic components. *See id.*, Claim 1; *id.*, Claim 16. These protective coverings are intended “to prevent damage from later stages of a manufacturing process (e.g., introduction into a mold cavity . . .) in which rigorous temperatures, pressures, or other environmental conditions are created in order to apply other coated materials.” *Id.*, col. 8:66–9:3. Based on the patent’s disclosures, the coverings—which are at the inventive core of the ’811 patent—would be entirely

unnecessary but for the fact that the patentees contemplated forming the molding directly over the components. *See id.*, col. 8:13–16 (“[A]fter selectively applying protective material an inner molding is formed over a framework, associated elements (i.e., elements coupled to the framework, and the previously, selectively-applied protective material.”).

Complainants’ new proposed construction—which neither acknowledges the presence of the underlying components during the molding process nor requires that the molding be formed in a way that would cover the underlying components—thus completely divorces the claims from the very problem the ’811 patent purports to solve and ignores the consistent disclosure in the specification. If, as Complainants’ new proposed construction suggests, the molding need not be formed over the covering, plurality of elements, and framework, there would be no need for the “covering” in the first place, nor for the purported invention of the ’811 patent as a whole. In contrast, Respondents’ proposed construction—“using a . . . mold to apply material”—remains faithful to the purpose of the purported invention by requiring the *application* of the molding material in a manner that “covers all or substantially all” of the underlying components.

Because the patentees were very explicit about the purpose of the invention, and because Complainants’ proposed construction is inconsistent with that purpose, the new proposed construction should be rejected. *See Apple Computer, Inc. v. Articulate Sys., Inc.*, 234 F.3d 14, 25 (Fed. Cir. 2000) (“[T]he claim must be interpreted in light of the teachings of the written description and the purpose of the invention described therein.”); *see, e.g., Curtiss-Wright Flow Control Corp. v. Velan, Inc.*, 438 F.3d 1374, 1382 (Fed Cir. 2006) (“Any construction to the contrary is not consistent with the overall context of this invention and this field of art as described in the specification.”); *Renishaw PLC v. Parpos Societa’ per Azioni*, 158, F.3d 1243, 1251 (Fed. Cir. 1998) (“[The claim] does not exist in rarefied air, but rather is surrounded by a

patent disclosure of singular purpose.”); *Hill-Rom Co. v. Kinetic Concepts, Inc.*, 209 F.3d 1337, 1341 n.* (Fed. Cir. 2000) (“noting that “[w]e have frequently looked to the abstract to determine the scope of the invention”).

Indeed, the '811 patent does more than simply *imply* that the molding should be applied directly over the components. It uniformly describes the moldings as being selectively formed directly over the framework, electrical sensors, and other moldings. *See, e.g., ICU Med.*, 558 F.3d at 1374–75 (determining that the term “spike” must be pointed in the claims because, “[a]s the district court correctly noted, the specification repeatedly and uniformly describes the spike as a pointed instrument for the purposes of piercing a seal inside the valve” (quotation marks omitted)); *Praxair, Inc. v. ATMI, Inc.*, 543 F.3d 1306, 1324 (Fed. Cir. 2008) (“The claims of the patent must be read in light of the specification’s consistent emphasis on this fundamental feature of the invention”).

According to the '811 patent, to form the inner molding, the framework and the electronic sensors are “placed in mold cavity **302** where another protective layer or coating (e.g., inner molding []) may be applied from [the] nozzle **304**.” *Id.*, col. 5:16–18. As is apparent in the accompanying picture, the molding **312** is formed by covering the framework while it is in the mold cavity **302**.

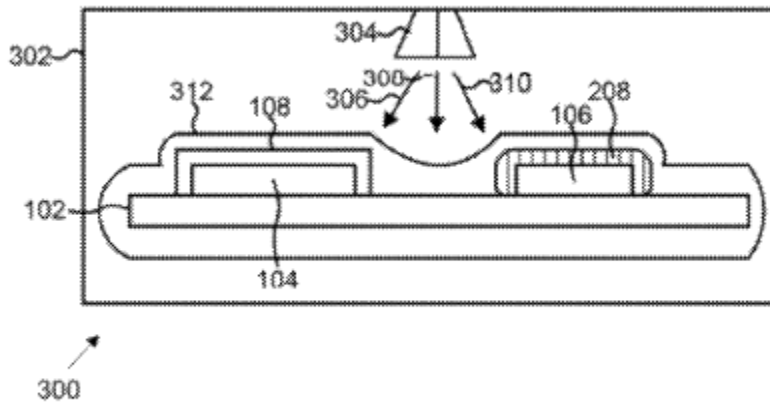


FIG. 3

Id., Fig. 3; *see also id.*, col. 8:13–16 (“[A]fter selectively applying protective material, an inner molding is formed over a framework, associated elements (i.e., elements coupled to the framework), and the previously, selectively applied protective material.” (emphasis added)). Consistent with the stated purpose of protecting the sensitive components during the molding step, moreover, the inner molding is formed over the framework only after a covering **108** and/or a protective coating **208** is applied to protect those components.

Likewise, to form the outer molding, the framework with the already formed inner molding is “placed in mold cavity **402**.” *Id.*, col. 5:16–18. As made apparent in the accompanying figure, the framework (which is already covered by the inner molding **312**), is placed directly in the mold **402**, to form the outer molding **412**.

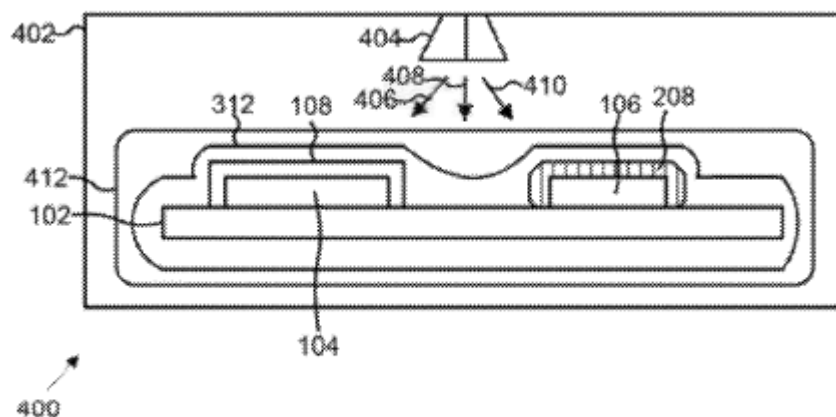


FIG. 4

Id., Fig. 3; *see also id.*, col. 8:32–34 (“[A]n outer molding is formed over the inner molding, the framework, its elements, and the protective material.” (emphasis added)). The rest of the figures also describe the moldings as being formed directly over the other elements of the wearable device. *See also id.*, Fig. 6C (“*Form molding over* securing coating, components, and framework.” (emphasis added)); Fig. 10 (“*Form coating over* protective layer.” (emphasis added)); Fig. 11 (“*Form coating over* material to provide protective property.” (emphasis added)); Fig. 12 (“*Mold one or more layers over* framework and material to protect and provide protective property.” (emphasis added)).

Accordingly, when read in light of the specification, including the purpose of the purported invention, a person of ordinary skill would understand that the moldings need to be selectively formed by using a mold to apply the molding material.

B. The word “band” has a plain and ordinary meaning that requires no construction²

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

As discussed in Respondents’ Brief, “band” is not a technical term of art, is not defined in the patent specification, and has no bearing on the purpose of the patent. To the contrary, “band” has a common meaning and has been used as in a variety of contexts over a long period of time. Complainants’ argument that “band” should be narrowed from its plain and ordinary meaning relies on an isolated, cherry-picked sentence in the specification and a contention that the patentee acted as his own lexicographer. Both arguments are misguided.

To act as his own lexicographer, a patentee must “demonstrate[] a clear intention to limit the claim scope using words or expression of manifest execution or restriction.” *Trading Techs. Int’l, Inc. v. eSpeed, Inc.*, 595 F.3d 1340, 1352 (Fed. Cir. 2010). The phrase relied upon by Complainants to establish this clear intention to limit “band”—“‘strapband’ or ‘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 (emphasis added)—simply does not constitute an explicit definition or restriction. Instead, the patentees’ use of “may be” falls well short of the requirement that the patentee use “words or expressions of manifest execution or restriction.” *Trading Techs.*, 595 F.3d at 1352; *see, e.g., Hill-Rom Servs., Inc. v. Stryker Corp.*, 755 F.3d 1367, 1372 (Fed. Cir. 2014) (holding that there

² Regardless of whether the term “band” is determined to be limiting in the preamble of claim 2 of the ’522 patent, the term also appears in the body of the claim.

is no disclaimer or lexicography because “[t]here is no disclosure that, for example, the present invention ‘is,’ ‘includes,’ or ‘refers to’ a wired datalink and there is nothing expressing the advantages, importance, or essentiality of using a wired as opposed to wireless data link”); *Merck & Co. v. Teva Pharm. USA, Inc.*, 395 F.3d 1364, 1370 (Fed. Cir. 2005) (holding that the specification did not have “sufficient clarity to put one reasonably skilled in the art on notice that the inventor intended to redefine the claim term”).

Complainants’ opening brief also ignores another critical point: the patentees made affirmative statements throughout the specification indicating that “band” was not limited by this single, noncommittal sentence. For example, the patentees also indicated that a “band” “may be attached directly or indirectly to other items, organic, or inorganic, animate, or static.” ’522 at 4:20–23. Similarly, the patentee also disclosed that “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.*, col. 4:28–29. And, the specification continues that “band 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.*, col. 19:50–53; *see also id.*, col. 19:54–58 (“[T]he number, type, function, configuration, ornamental appearance, or other aspects shown may be varied without limitation”).³

Accordingly, a person of ordinary skill in the art would understand that, far from acting as their own lexicographer to narrowly define “band,” the patentees used numerous illustrations to demonstrate that the word is used in the plain and ordinary manner. Furthermore, the purpose of the patent—allowing the device to conserve battery power during shipment—is entirely

³ Complainants’ arguments that the disclosed embodiments are consistent with its proposed construction are irrelevant because there is no explicit definition in the specification.

unrelated to the shape of the band. A person of ordinary skill would not, therefore, read the patent as requiring that the band be worn in a specific and narrow manner. *See Hill-Rom*, 755 F.3d at 1373 (“[A]bsent some language in the specification or prosecution history suggesting that the wired connection is important, essential, necessary, or the ‘present invention,’ there is no basis to narrow the plain and ordinary meaning of the term data link to one type of datalink.”). Complainants’ argument that the patentee acted as his own lexicographer should therefore be rejected.

Complainants’ new proposed construction also fails to address shortcomings that existed in their original construction as well. For example, like the old construction, the new proposed construction does not purport to describe the band itself, but rather, *how* the band *may be worn*. *See* Respondents Brief at 12. Moreover, Complainants’ proposed construction also seeks to import limitations that are redundant of limitations already in the asserted claim. *See* Staff’s Brief at 9.

Staff’s alternate construction of “a substantially flat encircling strip” also falls short. While a band may be a “substantially flat encircling strip,” not all bands share those characteristics. Indeed, the bands illustrated in the ’522 patent are neither substantially flat, nor are they encircling in the sense of forming a complete circle. ’522 Patent, Figs. 7C and 7A. In sum, both Complainants and Staff have failed to demonstrate that a person of ordinary skill would have understood “band” differently from its plain and ordinary meaning in the context of this patent.

Respondents’ proposed construction of plain and ordinary meaning is therefore correct.

C. The '546 patent discloses two mutually exclusive types of data: “contextual data” and “physiological data”

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

As described in Respondents' Brief, the specification and claims of the '546 patent draw a clear line between “contextual” data/sensors on the one hand, and “physiological” data/sensors on the other hand. Respondents' Br. at 16–17. For example, claim 1 states as follows: “derive *physiological and contextual data* of the individual from data detected by said sensor device.”

Complainants' refusal to acknowledge this distinction is predicated on the assertion that the patentees acted as their own lexicographers, which in turn is based on a single cherry-picked sentence in the specification. Complainants' Br. at 5–6. As noted above, a high hurdle must be surmounted before one can find that patentees acted as their own lexicographer. And here again, Complainants' argument falls flat because the sentence upon which they rely does not even utilize the phrase “contextual data.” Instead, it uses the phrase “contextual parameters.” *See* Complainants' Br. at 5. Of course, different terms in a patent are presumed to have different meanings. *See Helmsderfer v. Bobrick Washroom Equip., Inc.*, 527 F.3d 1379, 1382 (Fed. Cir. 2008) (“Our precedent instructs that different claim terms are presumed to have different meanings.”). And in the context of this claim term, that presumption is both well founded and entirely consistent with Respondents' proposed construction.

The '546 patent unambiguously defines “contextual parameters” as “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.”

'546 patent, col. 10:5-10. A specific location such as the summit of Mt. Everest is an example of a contextual parameter.

As Complainants point out, the patent further states that “data [may be] indicative of various contextual parameters [such as environment, surroundings, or location].” *Id.* (quoting '546 patent, col. 13:1–3). But this does not mean, as Complainants would have it, that “data” and “contextual parameters” have identical meanings. Instead, it merely explains that “data” such as low partial pressure of oxygen might provide information about “contextual parameters” (e.g., that the “location” or “environment” is at an extreme elevation such as the top of Mt. Everest). The common sense notion that certain “data” may provide information about the environment, surroundings, or location is a far cry—both legally and logically—from the notion that the data and the parameter (i.e., “environment, surrounds, or location”) suddenly become one and the same. Accordingly, the Commission should reject Complainants’ efforts to equate “contextual data” and “contextual parameters.” See *CAE Screenplates Inc. v. Heinrich Fiedler GmbH & Co.*, 224 F.3d 1308, 1317 (Fed. Cir. 2000) (“In the absence of evidence to the contrary, we must presume that the use of these different terms in the claims connotes different meanings.”); *Bicon, Inc. v. Straumann Co.*, 441 F.3d 945, 950 (Fed. Cir. 2006) (“claims are interpreted with an eye toward giving effect to all terms in the claim”).

To be sure, the patent’s use of the phrases “contextual parameters” and “contextual data” is not the model of clarity insofar as it may lead one to believe that the two are identical, or that *only* “contextual data” may provide information relating to “contextual parameters.” Indeed, Staff notes with concern that the '546 patent teaches that contextual parameters “may be derived in part from data supplied by physiological sensors.” Staff’s Br. at 11. In doing so, Staff commits the same error as Complainants by assuming that, if data from physiological sensors

can *inform* contextual parameters, then a contextual parameter must *be the same thing* as a physiological parameter.

But that is not the teaching of the '546 patent. As noted above, the '546 patent defines contextual parameters as a parameter relating to things such as the environment, surroundings and location of the individual. Importantly, the patent further teaches that two kinds of data may provide information about one's environment—physiological data and (non-physiological) contextual data. *Compare* '546 patent, col. 12:27–30 (“Sensor device 10 may be able to derive information relating to an individual's physiological state based on the data indicative of one or more physiological parameters”) *with id.*, col 13:1–3 (“Additionally, sensor device 10 may also generate data indicative of various contextual parameters relating to activity state or the environment surrounding the individual.”). To continue with the Mt. Everest example, “physiological data” suggesting an extreme elevation may include an individual's elevated heart rate and shortness of breath, and contextual / non-physiological data may include the aforementioned low partial pressure of oxygen. While the '546 patent does not explicitly so state, the implied concept is that by using both physiological (heart rate) and contextual (partial pressure of oxygen) data, the disclosed system may more accurately determine the contextual parameter (location with high elevation). Thus, when the '546 patent indicates that contextual parameters may be derived in part from data supplied by physiological sensors, it is merely teaching the common-sense notion that a user's physiological readings also may provide insight into her current location or activity status.

Accordingly, in light of the entirety of the patent disclosure—as opposed to the one cherry-picked sentence relied on by Complainants—a person of ordinary skill would have

understood that contextual parameters are mutually exclusive from physiological parameters. Respondents' construction is therefore correct.

III. CONCLUSION

For the foregoing reasons, Respondents respectfully ask the Commission to adopt its proposed constructions for the disputed claim terms addressed herein, and reject Complainants' proposed constructions.

Date: December 4, 2015

Respectfully submitted,

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

Investigation No. 337-TA-963

CERTIFICATE OF SERVICE

I, Phillip K. Lum, certify that on December 4, 2015, copies of Respondents' Responsive Claim Construction Brief were served, pursuant to Commission regulations, on the following interested parties in the manner so indicated:

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Investigation No. 337-TA-963

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